EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4103727/2020 (V)

Held remotely on 15 January 2021

Employment Judge: W A Meiklejohn

Miss S Massey	**Claimant** **In person**
Project Trust	**Respondent** **Represented by:** **Ms D Miller – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is as follows –

(a) The claimant's complaint of disability discrimination was not presented within the time limit contained in section 123 of the Equality Act 2010 ("EqA") but it is just and equitable to extend time and accordingly the complaint is not time-barred, but

(b) The Tribunal does not have jurisdiction to consider that complaint because the alleged discrimination contrary to section 39 EqA did not relate to "employment" as defined in section 83 EqA, and the complaint is dismissed.

REASONS

1. This case was listed for an open preliminary hearing, conducted remotely by means of the Cloud Video Platform ("CVP"), for the purpose of determining

two preliminary issues. The first of these was time bar. The second was whether, where the claimant was seeking to take part as a volunteer in an overseas programme organised by the respondent, the respondent was an employer for the purpose of section 39 EqA.

Nature of claim

2. The claimant brought a complaint of disability discrimination. In her ET1 claim form the claimant did not identify the precise nature of that claim but in subsequently answering a request for information from the respondent she confirmed that her claim was based on section 13 EqA (**Direct discrimination**), section 15 EqA (**Discrimination arising from disability**) and sections 20/21 EqA (**Duty to make adjustments/Failure to comply with duty**). The claimant argued that although the position for which she had applied was labelled by the respondent as a "*volunteer"* it involved payment of a *"living allowance"* which made it a "*job".*

3. The claimant contended that the respondent had acted contrary to section 39 EqA which, so far as relevant, provides as follows –

"*(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."

Procedural history

4. The claimant's ET1 was lodged on 10 July 2020. The respondent duly lodged an ET3 response form in which they resisted the claim, raised the preliminary issues and reserved their right to amend their response when further specification of the claim was provided.

5. A preliminary hearing for the purpose of case management was held by telephone conference on 9 September 2020 (before Employment Judge

Hendry). The principal outcome was that there should be a further preliminary hearing held by CVP to determine the preliminary issues described above.

Evidence

6. I heard evidence from Ms J McMeekin, the respondent's Head of HR and PA to their Chief Executive. I also heard evidence from the claimant and from her mother, Mrs K Massey. I had a bundle of documents extending to 99 pages to which I refer by page number.

Findings in fact

7. The respondent is a gap year educational charity which has operated since 1967. It sends young people, normally school leavers, to participate in international volunteering projects. These can be of 8 or 12 months' duration. The process involves the following steps –

(a) An online application.

(b) A selection course, normally lasting 5 days and based at the respondent's headquarters on the Isle of Coll.

(c) A period of fundraising, supported by the respondent's Volunteer Fundraising Team.

(d) A 4 day training course based at the respondent's headquarters at which participants are trained with their country group and paired with their project partner.

(e) Participation in the assigned volunteering project. These can be in Africa, Asia, Latin America, Oceania or the Caribbean and involve teaching, social care or outdoor education. Each project has a Project Host.

(f) A 2 day debriefing course at the respondent's headquarters.

Claimant applies

8. The claimant submitted her application to the respondent on 3 January 2020 (35-36). She provided her educational background and indicated that she was currently attending Hartlepool College of Further Education. She referred to her diagnosis with autism at the age of 16. She described her aspiration to study natural science and set out her reasons for applying.

9. The claimant attended a training course on 13-15 February 2020. Adverse weather prevented travel to Coll and the shortened course took place in Oban. On 25 February 2020 the claimant received by email a letter from the respondent advising that she had not been selected for an overseas volunteering programme. Feedback was provided in a telephone call on 26 February 2020.

Documentation

10. There was a Project Guide for Volunteers (48-91) which was sent to applicants in response to their application. This emphasised a skills framework based on the core competencies of communication and collaboration, leadership, self-confidence, resilience and awareness. It referred to the participating young people as *"volunteers"* with no reference to any other status.

