EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr Stanley Lewry **v** **Hays Specialist Recruitment Ltd (1)**
Astrazeneca UK Ltd (2)

Heard at: Cambridge Employment Tribunal

On: 22nd January 2021

Before: Employment Judge King

Appearances

For the Claimant: In person
For the 1st Respondent: Miss Wright (counsel)
For the 2nd Respondent: Mr Andrew Allen QC (counsel)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was (V) video having been conducted by CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The Tribunal does not have jurisdiction to hear the claimant's claims for, disability discrimination as they were presented out of time and it is not just and equitable to extend time.

REASONS

1. This is the reserved judgment of the Tribunal in the above matter. The case was listed for a hearing on 22nd January 2021 for one day to deal with preliminary matters but the Tribunal reserved its judgment due to time constraints on the day of the hearing.

2. The claimant was acting in person. The first respondent was represented by Miss Wright (Counsel) and the second respondent was represented by Mr Allen QC (Counsel). I heard evidence from the claimant. There being no order for a witness statement the claimant gave evidence without the

benefit of a witness statement for the Tribunal. I heard no evidence for the respondents. The claimant and respondents exchanged documents in advance and prepared an agreed bundle of documents which ran from pages to 1 to 111 to which I have had regard.

3. The matter was heard via CVP. It was agreed that the Tribunal would go through the claimant's chronology with him as evidence giving the claimant an opportunity to add additional evidence he wanted the Tribunal to consider and documents within the bundle he wanted to have in evidence. I also permitted additional GP records to be admitted as they were relevant to the issues although not contained within the bundle. The respondents' were then given the opportunity to cross examine the claimant. As the second respondent had two jurisdictional issues it was agreed that the second respondent's counsel would take the lead in this case and Miss Wright on behalf of the first respondent was able to make additional representations and cross examine after the second respondent.

4. The case had been listed by Employment Judge Cassel on 22nd August 2020 for the preliminary hearing today to consider whether the Employment Tribunal had jurisdiction to hear his claim. No further detail was given but the parties all understood (and critically the claimant understood) that this was to determine the two challenges to the Tribunal's jurisdiction. It was agreed by all parties and the claimant accepted when he submitted his claim that it was out of time having been presented outside the ordinary time limit for doing so. This was the first issue for the Tribunal and then secondly whether the claimant could actually bring a claim against the second respondent under the Equality Act as set out below.

The issues

5. At the outset of the hearing these issues were identified and agreed between the parties before evidence was heard as follows:

6. Does the Employment Tribunal have jurisdiction to hear this claim and specifically:

   6.1 The claimant's claim having been presented outside the time limit under (s.123 (1)(a) Equality Act ("EqA") 2010), has the claimant presented his claim in such other period as the Employment Tribunal thinks just and equitable within the meaning of s123(1)(b) EqA 2010)?

   6.2 Can the claimant bring a claim against the second respondent under the Equality Act 2010 given the relationship in this case as falling within either s39 or s41 of the Equality Act 2010?

7. It was agreed that the Tribunal would look at issue 6.1 first as this could determine the claim and how it proceeds against both respondents and then it would move onto consider issue 6.2 against the second respondent.

The law

8. Section 39 Equality Act 2010:

> **"39 Employees and applicants**
>
> (1) An employer (A) must not discriminate against a person (B)—
>
> (a) in the arrangements A makes for deciding to whom to offer employment;
> (b) as to the terms on which A offers B employment;
> (c) by not offering B employment.
>
> (2) An employer (A) must not discriminate against an employee of A's (B)—
>
> (a) as to B's terms of employment;
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
> (c) by dismissing B;
> (d) by subjecting B to any other detriment.
>
> (3) An employer (A) must not victimise a person (B)—
>
> (a) in the arrangements A makes for deciding to whom to offer employment;
> (b) as to the terms on which A offers B employment;
> (c) by not offering B employment.
>
> (4) An employer (A) must not victimise an employee of A's (B)—
>
> (a) as to B's terms of employment;
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
> (c) by dismissing B;
> (d) by subjecting B to any other detriment.
>
> (5) A duty to make reasonable adjustments applies to an employer.
>
> (6) …
>
> (7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—
>
> (a) by the expiry of a period (including a period expiring by reference to an event or circumstance);

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

(8) Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms."

