



## EMPLOYMENT TRIBUNALS (SCOTLAND)

5

**Case No: 4106308/2023**

**Hearing held by CVP on 8 April 2024**

10

**Employment Judge McFatridge**

15

**Mrs H Baronova**

**Claimant  
In person**

20

**Cakes by Alli-Baba Limited (Company number  
SC567029)**

**Respondent**

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that

25

(1) The correct designation of the respondent is Cakes by Alli-Baba Limited (Company number SC567029) whose address is stated above.

(2) The default judgment issued on 22 November 2023 is revoked.

(3) The time within which the ET3 response may be accepted is extended and the Secretary is directed to accept the response submitted by the respondent to the Tribunal on 5 December 2023.

30

(4) A further final hearing shall be fixed in order to determine the issues between the parties.

### REASONS

35

1. The claimant submitted a claim to the Tribunal in which she claimed to have suffered an unlawful deduction of wages by the respondent. No response was submitted during the statutory period and a default E.T. Z4 (WR)

judgment issued on 22 November. On or about 5 December the respondent submitted a form ET3 together with an extension of time request and a request that the default judgment be revoked. A reconsideration hearing was fixed and at the hearing Ms Stewart gave evidence on behalf of the respondent. The claimant did not give evidence but cross examined Ms Stewart. On the basis of the evidence I found the following matters to be proved or agreed.

### **Findings in Fact**

2. The claimant lodged her claim with the tribunal in which the respondent was designated as “Cakes by Alli baba Allison Stewart” at the address of the respondent. On 23 October a notice of claim was sent to the respondent so designated at the above address. In paragraph 4 on page 1 it was noted that a prescribed response form was enclosed and that this required to be submitted no later than 20 November 2023. On page 2 the date 11 January 2024 at 11.00am is set out in a box in bold type. This date referred to the hearing which would take place in the event that the claim was defended.
3. The claim was received at the respondent shortly after 23 October 2023 by their director Ms Stewart. The respondent are a small bakery business which specialises in cakes including wedding cakes and celebration cakes. Much of their business is done through direct selling at markets and events. The business currently has no employees. In the past it has occasionally employed one person to work in the business along with Ms Stewart who is the principal.
4. In or about February 2023 Ms Stewart was diagnosed with FND (Functional Neurological Disorder). This was diagnosed by a Consultant Neurologist to whom she was referred by her GP. Ms Stewart has been receiving treatment for this. In October/November 2023 she was waiting for an appointment with a psychotherapist to assist her with brain neural pathways work. She was also referred to various other specialists including a physiotherapist and a speech therapist.
5. The symptoms of FND are numerous however one of these which is relevant is that of brain fog and a failure to deal with numbers. Ms Stewart

can become fixated on a particular number and has a cognitive difficulty in dealing with numbers. She has been advised that this can be characterised as a disability.

- 5 6. At or around the time the notice of claim arrived Ms Stewart was also having some difficulties in her private life. She had moved temporarily to her parent's house which is situated in a rural location whilst work was being done on her own house. Her father has Alzheimer's and in the summer of 2023 was also diagnosed with a blood cancer. Her father suffered from anger episodes and Ms Stewart often suffered the brunt of these. She also required to assist and care for her father. She found this extremely stressful. In addition to this her business is still in the process of recovering from Covid.
- 10 7. Additionally at or around this time she received the ET3 Storm Babette hit the north east of Scotland. For a few days many roads in the vicinity of where she lived were closed and she was unable to get to business. More seriously for her many of the markets and events which she had booked to sell her items in were cancelled over this period. This caused her a degree of stress.
- 15 8. When Ms Stewart first saw the notice of claim she saw the box on page 2 which stated that date 11 January and she became fixated on this date. She understood that this was the date she had to respond by. She put this date in her diary. It was always her intention to dispute the claim made by the claimant. It was her intention to do whatever she required to do prior to 11 January which she understood was the deadline. Due to the other stressful things that were going on in her life at that time she did not go back to check the form.
- 20 25 9. The statutory period within which the respondent was supposed to submit the response form expired on 20 November with no response having been lodged. The matter was referred to an Employment Judge and a default judgment was issued on 22 November. The respondent received this a few days later. Ms Stewart immediately contacted the Tribunal by telephone. She advised of her situation and was told of the procedure for requesting that the default judgment be revoked and an ET3 response
- 30

received late. Ms Stewart caused a handwritten response form to be lodged by post which arrived at the Tribunal on or about 5 December 2023.

10. In the ET3 the respondent disputes that any sum was deducted from the claimant's wages. It is their position that the claimant worked 15 hours  
5 and was paid 15 hours at the rate of £10.50 per hour together with a sum in respect of mileage. This stated that this was in terms of the agreement made. It is noted that the claimant did attend a shadow shift but that it was agreed that this would be unpaid. This contrasts with the claimant's position which was that the shadow shift was meant to be paid. As well  
10 as the factual dispute over what was agreed there appears to be a factual dispute over what the claimant actually did during the shadow shift.

