EMPLOYMENT TRIBUNALS

Claimant: **Miss Natalie Cruz**

Respondent: **Paragon Network Services Limited (Previously Core Network Services limited)**

Heard at: **London Central Employment Tribunal**
On: **22 August 2023**

Before: **Employment Judge Smart**

Representation
Claimant: Mr. Cylock – Lay representative
Respondent: Mr. Walker – Lay representative

DECISION

The decision of the Tribunal was to extend time for the Respondent to submit its ET3 and to grant a further 7 days for submission from the date of the Preliminary Hearing.

Written reasons have been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013.

REASONS

Background

1. At a hearing on 22 August 2023, I decided to allow an extension of time for the Respondent to submit its ET3.

2. This is the decision of the Tribunal about the application for the Respondent to extend the time period within which it is allowed to submit its ET3 to the Claimant's Claims.

3. The background to this situation is as follows:

   3.1. The Claimant makes claims of unfair dismissal, notice pay and unlawful deduction of wages. All claims are in time.

3.2. The Respondent was sent a copy of the Claim form by the tribunal with a deadline for submitting its ET3 of 8 June 2023.

3.3. In Mid July 2023, the respondent says that it received a copy of the Claim form, which was after the date the ET3 was supposed to have been submitted.

3.4. On 26 July 2023, when this was identified as an issue by the Respondent, its consultant Mr. Walker emailed the Tribunal requesting an extension of time to submit the response.

4. Mr. Walker is not legally qualified and he says that he did not realise that a draft ET3 needed to be submitted with the application to extend time for submitting the ET3. The application to extend time was therefore defective and not in compliance with Rule 20 of the Tribunal Rules.

5. The Claimant is also not represented by a lawyer but is represented by a lay representative assisting her with the case.

6. The Respondent applied for an extension of 28 days from 26 July 2023, which would expire on the day after this preliminary hearing namely 23 August 2023. The Claimant opposed the application.

7. This case was listed for a full merits hearing to take place on 22 and 23 August 2023. The application made by the respondent was therefore heard at the start of that hearing.

8. As the hearing got underway, it became apparent that the respondent had not received a copy of the Preliminary Hearing Bundle the Claimant's representative had prepared. I therefore granted a short adjournment of 30 minutes to allow the Claimant's representative to email the bundle to Mr. Walker and some time for him to read it. The adjournment time was agreed with the parties.

9. The issues in the case were clarified and in the absence of a draft ET3, I enquired of the respondent about what its defense would be if it were to be permitted to submit its defense out of time.

10. I Heard submissions from both the Respondent and the Claimant about the Respondent's application. The Claimant's representative had some additional documentary evidence that he wanted me to see. No objection was raised by the Respondent and so an additional bundle of documents of 15 pages was provided by consent and read by Mr. Walker and the Tribunal.

Findings of fact

11. Upon reviewing the Claim form, two defects to the address put forward by the Claimant in the ET1 can be identified. These are namely:

11.1. The address states that the Respondent's address is in Guildford. However, I was persuaded that the correct address is Gomshall, which is a few miles outside of Guildford.

11.2. The Claimant also missed off Kings Court from the address in the ET1, instead only referring to Unit 2 when it should have been "Unit 2 Kings Court."

12. I was therefore satisfied on balance that:

12.1. The Claim for had been served on the Respondent late because of defects in the address of the Respondent.

12.2. That the Respondent had proven that it had a good reason for the delay in submitting a response; and

12.3. The difficulties for the Respondent had been caused by the Claimant providing the Tribunal with an incorrect address for service in the ET1 form.

13. In support of the Claimant's objection, the Claimant's representative referred me to documents showing that, after becoming aware that the Respondent was arguing that they had not received the ET1 until it was too late, he had used the address in the ET1 to send a recorded delivery letter and it had been delivered.

14. The receipt at page 2 of the additional bundle showed that postage was paid on 16 August 2023, and the record of the delivery at page 3 in the bundle showed it was delivered the next day. I have no reason to doubt the validity of those documents.