9. Section 41 Equality Act 2010 states:

41 Contract workers
(1) A principal must not discriminate against a contract worker—
(a) as to the terms on which the principal allows the worker to do the work;
(b) by not allowing the worker to do, or to continue to do, the work;
(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;
(d) by subjecting the worker to any other detriment.
(2) A principal must not, in relation to contract work, harass a contract worker.
(3) A principal must not victimise a contract worker—
(a) as to the terms on which the principal allows the worker to do the work;
(b) by not allowing the worker to do, or to continue to do, the work;
(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;
(d) by subjecting the worker to any other detriment.
(4) A duty to make reasonable adjustments applies to a principal (as well as to the employer of a contract worker).
(5) A "principal" is a person who makes work available for an individual who is—
(a) employed by another person, and
(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).
(6) "Contract work" is work such as is mentioned in subsection (5).
(7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

10. Section 83 (2)(a) Equality Act 2010:

83 Interpretation and exceptions
. . .
(2) "Employment" means— (a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

11. Section 123(1) Equality Act 2010 (Time Limits):

"123 Time limits

(1) Subject to section 140(a) and 140(b) proceedings on a complaint within section 120 may not be brought after the end of —

(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

> (1) …
>
> (2) For the purposes of this section—
>
> > (a) conduct extending over a period is to be treated as done at the end of the period;
> > (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> > (a) when P does an act inconsistent with doing it, or
> > (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

12. The second respondent's counsel referred to a number of cases in his written submissions to which we have had regard namely:

Robertson v Bexley Community Centre [2003] EWCA Civ 576
Apelogun-Gabriels v Lambeth London Borough Council [2001] EWCA Civ 1853
James v Greenwich London Borough Council [2007] ICR 577, EAT, *James v Greenwich London Borough Council* [2008] ICR 545, CA
Muschett v HM Prison Service and Brook Street (UK) Ltd, EAT [2010] UKEAT/0132/08/LA and Court of Appeal [2010] EWCA Civ 25
Abbey Life Assurance Company Limited v Mr C Tansell [2000] I.C.R. 789 (CA), [1999] I.C.R. 1211 (EAT)

13. I have also had regard to the list of factors in the Limitation Act 1980 s33 as set out in *British Coal Corporation v Keeble [1997] IRLR 336*.

Findings of fact

14. The first respondent is an employment agency in the business of the supply of temporary workers and introduction of permanent candidates to clients.

15. The second respondent is a global pharmaceutical company with headquarters in Cambridge.

16. On 14th June 2019 the second respondent entered into a master service agreement with the first respondent to supply recruitment services from time to time to the second respondent. The claimant was not a party to this agreement and there was no reference specifically to the claimant or Harmonious Futures Ltd in this document.

17. On 5th August 2019 the claimant sought treatment for his mental health conditions and was sectioned under the mental health act but promptly released. He was shortly thereafter able to work for the second respondent.

18. On 15th August 2019 the claimant was sent an assignment confirmation letter that Harmonious Futures Ltd had been accepted for an assignment commencing on the 19th August 2019 with the second respondent. The assignment confirmation came from the first respondent. The parties understood that the claimant would be providing service through his service company.

19. The claimant's assignment with the second respondent commenced on 19th August 2019 as a service excellence manager.

20. The claimant was a director and shareholder in a service company Harmonious Futures Ltd which had been established for a period of time as a vehicle under which he would offer his consultancy services. The claimant considered himself an employee of Harmonious Futures Ltd. He was paid as salary and then additionally dividends. The claimant had set it up this way after having taken accountants advice. The claimant gave evidence of the financial pressures he was under to maintain his home and the importance as to stability of income.

