



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs S Waheed

**Respondents:** 1. Language Empire Limited  
2. D A Languages Ltd

**Heard at:** Manchester

**On:** 29 April 2019

**Before:** Employment Judge Grundy

## REPRESENTATION:

**Claimant:** Mr M A Waheed, Husband

**1<sup>st</sup> Respondent:** Mr B Williams of Counsel

**2<sup>nd</sup> Respondent:** Mr A Famutimi, Consultant

# JUDGMENT ON PRELIMINARY HEARING

1. The Tribunal declares that in relation to the claimant's claims in respect of breach of contract and failure to consult under the TUPE provisions, the Tribunal does not have jurisdiction, each being brought out of time.

2. The Tribunal declares, having considered whether it was reasonably practicable to present those claims in time, it was so and they were not presented within any reasonable further period. Those claims cannot proceed.

3. The claim in relation to a redundancy payment which was articulated and re-labelled by the Tribunal on 13 December 2018 was in the first instance out of time; however the Tribunal exercises its discretion within the just and equitable test considering that that claim should proceed.

4. Therefore the Tribunal allows the claim for the redundancy payment to proceed to a full hearing. At the conclusion of this Judgment I will consider with the parties directions for that hearing.

# REASONS

## Background

1. The claimant was employed as an interpreter, albeit on a zero hours basis, at Wythenshawe Hospital, originally employed by South Manchester NHS Trust before there was a TUPE transfer to the first respondent in these proceedings. She contended that she had an entitlement to be called upon on a first refusal basis as a matter of contract, and that was one of her complaints.

2. The first respondent admitted it employed the claimant as an interpreter from 1 November 2015 to 30 September 2017, then asserted it had lost the Interpreter Services contract for the Trust with effect from 1 October 2017, such that the claimant automatically transferred to the second respondent, although the first respondent asserted it was only aware of the fact of transfer and identity of the second respondent transferee at a later date.

3. The previous Case Management Order of Regional Employment Judge Parkin on 13 December 2018 indicated at paragraph 4 that the claims would involve a determination of whether the claimant's employment as an interpreter by the first respondent transferred to the second respondent by reason of a transfer of undertaking, i.e. of a service provision contract, on or about 30 September or 1 October 2017, or whether the claimant's employment with the first respondent was simply terminated and when. It was for that reason that the second respondent was joined.

4. The purposes of today's hearing have been to consider the preliminary issue to determine the out of time issues.

5. The Employment Judge acknowledged that the redundancy payment claim had a different time limit under section 164 from the breach of contract claim and the TUPE claim, both of which are governed by the standard three months and reasonable practicability tests. The Tribunal has considered in respect of the breach of contract and TUPE claims the reasonable practicability test under the Employment Rights Act 1996 and article 7 of the 1994 Order and regulation 15(12) of the TUPE Regulations.

6. So far as the redundancy payment claim, which as I have already indicated has a six month time limit, the Tribunal also considered section 164(2) which says as follows:

“An employee is not deprived of his right to a redundancy payment by subsection (1) if during the period of six months immediately following the period mentioned in that subsection, and that is the period of six months, the employee –

(a) makes a claim for the payment by notice in writing given to the employer;

(b) refers to an Employment Tribunal a question as to his right to or the amount of the payment; or

(c) presents a complaint relating to his dismissal under section 111;

and it appears to the Tribunal to be just and equitable that the employee should receive a redundancy payment.”

7. Hence, in the case of the redundancy payment claim I have considered the just and equitable test to be so satisfied.

### **Evidence**

8. So far as evidence is concerned, I am grateful that the first respondent provided a joint bundle of documents numbering some 142 pages. That also included witness statements from the claimant and her husband, who I have heard give evidence on oath, and because the claimant is represented by her husband, I have attempted to explain the Tribunal's jurisdiction today in terms of gateway hearing rather than the substantive hearing as to the merits.