The Law

15. All decisions made by the tribunal under the Tribunal Rules must have regard to the overriding objective, which states:

"Overriding objective
2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;
(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
(c) avoiding unnecessary formality and seeking flexibility in the proceedings;
(d) avoiding delay, so far as compatible with proper consideration of the issues; and
(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

16. Rule 5 gives me the power to extend or revise any time limit specified in the rules, which states:

"Extending or shortening time
5. The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired."

17. Whilst no specific test is identified in this rule, it must be exercised within the context of the overriding objective.

18. Rule 6(a) provides for a wide discretion, where it is just, to waive or vary any requirement imposed by the rules in the case of irregularities or non-compliance. Rule 6 states:

"Irregularities and non-compliance
6. A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following—

(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;
(d) awarding costs in accordance with rules 74 to 84."

19. The correct test here is what is in the interests of justice.

20. Rule 20 of the Tribunal Rules allows the Respondent to apply either before or after the expiry of the time limit for presenting its response, for an extension of the response deadline. It states:

"Applications for extension of time for presenting response
20.—(1) An application for an extension of time for presenting a response shall be presented in writing and copied to the claimant. It shall set out the reason why the extension is sought and shall, except where the time limit has not yet expired, be accompanied by a draft of the response which the respondent wishes to present or an explanation of why that is not possible and if the respondent wishes to request a hearing this shall be requested in the application.

(2) The claimant may within 7 days of receipt of the application give reasons in writing explaining why the application is opposed.

(3) An Employment Judge may determine the application without a hearing.

(4) If the decision is to refuse an extension, any prior rejection of the response shall stand. If the decision is to allow an extension, any judgment issued under rule 21 shall be set aside."

21. Rule 21 describes the effect of a response being rejected. The effects are draconian in that a failure to comply with the response time limit can mean that the Respondent is barred from defending the claim and a default judgment is entered in favour of the Claimant. This could effectively be a complete denial of justice for a respondent. It states:

"Effect of non-presentation or rejection of response, or case not contested *21.—(1) Where on the expiry of the time limit in rule 16 no response has been presented, or any response received has been rejected and no application for a reconsideration is outstanding, or where the respondent has stated that no part of the claim is contested, paragraphs (2) and (3) shall apply.*

(2) An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone. [Where a Judge has directed that a preliminary issue requires to be determined at a hearing a judgment may be issued by a Judge under this rule after that issue has been determined without a further hearing.]

(3) The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge."

22. When coming to any decision under the Rules, I must also have regard to any Presidential Guidance issued by the president of the Employment Tribunal. There is no presidential guidance relevant to rule 20.

23. Extending the time for a response has been considered in the Employment Appeal Tribunal. The leading case on the extension of time for responses is **Kwik Save Stores limited v Swain [1997] ICR 49 EAT**. I reminded myself that I must look at a number of factors when deciding this issue. That case decided as follows:

23.1. that it was incumbent on a respondent applying for an extension of time to put before the industrial tribunal all relevant documents and other factual material in order to explain both the non-compliance and the basis on which it was sought to defend the case on its merits;

23.2. that an employment judge, in exercising the discretion to grant an extension of time to enter a response, had to take account of all relevant factors, including:

23.2.1. the explanation or lack of explanation for the delay; and

23.2.2. the merits of the defence, weighing and balancing them one against the other; and

23.2.3. to reach a conclusion which was objectively justified on the grounds of reason and justice.

24. It is clear from the legal principles that I have a broad discretion in this matter and must make my decision after considering all relevant factors, the balance of prejudice and the interests of justice. This must necessarily also take into account the Overriding Objective.

25. Then comes the Tribunal's general case management powers under rule 29, which states:

> *"**Case Management Orders***
> ***29.** The Tribunal may at any stage of the proceedings, on its own initiative or on application make a case management order [subject to rule 30A (2) and (3)] the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made."*

26. Similar considerations apply as they do with rules 5 and 6 in that I must consider the overriding objective and in particular whether it is in the interests of justice to make such an order.