21. On the 28th August 2019 Harmonious Futures Ltd entered into a contract with the first respondent to provide services to the first respondents clients. This followed the temporary assignment letter of 15th August 2019 which was subject to these terms.

22. The claimant was not named personally in the contract as the relevant consultant but the parties understood the claimant would be the one attending the workplace. There was no obligation on Harmonious Futures Ltd to accept any assignment that the first respondent offered. There was no obligation on the first respondent to offer any assignments. It was a requirement of the contract that any consultant be working under a contract for services with the Company (in this case Harmonious Futures) or employed by that Company and that the client of the first respondent (in this case the second respondent) was a customer of the Harmonious Futures Ltd. The contract sought specifically to exclude the Agency Workers Regulations in this way.

23. The claimant commenced the assignment on the 19th August 2019 but there were numerous issues over workplace location with the claimant initially being permitted to work from home for the first week and attend the offices of the second respondent in the second week.

24. Following issues between the parties, by email dated 2nd September 2019 the first respondent informed the claimant that "Astra will be terminating the contract today, you will be paid for the remaining week."

25. The claimant's assignment with the second respondent therefore ended on 2nd September 2019. The claim was submitted to the Tribunal on 30th December 2019 and this was late. The claimant accepted this in the ET1 form and relied on his mental health. His claim was for unfair dismissal (which was rejected by the Tribunal) and disability discrimination.

26. On 8th September 2019 the claimant was sectioned under s136 having been detained at Stansted airport. He had gone to the airport to catch a flight to stay with a friend in Greece but staff had become concerned for his welfare for the reasons set out in his discharge summary which I do not consider appropriate to set out in this judgment.

27. On the 9th September 2019 the claimant was discharged from the hospital as he had a strong desire to return to the airport and go to Greece as planned. In evidence the claimant confirmed that he was detained for one night and then he did go to Greece. The claimant confirmed in evidence that he stayed for 2/3 weeks on holiday. The reason for the trip was that he suffered from a physical condition (being the disability relied on for the purposes of this claim) and that he felt that he would benefit from time in a warmer climate.

28. The claimant submitted a lengthy complaint to the first and second respondent on 19th September 2019. This ran to three pages and consisted of 11 complaints. He concluded by saying that they were "both in breach of your industry standards and legal requirements". He was able to access the internet whilst away and being away or his mental health did not prevent him from setting out in detail his complaints.

29. The claimant had a diagnosis of anxiety with depression from his GP on 24th September 2019. The claimant also visited the GP for his seasonal influenza injection in October 2019. This was a routine procedure and not out of the ordinary.

30. The claimant was able to also in this period submit a data subject access request to the respondent. The claimant asked for an investigation report and this was provided to him by the end of October 2019.

31. The claimant had been actively seeking employment including by late December 2019 having had three interviews for roles and as he further explained in his ET1 he had sent out his CV 1000's of times.

32. On 10th October 2019, the claimant emailed the first respondent raising unfair discriminatory activities, that reasonable adjustments were not made and that his dismissal was because of his disability stating:

"I have taken legal advice and will continue to do so in this matter . . . Please respond with a satisfactory offer and the unredacted (GDPR withstanding) independent report <u>within one week</u> or I will initiate formal legal proceedings."

33. The claimant stated in evidence he had not gone to see a solicitor but had taken sought legal advice on-line and had made 2/3 calls to ACAS. He had considered seeing the CAB but on balance felt that they were not specialised enough. The claimant stated he had carried out internet research as to the process as well. As is evident from his later correspondence set out below, he clearly knew that he had to commence

ACAS early conciliation to bring his claim as the first step. I find that he was aware of the time limits given the nature of his research and the availability of information on these matters. The claimant is clearly an educated and articulate individual able to understand and articulate his rights. This is evident from the correspondence.

34. On 17th October 2019, the claimant emailed the first and second respondent stating:

"You have been given 7 days notice. Please reply to the below within 24 hours or I will be taking both Hays and AstraZeneca to Employment Tribunal due to breach of Disability Discrimination and Certainty of Assignment Laws."

