



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms C Heath

**Respondent:** Telent Technology Services Limited

**Heard at:** Midlands West Employment Tribunal

**On:** 10 June 2024

**Before:** Employment Judge Murdin

## Representation

Claimant: In person

Respondent: Mr Ansari (Counsel)

# JUDGMENT

1. In relation to the complaint, the conclusion of the Tribunal is as follows:
  - (i) The claim for unfair dismissal fails and is dismissed.
  - (ii) The claim for discrimination on the grounds of disability fails and is dismissed.
  
2. Page numbers cited below refer to the page numbers within the agreed and paginated bundle.

# REASONS

## The Complaint

3. The Claimant claims unfair dismissal and disability discrimination. By way of an ET1 dated 8<sup>th</sup> December 2023 [p2], the Claimant brings a complaint for unfair dismissal and discrimination on the grounds of disability. Further details of the Claim are set out at pages 8 & 13 of the bundle.
4. The Claim focuses largely on the alleged procedural defects within the redundancy process. It is also alleged that the Claimant was discriminated against on the basis of osteoarthritis within her right ankle. The Claimant avers that she has required significant time off work due to her osteoarthritis, and the Respondent was aware that she was soon to undergo an operation, which would necessitate a further substantial period away from work. The precise nature and formulation of the discrimination claim is currently unclear, and should the Respondent's application fail, the matter will have to be relisted for a further CMH to establish its legal framework.
5. The Respondent denies the Claim through an ET3 at page 25, with further details of that denial contained within the Grounds of Resistance dated 10<sup>th</sup> January 2024 beginning at page 34. The Respondent avers that the claims are out of time, and the Tribunal does not therefore have jurisdiction to consider the Claimant's complaints. Alternatively, the claims are both denied on substantive as well as jurisdictional grounds.

## The Background

6. The Claimant worked as a Talent Acquisition Recruiter for the Respondent, Telent Technology Services Limited. Her employment began on 20<sup>th</sup> August 2018, and was terminated by reason of redundancy on 14<sup>th</sup> July 2023. On 13<sup>th</sup> June 2023, the Claimant was informed that she was at risk of dismissal by reason of redundancy [pp 53-54]. It is agreed that the Claimant's effective date of termination was 14 July 2023 [pp 55- 56]. The

parties also agree that is the date from which her claims for unfair dismissal and disability discrimination began to run.

7. The Claimant entered early conciliation on 25 October 2023, after the primary time limit for her claims had expired, receiving her EC certificate on 10 November 2023 [p1].
8. The Claimant presented her ET1 on 8 December 2023, just under five months after time began to run for both her unfair dismissal and disability discrimination claims, and almost two months after the primary time limit for those claims had expired.
9. This Case Management Hearing was listed by the Tribunal [pp 45-47] following an application made by the Respondent on 18 January 2024 to have the Claimant's claims dismissed on the basis that they are out of time [pp 39-40].

### **The Evidence**

10. Ms Heath gave evidence to the Tribunal. She was a pleasant, consistent and credible witness, who at all times attempted to assist the Tribunal.
11. She accepted that both of her claims were issued beyond the primary limitation period. She explained that her discrimination claim was focussed largely on her dismissal, although it also included her attendance at an HR event in June 2022, which she had to attend on crutches. Ms Heath averred that these two acts constituted a series of acts. In any event, her dismissal was the final act upon which she relied.
12. In respect of the reasons for the late submission of her claims, she explained that she had initially put in an appeal to the Respondent. That hearing took place on 21<sup>st</sup> July 2023, and she received notification of the outcome on 13<sup>th</sup> August 2023.

13. Earlier in January and February 2023, she had been absent from work due to her osteoarthritis. In July 2023, she had a pre-operative appointment, which she described as sending her into a headspin. She was concerned that she would be non-weightbearing for 3 months, and she was a carer for her elderly mother. Her operation, which was due to take place in August 2023 was cancelled on 2 occasions, before eventually occurring on 22<sup>nd</sup> September 2023.
14. Ms Heath described a very difficult time, during which she was on morphine, and suffering with 'brainfog'. She was concerned at the risk of amputation if the operation failed, and was on strong painkillers for several months. She lived alone, and post-operation, she had an open plaster for 2 weeks, and then a full over-the-knee plaster for 8 weeks. Thereafter, she wore a boot, and had to use a wheelchair. She told the Tribunal that she was still wearing a full plaster when the ET1 was filed.
15. In cross-examination, she confirmed that she knew of the redundancy, and the reasons for her redundancy in the meeting on 13<sup>th</sup> June 2023. She took legal advice, and a letter was sent on her behalf by Askews Solicitors on 15<sup>th</sup> June 2023. At that stage, she knew that she could bring a claim. She accepted that her physical injury did not prevent her from using a phone and/or tablet, although she explained that her focus was not on the Respondent at that time, but rather on her health.
16. She completed the ET1 over a period of 2-3 days using a laptop. It took around 30 minutes on each of those days. She accepted that the ET1 could have been completed earlier, and explained that she was not aware of the 3 month time-limit; she had believed that the time-limit was in fact 3 months from the date of receiving the appeal outcome. She did not look up the limitation dates online, and she accepted that she could have done so throughout August and/or September.

