EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109653/2021

Held by telephone conference call on 16 July 2021

Employment Judge McFatridge

Mr S Spear	**Claimant** **Represented by:** **Ms Howie,** **Solicitor**
Fonab Castle Hotel Ltd	**Respondent** **Represented by:** **Mr Bronze,** **Solicitor**

JUDGMENT OF OPEN PRELIMINARY HEARING

The respondent's application for an extension of time to lodge the ET3 is granted. The ET3 lodged on 9 June is accepted.

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he had been subject to a detriment as a result of making a public interest disclosure. He also claimed that he had been unfairly constructively dismissed in terms of section 103A of the Act and that the sole or principal reason for his dismissal was that he had made a protected disclosure. The respondent did not submit a response within the statutory period however on 21 June they applied for and were granted an extension of

time for the submission of the response. In their letter seeking the extension of time they referred to an extension of 21 days however also referred to the extension being until 6 July 2021. The extension which was granted was to 6 July 2021. Had a 21 day extension been granted then the extension would have been granted to 9 July 2021. The respondent did not submit their response by 6 July 2021. On 9 July 2021 they submitted a draft ET3 together with an application for a further extension and a witness statement from Sarah Marten the case handler who had been dealing with the matter explaining how it came to be that the claim had been submitted late. Essentially, the reason for this was due to human error on the part of Ms Marten. She had worked on the basis that she had been seeking a 21 day extension which took her up to 9 July and she began working towards submitting the ET3 response on 9 July. The reference to 6 July in her initial email had simply been an error of calculation. She did not notice the error at the time and nor did she notice that the Tribunal had granted the extension to 6 July as requested rather than the 21 days which she had in her mind.

2. A preliminary hearing for case management purposes had already been fixed for 16 July. On 13 July an Employment Judge decided that this be converted to an open preliminary hearing to deal with the issue of whether or not a further extension of time should be granted to 9 July so as to enable the ET3 to be accepted.

3. At the hearing the respondent tendered the witness statement of Ms Marten which had been previously sent to the tribunal. The respondent's representative indicated that Ms Marten was available to speak to her statement and be cross examined on it if necessary. The claimant's representative indicated that she did not require to cross examine Ms Marten. I accepted Ms Marten's statement as truthfully setting out her reasons for failing to submit the ET3 response by 6 June 2021.

4. The claimant's representative confirmed that the extension of time was opposed by the claimant. I then invited the respondent's representative to make representations. He referred to the approach to deciding the matter set out in the well known case of ***Kwik Save Stores Ltd v Swain*** **[1997] ICR 49**. This sets out the general multi-factorial approach a number

of factors which the Tribunal should adopt in determining how to exercise its discretion in relation to the issue of extending time

5. With regard to the explanation provided for the delay the respondent's representative indicated it was an honest explanation. A mistake had been made. The case handler had in her mind that the extension granted would be for 21 days whilst in fact it had only been until 6 July. The error had been made in the initial email seeking the extension and the case handler had not noted matters properly when the order came back from the Tribunal. The respondent's representative emphasised that the balance of prejudice in this case very strongly favoured allowing the extension. There would be no real prejudice to the claimant if the application were allowed. The respondent had engaged with the Tribunal and the claimant's representative. Both sides had completed Agendas for the preliminary hearing. He pointed out that the claims being made of automatically unfair constructive dismissal and whistleblowing detriment were somewhat complex and there would be a significant windfall benefit for the claimant if he were to succeed without the necessity of proving his case against opposition from the respondent.

6. The claimant's representative indicated that in her view the strongest factor here was the inadequacy of the reason for the delay. The first extension granted clearly refers to 6 July. There was no question but that the respondent should have noted that as being the date they had to work to. The Tribunal had not granted an extension of 21 days and this would have been very clear from the letter. She pointed out that the respondent's email had been sent on 7 July not 6 July as stated in the witness statement. In any event, the result was that the claimant had only received the ET3 on 9 July which was only a few days before the preliminary hearing.

7. The claimant's representative indicated that another key factor in this case was the merits of the defence submitted in the ET3. In the view of the claimant the defence put forward was unsatisfactory. In her view it was clear that a protected disclosure had been made. The words of this were clearly set out in the ET1 and in documentation. There was also a recording which in the view of the claimant linked the detrimental treatment

to the disclosure. In her view the respondent were applying the wrong test when they sought to set out, as they did, their view that the respondent had complied in full with the Covid-19 restrictions applicable to them. They had also incorrectly referred to the test of good faith which is no longer one of the requirements for a protected disclosure. The claimant's representative pointed out that all the claimant had to show was a reasonable belief in relation to the information disclosed. In her view this was a critical point to bear in mind when assessing the balance of prejudice.

8. I invited the respondent's representative to respond and he confirmed that in his view the response set out a more than stateable defence to the claim. It was not for the Tribunal at this stage to be assessing reasonable prospects. The issue of the nature of the defence was relevant to an extent but only to the extent that there is no prejudice to a respondent in being unable to put forward a defence which is unstateable.

9. Having considered matters applying the approach set out in the case of ***Kwik Save Stores Ltd v Swain*** I advised the parties that my decision was that a further extension of time for lodging the ET3 be granted and that the ET3 be accepted. I explained my reasons to the parties at the time.