27. Whilst the case is not directly on point with the issues I had to decide, I kept in mind the general statement of Sedley LJ in **Blockbuster Entertainment Limited v James [2006] EWCA Civ 684** who said at paragraph 18 *"The first object of any system of justice is to get triable cases tried."* I agree wholeheartedly with this statement.

Submissions

28. The issues in the claim were:

28.1. The Claimant claims unfair dismissal;

28.2. On the face of her contact of employment, the Claimant did not appear to have two years' continuous service. However, she argues that there was a transfer of employment under the Transfer of Undertakings (Protection of Employment) Regulations 2008 "a TUPE transfer", which meant that she would have over two years' continuous service.

28.3. The Claimant does not argue any automatic unfair dismissal because of TUPE, however she does say that she was instantly dismissed with no procedure being followed at all.

28.4. The Claimant also claims breach of contract/wrongful dismissal for notice pay and unlawful deduction of wages because she claims she was not paid between the dates of 1 February 2023 and 21 February 2023. She claims that she did work during this period and it just hasn't been paid.

29. The Respondent's submissions any my conclusions about them are as set out below.

29.1. In response to the Unfair dismissal claim, the Respondent argued that there was a transfer of the Claimant's employment, which did not amount to a transfer of undertaking. I was informed there were some client contracts that transferred and some assets, but still there was no transfer. This therefore in the respondent's view broke her length of service. If this argument succeeds, then it is arguable that the Claimant does not have enough continuous service to bring an unfair dismissal complaint. TUPE transfers occur as a matter of law, can be complex and the factual matrix of each transfer can create counter-intuitive results, dependent on the precise circumstances and timing of the transfer. Even if both parties argue a transfer occurred, it is still for the judge to determine whether one happened by law rather than simply by consent. This was therefore an arguable defence that could entirely answer the unfair dismissal complaint.

29.2. The Respondent asserts that it has a potentially fair reason for the dismissal namely the Claimant's conduct. The Claimant appears to accept that she wasn't happy with how she was being treated and therefore the respondent says, she did not perform her duties.

29.3. In contrast to the Claimant, the Respondent argues that a procedure about the Claimant's dismissal had been ongoing from 3 January 2023 until it ended on 21 February 2023. It says there was a disciplinary meeting. Again, if this was the case and a fair procedure took place, this could also be an answer to the unfair dismissal complaint even if the Claimant does turn out to have enough continuous service to claim unfair dismissal.

29.4. If the Claimant was dismissed because of gross misconduct, then that is arguably an answer to the wrongful dismissal claim for notice pay.

29.5. Finally, the respondent argues that the Claimant ceased working during the period she was not paid and it argues the Claimant will not be able to prove that she did any work in that period. Again, if that is found to be correct on the evidence later on should the extension of time be granted, then that would answer the unlawful deductions claim by way of "no work – no pay".

30. Having discussed and confirmed the issues in detail, it is clear to me that against all claims, the Respondent has arguable defenses, that, if they are successful at trial on the evidence, could succeed in the dismissal of all claims. Likewise, the Claimant's claims appear to me to be fully arguable and much will depend on the facts.

31. Further the respondent submitted that really there was no prejudice to the Claimant if the ET3 was submitted now because she would be in the same position as she was if it had been submitted on time. I agree with that submission, which is mentioned further below.

32. The Claimant's objections and my conclusions about them are below:

32.1. The Claimant objects to the application for an extension of time. The Claimant says that the Respondent is misleading the Tribunal about the address because the recorded delivery letter to the same address in the ET1 was received at the correct address. I reject that submission for the following reasons:

32.1.1. There is nowhere near enough evidence for me to conclude the respondent was being dishonest or misleading in any way. It is clear that the two defects in the address were caused by the Claimant filling in an incomplete and incorrect address in the ET1.