### **Findings of Fact**

9. What did come out of the evidence are the following findings of fact that I make at this stage. The claimant has been very dedicated to her work as an interpreter, and I make clear there is no criticism at all of her work as an interpreter. It has clearly been difficult for her that that work has come to an end.

10. The matter of the redundancy payment aspect and the test to be applied only became truly clear after the Judge rose to consider her judgment and it is at that point that the Tribunal invited the parties to make further submissions as this had not previously been fully addressed. The respondents at that point sought to argue that the just and equitable test was not satisfied and directed the Tribunal to section 163 of the Employment Rights Act 1996, and in particular whether or not the claimant was asserting a dismissal. In my judgment that is a matter for another day and the case today was about the gateway of whether or not the claimant could bring her claims.

11. The claimant had written to the Tribunal in July 2018 seeking a redundancy payment, and reiterated that point on 8 August 2018 and then was then allowed by the Regional Employment Judge to amend her claims, as I have set out in December.

12. That said, the claimant claims originally identify as being predicated on a transfer or service provision change, or potentially a termination of employment, and the facts of the matter had not been known to her. What the first respondent contends is that on 1 October 2017 the claimant's employment transferred to the second respondent. What is clear is that the claimant's claim to the Tribunal was not received until 31 May 2018. That would be bordering on eight months after the purported transfer. What is clear is that there is no further work that the claimant has done for either respondent since 30 September.

13. It seems to me that the evidence in respect of the claimant's knowledge of her employment status has been wholly blurred from her point of view since September, and what is happening is that there is a grave danger that she is falling between the cracks and not being able to find remedy for the position in which she now finds herself.

14. From the evidence the opaqueness was made a little clearer by the emails to which I was directed and from the evidence given by the claimant and her husband. They are clearly calm and measured people. They seem to be to be balanced and sensible. The reason perhaps why, and it is an unusual set of circumstances, there was a lack of urgency in bringing the matters before the Tribunal is that the claimant's motivation for the job has not been the financial motivation; it has been a loss of a job that she has enjoyed.

15. It is clear though that the claimant and her husband knew from page 94 of the bundle of documents that they could seek recourse to the Employment Tribunal, and indeed that Google function on the internet does give lots of information about many different things, and indeed the claimant accepted that was how she had obtained the contact details for the second respondent.

16. The claimant did not try to Google to find out what time limits would apply. She and her husband did not Google to take matters forward and seek legal advice. There were a number of issues that the claimant had had with the first respondent which her husband had advocated for her. It seems to me that the state of knowledge of the claimant became a lot clearer on one level after the meeting on 26 October 2017 and the email traffic which followed, that which is contained in the bundle of documents is of assistance. Certainly there is an email from Monica Wieczorek to the claimant on 2 November 2017, and a reply from the claimant's husband on 7 November 2017, which directly references a transfer to DLA (page 51), and in the email on 7 November Mr Waheed asks:

"I would like to ask when you will be coming back to us in respect of the transfer to DLA and also the fact there is no work for Shaheen at all."

17. There is also an email of 6 December on page 77 of the bundle from the first respondent, which encourages her to speak with the second respondent seeking clarity about the position on her work.

18. The claimant's note of 13 April 2018 is the first note of a telephone call to chase matters. She says that she telephoned before that but did not keep a note. What is clear from the claimant's evidence is that there was nothing particularly going on between October 2017 and April or May 2018 to take matters forward. It is clear from the claimant's evidence and that of her husband that there was no real urgency at that point.

19. The respondents assert that the service provision change occurred on 1 October 2017 and the claimant certainly had notice by 26 October 2017. In my judgment the P60 received from the first respondent did not prevent the claimant from bringing her claims. She did not know of the application of a time limit but nevertheless she waited until 31 May 2018. That was significantly out of time. The

clock was ticking by 26 October 2017 and had clicked well outside the three month time limit in the first instance in respect of her first two articulated claims and also beyond the six month time limit by a shorter period in the claim in respect of redundancy. A matter of a few weeks rather than a few months.