11. The only document which a selected applicant was required to sign was the respondent's Code of Conduct (46-47). This stated that *"Volunteers are expected at all times to act under and consider the following 4 principles".* The Code then set out a series of undertakings under the headings Work Ethic, Legal, Safety and Reputation. There was a four stage disciplinary procedure with the ultimate sanction being repatriation. If this was invoked, the volunteer's parents or guardians might become involved. The disciplinary procedure had been used in the past, including repatriation.

12. There was an expectation that volunteers would "*stay the course"* for the scheduled duration of their placement. The two volunteers partnering each other would usually travel together and live together and were expected to support each other. The respondent maintained contact with the volunteers through a country coordinator based on Coll. The respondent did not have project/team leaders on site, and the locations could be remote. A level of resilience and independence was required of the volunteers. However, if a volunteer wanted to leave their placement and return home, they could do so.

Financial arrangements

13. There was a cost of £180 to attend the selection course. This was a contribution to the cost of travel to and food/accommodation on Coll. It was not refundable. It could be covered by a Selection Bursary (and was in the case of the claimant).

14. There were fundraising targets - £6950 for a 12 month placement and £6250 for an 8 month placement. Funds were raised for the benefit of the respondent and went into "*one pot"*. The respondent met the cost of travel to and from the placement and medical insurance. The volunteers met the cost of visas and inoculations.

15. Volunteers were required to provide their own spending money while on placement. The amount depended on the country of placement; Ms McMeekin indicated that £1000-1500 would be normal. In the section of the respondent's website dealing with Volunteer Fundraising (93-96) it was stated that "*you will need some spending money (for your long holidays)".* The evidence of Ms McMeekin indicated that this was for things like excursions, trips, souvenirs and dining out.

16. The FAQ section of the respondent's website (92) included the question *"Do I receive an allowance or pocket money?".* The answer stated "*You will receive a living allowance from Project Trust or your overseas host, which will be enough to live on in your local community on a day-to-day basis".*

17. This wording had changed since the time of the claimant's application. Ms McMeekin's evidence was that only the question had changed, and that it had previously read "*Do I get paid?".* The claimant's evidence was that the answer had also changed – it previously started with the word "*Yes".* The claimant said she had taken a screenshot of this. Based on that, I preferred the claimant's evidence on this point.

18. The living allowance was intended to cover a volunteer's out-of-pocket expenses. The amount varied according to location. In the majority of cases it was paid by the Project Host. Where the Project Host was unable to pay, they would be asked to provide accommodation, and the respondent would pay the living allowance.

Claimant takes advice

19. The claimant was upset at not being selected. She was also unhappy about the feedback given by the respondent. She described this as having a negative effect on her mental health. She said that she "*put off*" doing anything about matters relating to the respondent. Neither the claimant nor her mother had any knowledge of Employment Tribunals or employment law. They were unaware of the time limit for bringing a Tribunal claim.

20. Mrs Massey described doing some internet research in March 2020. This included visiting the ACAS website. On the claimant's behalf, Mrs Massey contacted ACAS. She spoke to ACAS on three occasions, each time with a different adviser. She could not provide dates for these conversations other than to indicate that the first one was around the end of March 2020 and the last one was towards the end of May 2020.

21. Mrs Massey said that her initial contact with ACAS was about discrimination (rather than Employment Tribunals). She was advised that noone should discriminate against a person with autism. She was advised that the claimant could "*take it further".* The evidence did not disclose what advice had been

given during each conversation, except that Mrs Massey understood from the third conversation that there was a time limit and it was "*within a day or two".* There had been no reference to time limits in the earlier conversations.

22. Mrs Massey also understood from the third conversation with ACAS that the claimant should start a "*complaints process".* She was unable to recall if she had been told that it was necessary for the claimant to do this before submitting a Tribunal application. The claimant and Mrs Massey prepared a letter of complaint and submitted this to the respondent on 19 May 2020, and Ms McMeekin replied on 16 June 2020 (these dates being mentioned in the paper apart to the respondent's ET3).