32.1.2. The recorded delivery letter the Claimant's representative sent by recorded delivery may have got there the next day. However, the ET1 was sent by normal post, not recorded delivery. It is a different letter sent from a different place on a different date. I need to consider all circumstances but those with weight are the circumstances present at the time the Tribunal sent the ET1 form originally, not another document sent after the event by a different postal method.

32.2. The Claimant argued further that really the Company should have at least put in a draft response by now and they still haven't started drafting one. There was some merit to this submission. After all, the rules require a respondent to attach a draft ET3 to the application to extend time if that application is made after the ET3 deadline has passed. However, I reject this submission for the following reasons:

32.2.1. This whole situation has been caused because the Claimant completed the incorrect address for the Respondent in the ET1. It would not be just for the Claimant to therefore benefit from this against the Respondent whether the rules say a draft ET3 should have been submitted with the extension application or not.

32.2.2. The Respondent, in my judgment, was genuinely unaware of the need to file a draft ET3 with its extension application and as the respondent was not represented by a lawyer, I can understand why they would not know this. Again, it would not be just for the Claimant to on the one hand have submitted an incorrect address for the Respondent, then on the other rely on a technicality to try to bar the Respondent from being able to defend the Claim.

32.2.3. I therefore concluded it was in the interests of justice to waive the requirement for the Respondent to have submitted a draft Response with

its application to extend the time limit to submit its ET3. It was in furtherance of the overriding objective to proceed on this basis so that it set the parties on an equal footing.

32.3. The Claimant alleged that the Respondent was using delaying tactics because it wanted to roll up the Company and create another company so it could avoid liability. Whilst the Company might be doing this, I come back to the submission of Mr. Walker, in my view, if the Company is trying to do this as a result of the Claimant's claim, then they would have done it any regardless of whether the ET3 was submitted on time or late.

33. The Claimant further alleged that the delay and lack of engagement in the proceedings were also prejudicial to the Claimant. I reject those submissions. First the Respondent appears to me to have engaged in the proceedings once it knew it had a claim to respond to hence its appearance before me today. Yes, there would be a slight delay in the proceedings. However, not to the extent that would be prejudicial to the Claimant or the fairness of the proceedings.

Final Conclusions

34. In my judgement, a fair hearing of this case can still happen and the situation has only been delayed by a relatively short period of time.

35. The case before me at the preliminary hearing was not ready for trial. Having found in the bundle that there are two contracts of employment each with a different continuous service date, I could not be certain without further information that the Claimant had the required continuous service to bring an unfair dismissal complaint.

36. The defenses the Respondent wishes to put forward, albeit on a preliminary evaluation based on submissions, appear to be arguable. Similarly, the Claimants claims appear to be arguable and this strikes me as a very fact specific case where the battle ground will be down to witness and other documentary evidence.

37. I do not believe that the Claimant would be prejudiced by this decision any more than if the Claim were defended on time in the first place.

38. In my judgment, the balance of prejudice would therefore be in favour of the Respondent who would potentially be completely barred from responding to the complaint, amounting to a complete denial of justice that could not be remedied by merely allowing participation in the hearing such as allowing their witnesses to give evidence.

39. The other difficulty with the Respondent's application was that the preliminary hearing could not be listed until the day before the applied extension of time would expire.

40. It was also my view, that the Respondent could and should have started to get its house in order about he ET3 by now and that it shouldn't have taken this length of time for the respondent to have started to work on it at the very least.

41. Under rule 5 and 29 of the Tribunal Rules I therefore granted a further 7 days extension on top of the extension period requested by the respondent, from the date of the preliminary hearing, and gave it until 29 August 2023 to submit its ET3. In my view, it was in the interests of justice to do so in all the circumstances.
42. I therefore further ordered that, day two of the hearing be vacated and a further hearing listed alongside replacement case management orders, which were agreed between the parties.

43. Overall, in my judgment, this was a triable case and justice requires it to be tried.

_____

Employment Judge G Smart

Date: 20/11/2023

REASONS SENT TO THE PARTIES ON

20/11/2023

.

FOR THE TRIBUNAL OFFICE