20. In considering the reasonable practicability test in respect of the breach of contract and failure to consult claim, there was clearly a huge gap of time in which there was inaction. Sometimes it is argued that there is a reason for that, like bereavement or illness or other events, but I agree with Mr Williams' submission that inevitably in this case the claimant and her husband wanted to see how things would play out, and in my judgment therefore the claim in respect of those two heads was not presented in a reasonable period, and it was reasonably practicable to have presented it within the time limit in any event.

21. The redundancy time limit point has troubled me further, as the parties and representatives will have been aware. The claimant certainly presented her right to a payment to the Employment Tribunal within 12 months, albeit just outside six months given the original July letter that I have referred to in this Judgment and the amended direction of Regional Employment Judge Parkin from the 18 August letter. Therefore in my judgment the claimant satisfies section 164(1)(c), the question as to the employee's right to or the amount of the payment has been referred to an Employment Tribunal.

22. I then have to consider the provision for extending the time limit beyond the initial six months, if it is just and equitable that she should receive a redundancy payment having regard to the reason shown by the employee for his or her failure to take any of the specified steps earlier and to all other relevant circumstances.

23. The claimant did not apply earlier and I have already dealt with that in terms of the reasons for not progressing matters earlier in these Reasons, but what is important is to consider the wide range of matters that the Tribunal can take into consideration in relation to the just and equitable test.

24. The claimant has been honest and dedicated in the work and job she loves, and she has done that for over 15 years. This Tribunal considers it would be wholly unfair, therefore, not to open the gateway to allow her to claim a redundancy payment. The issue of whether or not her employment continues or whether or not she has been dismissed, and whether or not the first or the second respondent will bear the cost of any redundancy payment, is seems for me is for a different Tribunal on a different day. The claimant has intimated a claim for a redundancy payment to this Tribunal prior to the expiry of a period of 12 months.

25. So far as the matters which the Limitation Act invites Tribunals to consider in the broader sense, in looking at the just and equitable test, the length of the delay is not inordinate; the prejudice to the respondents cannot be said to be so severe that I cannot allow the claimant to bring the claim; all the circumstances seem to me it would be an injustice if I did not allow the claimant to proceed on this basis; and the cogency of the evidence, well it is not old, it can still be tested. The claimant has acted promptly enough, albeit that her other claims are out of time, and I cannot look to the reasonable practicability test in their case. The justice of this case, in my view,

should allow the claimant's claim to proceed on the basis it is a claim for a redundancy payment, and in the first instance it remains intimated against both the first and second respondents.

26. So I intend to list that claim for hearing before a different Employment Judge on another date.

**Directions**

27. The case management directions for the listing of the hearing to deal with the claimant's claim in respect of a redundancy payment are as follows: the claim shall be listed for full hearing before an Employment Judge sitting alone on **25 and 26 June 2019**.

28. The following directions are given on the basis of case management to bring that claim to a conclusion:

- (1) The claimant shall file a calculation of her redundancy payment by 20 May 2019.
- (2) All parties shall file any further documents to be added to the bundle of document by 20 May 2019.
- (3) Any further documentation and witness statements from any parties to be called at the hearing shall be filed and served by 3 June 2019.
- (4) The first respondent shall bear the burden of providing the bundle of documents to the Tribunal. The Tribunal will require a copy for the witness table and a copy of the Employment Judge.
- (5) The parties have revised the List of Issues and will file and serve the same on the claimant by 20 May 2019.

\_\_\_\_\_  
Employment Judge Grundy

Date\_\_\_\_\_17.5.19\_\_\_\_\_

JUDGMENT, REASONS AND ORDERS  
SENT TO THE PARTIES ON

13 June 2019

FOR THE TRIBUNAL OFFICE

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**(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.**

**(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**

**(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.**