35. On 18th October 2019, the claimant emailed the first respondent again highlighting that they could not dismiss people because of their disability and the investigation report was not independent. He had clearly received the report by this time which he accepted in evidence.

36. On 21st October 2019, the claimant wrote to the first respondent stating:

"This will be proceeding via ACAS Conciliation."

37. The claimant accepted under cross examination that by this time he had had all the information from the first respondent and was not waiting on additional documentation.

38. The claimant did not commence ACAS Early Conciliation until 20th December 2019 and he immediately got the ACAS EC certificate so this was dated 20th December 2019.

39. The claimant presented his claim to the Tribunal on 30th December 2019. The claim was for matters at the latest that ended with the termination of his assignment on 2nd September 2019.

Conclusions

Does the Employment Tribunal have jurisdiction to hear this claim and specifically:

The claimant's claim having been presented outside the time limit under (s.123 (1)(a) Equality Act ("EqA") 2010), has the claimant presented his claim in such other period as the Employment Tribunal thinks just and equitable within the meaning of s123(1)(b) EqA 2010)?

40. The parties all agree that the claims are out of time even if we take the last act to be the act of termination of the contract in this case. I should consider the claims against each respondent separately and given the decision to terminate the contract came from the second respondent it is entirely possible (but not clear until the issues and claims are properly

identified) that the acts in respect of the first respondent may be earlier. For the purposes of determining this issue I have taken termination of the contract to be the last act for both respondents.

41. In accordance with *Robertson v Bexley Community Centre* [2003] EWCA Civ 576 the onus is on the claimant to establish that it is just and equitable to extend time and the time limits need to be construed strongly. I have taken into consideration all the evidence in this case and that the claimant is a litigant in person. He provided redacted medical evidence to the respondents and the tribunal and whilst he did not provide a witness statement as there was no order to do so, he was given the opportunity to give evidence at length of the matters that needed to be decided at this hearing. The respondents had the opportunity individually to cross examine him. The claimant also produced additional medical evidence that was permitted to be relied on.

42. This is not a case where the claimant was in position for long with a complex passage of acts over an extended period where sometimes a claimant can be caught out by the limitation period if some of the earlier acts are found to be discriminatory but not later acts. The engagement lasted for a short period from 19th August 2019 and ended on 2nd September 2019. Limitation periods are intended to ensure cases are brought promptly after the acts complained of. It is not the fault of the claimant that this preliminary hearing was listed over 12 months after he presented his claim so this must be disregarded.

43. I have in mind the factors in the *British Coal Corporation v Keeble [1997] IRLR 336* case as a background although they are not to be used as a checklist. I must consider all the evidence in the round.

44. The claimant should have commenced ACAS early conciliation by 1st December 2019 to benefit from the time provisions that pause the limitation clock and he failed to do so. He did not commence ACAS for another 19 days. He started and concluded ACAS early conciliation on the same day and then did not submit his claim for another 10 days. By the time the claim was submitted it was 29 days out of time in total.

45. The claimant relies on his ill health as the reason for the delay. I accept that the claimant was clearly unwell in September 2019 and suffering with mental health issues. Indeed, he was unwell and suffering with similar issues in August 2019 yet was able to start work with the second respondent and attend work for a period.

46. The claimant had some mental health issues during this period but was able to apply for roles, attend interviews, go on holiday, visit the GP etc. The claimant has provided no evidence for the delay in submitting the claim beyond the end of October 2019. His explanation was that he was unwell and found the matter traumatic and had to do this in small doses but this does not explain the significant delay. The claimant was not at that time undergoing any medical treatment or on medication for his mental health concerns once he was released from the hospital in early

September. The GP did not consider it significant enough when he was diagnosed with anxiety with depression on 24th September 2019 to refer the claimant elsewhere at that stage.