10. I agreed with the claimant's representative that the reason given for the delay was not a particularly good one however the existence of human error is one of the reasons why the Tribunal is given a degree of discretion as to whether to accept late submissions. The Tribunal would not wish to encourage sloppy practice but equally the fact that a document has not been submitted on time due entirely to unforced human error does not mean that the Tribunal should not exercise its discretion to extend time.

11. I advised that I considered a key point in this case to be the balance of prejudice to the parties. I did not agree with the claimant's representative that the proposed defence in the ET3 was unsatisfactory. There are clear factual differences between the parties as well as differences of interpretation. The issue of the reasonableness or otherwise of the claimant's view in relation to the matters disclosed is clearly disputed. There are averments from the respondent that he was clearly told of the

correct legal position and that in those circumstances he could not reasonably believe in the correctness of the information which he claims to have disclosed and that said information tended to show any of the proscribed matters. There is also a dispute in relation to detriment and most importantly in the reason for any of the alleged detrimental treatment. In short the respondent have set out a defence which if they are successful in whole or in part would result in them being able to successfully resist the claim either in full or in part. If they are not permitted to put forward that defence then they run the risk of being found liable to pay substantial damages in circumstances where they have not in fact incurred any legal liability. On the other hand the prejudice to the claimant if the ET3 is allowed is slight. The claimant loses the windfall benefit of obtaining substantial damages without having to prove his case. Other than that his position is unchanged. If his case is good then he will succeed after the final hearing. I agreed with the respondent's representative that there has been no hold up to the proceedings and no delay has been caused by the respondent's failure. In this circumstance I considered that it was clear to me that the time should be extended so as to allow the ET3 to be submitted.

12. Having advised the parties that the Tribunal accepted the ET3 I then discussed with them further procedure. In his Agenda the respondent indicated he was seeking a preliminary hearing to determine whether or not a protected disclosure had been made in this case. The respondent's position was that they accepted that the claimant had made the statement alleged but they disputed that it qualified as a qualifying disclosure under the legislation. The claimant's position was that they would prefer all matters to be dealt with at a final hearing. They considered that this would result in an overall saving of cost.

13. Having considered matters I decided that in this case it was appropriate to grant the respondent's request for a preliminary hearing. At the moment so far as I can see from the ET1 the sole claims which are being made are under section 47B and section 103A of the Employment Rights Act 1996. The claimant cannot have a freestanding claim for unfair dismissal or wrongful dismissal given that he does not have sufficient qualifying

service. Accordingly, if the Tribunal were to find that no qualifying disclosure had been made that would be substantially the end of the case. There is also a claim of wrongful constructive dismissal but it is not clear whether or not this could continue in the absence of the protected disclosure element. In any event it is likely that this could be settled between the parties. It appeared to me that the issue of whether or not the statement which both parties accepted was made was a protected disclosure was one which could be determined fairly readily. Evidence may be required from the claimant however it is likely to be in fairly short compass. The respondent's representative confirmed that at most the respondent would be leading evidence from one witness. This is as opposed to the final hearing at which the respondent anticipated they would require to lead evidence from five witnesses.

14. There was a discussion regarding the issues in the case. The respondent's representative had in their Agenda indicated they were seeking some additional information from the claimant regarding the nature of the claim. One of these was whether or not the claimant was making a claim under section 100 of the Employment Rights Act 1996. I indicated that my reading of the section of the claim which they referred to indicated that no claim under section 100 was currently before the Tribunal. The claimant's representative indicated that she was seeking a period of 21 days within which the claimant could confirm his position regarding that point and also the two other points made by the respondent in their Agenda. I indicated that I was happy to allow the claimant to provide clarification of their position within 21 days. Both parties had produced draft Lists of Issues. I indicated that in the circumstances I would make an order that the parties use their best endeavours to produce an Agreed List of Issues within 28 days.

15. If the claimant does provide further and better particulars of claim and the respondent considers that these amount to an amendment which they are objecting to then the respondent should advise the Tribunal of their objection as soon as possible after they receive any further and better particulars from the claimant.

16. Having agreed with the parties that the case should be listed for a one day preliminary hearing to deal with the issue of whether or not a qualifying disclosure had been made I enquired of the parties whether or not they were happy for this to take place over CVP. Both indicated that they could see no difficulties with this. I canvassed with the parties the issue of using witness statements. The respondent's representative was in favour of using witness statements. The claimant's representative did not have a firm view. In the circumstances, I decided that it would be appropriate for witness statements to be used in this case.

17. I indicated I would be making the usual case management order for the parties to exchange documentary productions (relating only to the matter required to be dealt with at the preliminary hearing) in advance of the preliminary hearing.

18. The parties had both indicated in their Agendas that they did not consider this was a case suitable for the appointment of a judicial mediator.

19. Having discussed matters it was agreed that the preliminary hearing would take place on **23 September 2021**. It will take place by CVP. The issue to be decided is whether or not the claimant made a protected disclosure as alleged in his ET1.

Employment Judge: **I McFatridge**
Date of Judgment: **21 July 2021**
Date sent to parties: **23 July 2021**