17. She spoke to ACAS on 25<sup>th</sup> October 2023, and accepted that she could have done so in August. It was not her priority at the time; she chose to prioritise her health.

## **The Law**

### **Unfair Dismissal**

18. The primary time limit to bring a claim of unfair dismissal is before the end of the period of three months beginning with the effective date of termination: Employment Rights Act (ERA) 1996, s.111(2)(a).
19. However, the Tribunal can still hear a claim for unfair dismissal if it was presented within a further period that the Tribunal considers reasonable where it is satisfied that it was not reasonably practicable for the complaint to be presented in the primary time limit: s.111(2)(b) ERA 1996. In these circumstances, the tribunal must follow a two-stage process. Firstly, the tribunal must decide whether it was reasonably practicable for the complaint to be presented within the primary time limit; and, secondly, if it finds that it was not reasonably practicable, then it must decide whether the claim was brought within such further period as it considers reasonable: *Cullinane v Balfour Beatty Engineering Services Ltd (UKEAT/0537/10/DA, unreported)*.

### **Was it reasonably practicable to bring the claim in the primary time limit?**

20. What is “reasonably practicable” is primarily a question of fact for the tribunal: *Palmer v Southend-on-Sea BC [1984] ICR 372 (CA)*.

“Practicable” means “feasible”, and the best approach is to ask colloquially and untrammelled by too much legal logic “was it reasonably feasible to present the complaint to the employment tribunal within the relevant period?”: *Palmer v Southend-on-Sea BC at p.385A-B*.

This applies as much to claimants with medical issues as those without: see, *Cygnets Behavioural Health Ltd v Britton [2022] EAT 108*. The question

for the Tribunal remains, notwithstanding any such issues: what reasonably could have been, not whether it was reasonable not to do what could be done.

The employee bears the burden of proving that it was not reasonably practicable to bring the claim within the 3-month period, and she must show precisely why they did not do so: *Porter v Bandridge Ltd [1978] ICR 943 (CA)*

Mere ignorance of time limits, or the procedure for making a claim, or even the right to bring a claim, will not satisfy the reasonable practicability test. The claimant must show that their ignorance was itself reasonable. Ignorance will not be reasonable if it arises from the fault of the claimant in not making such inquiries as s/he should reasonably in all the circumstances have made: *Wall's Meat Company Ltd v Khan [1979] ICR 52 (CA)*.

**Has the claim been presented within a further reasonable period?**

21. Only if the tribunal finds that it was not reasonably practicable to bring the claim in the primary time limit, must it then decide whether the claim was brought within such further period as it considers reasonable.

Whether the further period between expiry of the primary time limit and the eventual presentation of a claim is reasonable requires an objective consideration of the factors causing the delay, and of the period that should reasonably be allowed in those circumstances. This assessment must always be made against the general background of the primary time limit and the strong public interest in claims being brought promptly: *Cullinane v Balfour Beatty*. It will “inevitably include taking account of what the claimant did and what he knew about time limits, what he, reasonably, ought to have known about them, and then asking themselves why it was that the further delay occurred”: *Nolan v Balfour Beatty Engineering Services (UKEAT/0109/11/SM, unreported)*.

## Unfair Dismissal

### Conclusion

22. Having considered the chronology in this matter, and the evidence of the Claimant, I have concluded that it was reasonably practicable for the Claimant to bring her claim for unfair dismissal within 3 months from the date of her dismissal. It is clear that Ms Heath was aware of her legal options prior to her dismissal, and although she was deeply worried about her health during the 3 month limitation period, she suffered with no physical impairment, which might have prevented her from bringing her claim.
23. She was honest enough to admit as much. She chose to focus on her health, and no one can criticise her for that decision. Unfortunately for Ms Heath, it does however mean that, in terms of my decision, it was reasonably practicable for her to bring her claim within the limitation period.
24. If I am wrong about whether it was reasonably practicable for Ms Heath to bring her claim within 3 months, I then have to consider whether the claim was brought within such further period as I consider reasonable. Unfortunately, there was a further significant delay until the claim was brought on 8<sup>th</sup> December 2023. Of course, within that period, Ms Heath twice had her operation cancelled, before finally undergoing surgery on 22<sup>nd</sup> September 2024.
25. Again, Ms Heath was honest enough to admit that she could have brought her claim during this period of time. She was extremely concerned about her health, which she again chose to prioritise.
26. In those circumstances, and whilst I have great sympathy for Ms Heath and the extremely challenging situation in which she found herself, I conclude that it was not reasonable for her to wait until 8<sup>th</sup> December 2023 to bring her claim. Even if I am wrong about my initial determination in respect of limitation, and I remind myself of the strong public interest in claims being