47. The claimant's mental health did not prevent him from doing many things after 9th September 2019 when he was released. He was able to go on holiday, correspond with the respondents numerous times, see his GP, have routine unconnected treatment, research and take advice on his legal claims, apply for jobs and attend interviews. So I do not accept having heard the evidence and taken into account all the medical evidence in the round that he was too unwell to bring the claims in time. There is an unexplained delay from the end of October 2019 when he indicated he was to bring a claim and start ACAS which ended up in him taking no action in November or early December.

48. Whilst the claimant explained his financial pressures and it is therefore understandable that he should want to focus on the job hunt, being busy is not a good reason to miss the tribunal deadline. Limitation periods should be observed strictly.

49. Given the short employment period for the witnesses to recall evidence from I am not concerned by the cogency of the evidence being affected by the delay. In actual fact, there has been a long tribunal process which has substantially impacted on this delay before the case was listed for this hearing and it is not the fault of the claimant. I do not consider it right to say the delay impacts on the cogency of the evidence given the longer delays since. I have considered there to be no difference in this cogency issue for witnesses of the first or second respondent.

50. The first respondent had provided the investigation report and subject access request the claimant had requested. The respondents had cooperated with those requests and engaged in correspondence with the claimant. There was no need to wait for any information from the respondents as the claimant accepted that he had everything he needed by the end of October 2019. He was not waiting for any internal processes to complete. He was ready to proceed but did not do so.

51. It is clear that the claimant during both September and October 2019 knew of his legal rights, that the Tribunal was the appropriate forum for any disability complaints and that ACAS early conciliation was required. He had researched the position, spoken to ACAS and sought advice. He knew what he had to do and that there were time limits. However, other than entering into the above correspondence with the respondents he took no steps to actually submit his claim or commence ACAS early conciliation in September, October or November.

52. Tied in with this is the consideration of the promptness with which claimant acted after he knew of his rights. The claimant knew of his rights and had everything he needed to proceed before the end of October but did not do so. I have set out already in detail that I do not consider that the claimant's mental health prevented him from taking action in this case. His letter of

19th September 2019 was detailed and the correspondence between him and the respondents continued for another month when he indicated that he would commence ACAS EC but then did nothing to progress this for almost two months.

53. Of course, there is a public interest in having any allegation of discrimination scrutinised by the tribunal. All claimants deserve this but it is not a reason alone for me to exercise my discretion. The onus is on the claimant to establish that it is just and equitable to extend time if he presents his claim outside the primary limitation period as statute intended and he has failed to establish this.

54. The claim is 29 days outside the primary time limit which is not of itself a long period of time but taken in the context of this case this period is longer than the entire period of the engagement in this case. If this had been a case of discrimination during ordinary employment the case would submitted out of time by a period longer than the employment itself.

55. The period of time should also be taken in context where the claimant has not explained why he did not take action in November at the latest when he knew his course of action, what he needed to do, his rights, that he had all the information he needed and was able to do so much in late September and October. The delays in this case are instead not indicative of mental health issues preventing him from proceeding rather it is indicative that it was not a priority and he chose not to proceed at that time.

56. On balance having taken everything into account I do not consider it just and equitable to extend time under s123 (1)(b) Equality Act 2010 and as such the Tribunal does not have jurisdiction to hear this claim.

Can the claimant bring a claim against the second respondent under the Equality Act 2010 given the relationship in this case as falling within either s39 or s41 of the Equality Act 2010?

57. Given my conclusions that the claimant's claim is out of time and it is not just and equitable to extend time it is not necessary for me to consider this issue and reach a conclusion.

58. However, in the interests of completeness as the second respondent had made submissions on this second issue, I have set out briefly my conclusions on this issue also.

59. The claimant was not an employee of the first or second respondent but rather his own service company.

60. However, S83 of the Equality Act 2010 defines employment in a wider sense as employment under a contract of employment, a contract of apprenticeship or contract personally to do the work. I accept the second respondent's submission that s39 of the Equality Act 2010 would not encompass the arrangement the claimant was placed at the second

respondent because there was no contract between the claimant and the second respondent in accordance with *James v Greenwich London Borough Council* [2007] ICR 577, EAT, *James v Greenwich London Borough Council* [2008] ICR 545, CA.