### **Matters arising from the evidence**

11. Ms Stewart gave her evidence in a frank and patently honest manner. She did not submit any medical evidence but on several occasions indicated  
15 that she would be happy to submit her medical records if necessary. I explained to her that at the Tribunal the decision is made on the basis of the evidence available on the day and that if she had wanted to submit medical evidence she required to have done this prior to the hearing. That having been said I had no doubt that she was telling me the truth in respect  
20 of her medical condition and the other matters. In cross examination she confirmed that Storm Babette only caused transportation difficulties for a few days however the main point was that she had it in her head that the appropriate date was 11 January. This was the date she had put in her diary and it was her position that she had become fixated on this date at  
25 least partly as a result of her cognitive impairment.

### **Discussion and decision**

12. I am required to approach the matter of whether or not to reconsider the decision and allow an extension of time for submitting the ET3 on the basis  
30 of the overriding objective which is to do justice between the parties. In the normal course parties to a Tribunal case are expected to comply with the timescales in the Tribunal rules. The rules do however recognise that human beings occasionally get things wrong and there is provision for the Tribunal to extend time in appropriate circumstances and to revoke default

judgments. I note that in the normal case reconsideration of a judgment is made by the same judge who made the original decision however Rule 72(3) provides that if it is not practicable for the Employment Judge who made the original decision to consider the reconsideration application the President shall appoint another Employment Judge to deal with the application. Employment Judge Eccles who is Vice President of the Tribunal has directed that this be the case here.

5

10

13. In deciding whether or not to grant the applications I am required to take into account all of the relevant facts. One factor is the reason for the non-presentation of the response within the original statutory period. It is however, simply one of the matters which I am required to consider. I am also required to consider the overall requirements of justice and in particular the balance of prejudice between the parties.

15

20

14. In this case I consider that the respondent have provided an explanation as to why the response form was not lodged within the original statutory period. Essentially, it was a mistake on the part of Ms Stewart. I accepted her explanation that she was suffering considerable personal stress at the time and also that her symptoms of FND make it more likely that such a mistake would be made. This is not a case where the respondent deliberately ignored the existence of a time limit. She looked at the document served on her and read it incorrectly.

25

15. I also note that the period of delay was relatively short. I note that Ms Stewart contacted the Tribunal virtually immediately after receiving the default judgment and thereafter took prompt steps to submit an ET3 form together with the appropriate application.

30

16. With regard to the balance of prejudice I note that if the defence put forward by the respondent in their ET3 response is factually correct then the respondent is not due any money to the claimant. That is not to say that I accept that the factual position is that put forward by the respondent. It is simply to say that if the respondent is right then they have a good defence to the claim and are not due to pay anything to the claimant. I am required to consider the balance of prejudice in that light. If the respondent are correct in their factual assertions then if they are not

permitted to the extension of time to submit their ET3 and if the default judgment stands then they will end up being forced to pay money which is not due. On the other hand the prejudice to the claimant is less. If the claimant is correct in her factual assertions then she will win her case at any subsequent hearing and all she has lost is a little time and the windfall benefit of obtaining a judgment without having to prove her case at a hearing. I do not consider that the delay is one which is significant given the length of time such claims often take. In all the circumstances I consider that the interests of justice fall firmly in favour of revoking the default judgment, allowing the response form to be lodged late and directing that the issue between the parties be decided at a hearing. I will make an order to that effect.

17. During the course of the hearing it became clear to me that the appropriate designation of the respondent is in fact Cakes by Alli-Baba Limited (Company number SC567029) as they are a registered Scottish limited company. I therefore direct that the respondent's designation be changed in the Tribunal records so as to reflect this.

18. During the course of the hearing Ms Stewart also indicated that she wished to counterclaim against the claimant for certain monies she considered to be due to the respondent. There is reference to such a counterclaim in her ET3 form. I pointed out to her that the Tribunal only has very limited jurisdiction to deal with such counterclaims by an employer. In general terms a counterclaim can only be entertained where the claimant has made a claim of breach of contract. In this case it appears to me that the claimant has not made a claim of breach of contract but simply a claim of unlawful deduction of wages. It therefore appears to me that the Tribunal would have no jurisdiction to hear her counterclaim. This does not of course prohibit the respondent from raising such a claim in the Sheriff Court although I should make it clear at this stage that I do not pass any judgment whatsoever on the validity of or likelihood of success of such counterclaim. The respondent may wish to take legal advice in relation to this. All I am saying is that on the information before me the counterclaim is incompetent and cannot be registered as a counterclaim by the employment tribunal.

5

**Employment Judge I McFatridge**

---

**Employment Judge**

**10 April 2024**

10

---

**Date of judgment**

**Date sent to parties**

**11 April 2024**