brought promptly, it would have been reasonable for Ms Heath to bring her claim shortly after liaising with ACAS on 25<sup>th</sup> October 2023. There is no good reason for a further substantial delay until 8<sup>th</sup> December 2023.

27. I conclude therefore that it was reasonably practicable for her to bring her claim for unfair dismissal within 3 months, and secondly, it was not reasonable for Ms Heath to delay until 8<sup>th</sup> December to issue her claim. It follows therefore that, in respect of the claim for unfair dismissal, I accede to the Respondent's application dated 18<sup>th</sup> January 2024, and dismiss the claim.

## **The Law**

### **Disability Discrimination**

28. The primary time limit to bring a claim of discrimination is within three months starting with the date of the act to which the complaint relates, which in this instance was the date of dismissal on 14<sup>th</sup> July 2023.
29. If the claim is not presented within the primary time limit, it must be presented within such other period as the employment tribunal thinks just and equitable: s.123(1)(b) of EqA 2010.
30. In *Robertson v Bexley Community Centre t/a Leisure Link* [2003] IRLR 434 (CA), the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now s.123(1)(b) EqA 2010, "*there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule*" (per Auld LJ at para 25).
31. As to the exercise of this "*wide discretion*", s.123(1) of the EqA 2010 does not specify any list of factors to which a tribunal is instructed to have regard in exercising the discretion. Previously, the EAT in *British Coal Corporation*



*v Keeble [1997] IRLR 336* suggested that in determining whether to exercise their discretion, tribunals would be assisted by considering the factors listed in s.33(3) of the Limitation Act 1980 (LA 1980) including the balance of prejudice and in particular: the length of, and reasons for, the delay. That is of course, the well-known statutory section dealing with the exercise of discretion in civil courts in personal injury cases.

32. Subsequently, however, the Court of Appeal in *Southwark London Borough Council v Afolabi [2003] ICR 800* confirmed that, while the checklist in s.33 of the LA 1980 provides a useful guide for tribunals, it need not be adhered to slavishly. The Court of Appeal decided that the tribunal would not err in law by failing to consider the matters listed in s.33 of the LA 1980 when considering whether it was just and equitable to extend time, provided that it left no significant factor out of account in exercising its discretion. This approach was endorsed in *Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23*. In that case the Court of Appeal suggested that it is not healthy for the Keeble factors to be taken as the starting point for tribunals' approach to just and equitable extensions. The best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular the length of, and the reasons for, the delay.

## **Disability Discrimination**

### **Conclusion**

33. It is accepted by Ms Heath that her claim for disability discrimination was not brought in time. I therefore have to consider whether it was presented within a period that this tribunal considers just and equitable. It was presented approaching two months late, and I have to consider the reasons for that delay.
34. I listened carefully whilst Ms Heath explained the difficulties that she faced at that time. In particular, she faced significant health challenges, which she chose to prioritise. She had initially awaited the outcome of her appeal,

despite receiving legal advice at an early stage. She admitted that she could have brought the claim within August and September, and given her operation was twice cancelled, she could certainly have brought her claim before the operation eventually went ahead on 22<sup>nd</sup> September 2023.

35. Thereafter, there was a further 2 ½ month delay. I accept that there would have been a period of acute recovery, and furthermore, that Ms Heath required strong painkillers. However, she could and should have brought her claim at a much earlier date. Taking into account all of the circumstances of the case, I conclude that Ms Heath did not bring her claim within a period that was just and equitable.
36. It follows therefore that, in respect of the claim for disability discrimination, I accede to the Respondent's application dated 18<sup>th</sup> January 2024, and dismiss the claim.

### **Conclusion**

37. The claim for unfair dismissal therefore fails, and is dismissed.
38. The claim for disability discrimination also fails, and is also dismissed.

**Signed by: Employment Judge Murdin**

**Signed on: 24<sup>th</sup> June 2024**

### Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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