61. The second respondent correctly accepts that there does not need to be a direct contractual relationship between the claimant and the principal for the claimant to have protection. Contract workers are covered under s41 Equality Act 2010.

62. The claimant would have a route to bring this claim the "gateway" the second respondent refers to if the second respondent is a 'principal' and the claimant was a 'contract worker' under s41 Equality Act.

63. The definition of principal is found in s41(5) of the Equality Act 2010 that the contract worker is 'employed' by one person and supplied by that person 'in furtherance of a contract to which the principal is a party'. I accept the second respondent's submission that the second Respondent is the person who makes work available and that the second respondent's contract is with first respondent and not the claimant. The first respondent supplied the claimant to the second respondent.

64. I accept the second respondent's submission that in order for the claimant to fulfill the definition of 'contract worker' the contract between the individual and the first Respondent must be one of 'employment', albeit the wide definition of 'employment' set down by s83 Equality Act 2010 rather than the more restrictive definition of 'contract of service' that applies to some employment protections such as unfair dismissal.

65. The claimant was not employed by the first respondent but instead with his own service company. He was not an apprentice so the claimant's relationship with the first Respondent (Hays) must be under a 'contract personally to do work' in order to meet the requirement of s83 Equality Act 2010.

66. There are various terms of the contract that would indicate that the claimant was not contracted personally to do the work. He was not a named relevant consultant, there was a right to substitution (albeit not totally unfettered), there was no obligation to accept (or on the first respondent) to offer any assignments and in addition there is the agency workers clause that indicates there is no contractual relationship between the first respondent and the relevant consultant in this case the claimant. The difficulty here is that these clauses have not been tested as given the short duration of the assignment.

67. I have exercised some caution that the contract may not reflect the reality of the situation and could have been engineered to deny employment rights but I also weigh this caution against the fact that the claimant chose to operate under his service company and had done so for some time. This was not a vehicle created for this specific contractual relationship but the way he carried out his work.

68. Whilst it is not entirely satisfactory that as a matter of law a claimant could have no protection against theoretical discrimination by the end user (I say theoretical as I have made no findings here as to actual discrimination having occurred), this is not the first time this issue has had to be addressed by the Tribunal and indeed the higher courts but the Equality Act 2010 has not been amended in light of this issue.

69. In *Abbey Life Assurance Company Limited v Mr C Tansell* [2000] I.C.R. 789 (CA), [1999] I.C.R. 1211 (EAT), it was held that the mere existence of another contract did not prevent discrimination protection. That case can be distinguished as there was a requirement to provide the services personally.

70. A more comparable authority to this current case is that of *Muschett v HM Prison Service and Brook Street (UK) Ltd*, EAT [2010] UKEAT/0132/08/LA where in that case the agency worker's discrimination claims failed against both the employment business (akin to the first respondent on these facts) and the end-user client (akin to the second respondent on these facts). In that case it was held that:

    70.1 The worker was not "employed" by the employment business for discrimination purposes, as there was no mutuality of obligation between him and the employment business and his contract did not oblige him to perform work personally for that business. This is evident in the current case.
    70.2 As he was not employed by the employment business, the worker did not fall within the definition of a "contract worker" of the end-user. This is evident in the current case.
    70.3 Further, the worker was not employed by the end-user. This is evident in this case.

71. Whilst not entirely comparable factually, there are some parallels in this case. It was another case where the claimant fell between the gaps of the protection under the Equality Act 2010.

72. Given the above, I conclude that had I found it was just and equitable to extend time in this case, the claim against the second respondent would not have been able to proceed as the Tribunal would not have jurisdiction in this regard either.

73. The further preliminary hearing listed for this matter to identify the issues is therefore vacated and the claims are dismissed.

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Employment Judge King

Date: …….21.04.2021……..

Sent to the parties on: ...

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For the Tribunal Office