23. The claimant consulted the Citizens Advice Bureau ("CAB") in Hartlepool on two occasions. She was accompanied by Mrs Massey. The second occasion was on 26 August 2020 and is not relevant for present purposes. Neither the claimant nor Mrs Massey could recall the date of the first consultation, other than to say that it was *"within a month"* of lodging the ET1 (per the claimant) or *"three or four weeks before the claim was lodged"* (per Mrs Massey).

24. The claimant said that the first consultation with the CAB had been *"only a short appointment due to Covid-19".* She said that she was told she would have to submit her Tribunal claim *"soon".* She was told there could be *"exemptions".* This suggests that the claimant and Mrs Massey might have been told that the time limit for presenting a Tribunal claim had already passed.

25. The claimant's ACAS Early Conciliation ("EC") certificate (13) records that the date of notification to ACAS (and also the date of issue of the EC certificate) was 9 July 2020. The claimant's ET1 was submitted on 10 July 2020.

26. Both the claimant and Mrs Massey stated in evidence that they understood there were two options open to the claimant. One involved ACAS and/or the Tribunal. Neither could recall the other option. It appeared that this

understanding was based on what Mrs Massey had been told by ACAS. My view of this was that it confirmed the lack of any real understanding on the part of the claimant and Mrs Massey as to the nature of the remedy for alleged discrimination and the Employment Tribunal process.

Submissions

27. Ms Miller reminded me that the preliminary issue of jurisdiction related to the terms of section 39 EqA. The preliminary issue of time bar related to the terms of section 123 EqA.

28. Referring to the language of section 39 EqA (see paragraph 3 above), Ms Miller said that the key word was "*employment".* This was defined in section 83(2)(a) –

"(2) Employment means –

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work…"

29. Ms Miller argued that, had she been selected, the claimant would have been neither an employee nor a worker. She would have been a volunteer. This was a separate category of activity.

30. Ms Miller referred to ***Murray v Newham Citizens Advice Bureau [2001] ICR 708***, a decision of the Employment Appeal Tribunal, where a job applicant who was schizophrenic had his complaint under the Disability Discrimination Act 1995 dismissed by the Employment Tribunal on the basis that the voluntary adviser post for which he had applied and the training programme for that post did not come within the definition of "*employment".* The EAT upheld an appeal against the Tribunal's finding that the absence of pay was the crucial factor. The existence or absence of pay was only one factor.

31. In the present case the claimant, if she had been selected, would have received a living allowance. That was the equivalent of expenses. The placement would have been an educational experience, not employment.

The Code of Conduct was not a contract of employment. There was no intent to create a legal relationship.

32. Ms Miller highlighted what she argued were inconsistencies with the relationship between the parties (assuming the claimant had been selected) being one of employment –

(a) The sole focus was on the educational experience.

(b) The requirement to fund raise and meet the cost of a visa.

(c) The absence of any correlation between between payment (of living allowance) and work done.

(d) The absence of control by the respondent which would only intervene if issues arose. The disciplinary procedure under the Code of Conduct did not operate as in a normal employment situation.

33. Ms Miller referred to ***X v Mid Sussex Citizens Advice Bureau and another [2013] ICR 249***. In that case the claimant entered into a volunteer agreement. When asked to leave, she claimed disability discrimination against the respondent and its manager. Her argument before the Supreme Court was that the Disability Discrimination Act 1995 derived from EU Directive 2000/78 which referred at Article 3(1)(a) to "*occupation".* The Supreme Court found that Article 3 was "*not directed to voluntary activity"*.

34. It followed, Ms Miller submitted, that the definition of "*employment"* in section 83 EqA meant the status of employee or worker. It did not extend to a volunteer.

35. Turning to time bar, Ms Miller argued that an extension of time was the exception, not the rule – ***Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434***. In ***British Coal Corporation v Keeble [1997] IRLR 336*** the EAT held that the exercise of the discretion afforded to

the Tribunal in determining whether it was just and equitable to extend time was similar to the discretionary factors set out in section 33(3) of the Limitation Act 1980. In ***Southwark London Borough Council v Afolabi [2003] EWCA CIV 15*** the Court of Appeal held that it was not an error of law if a Tribunal did not go through the section 33(3) "*checklist".*

36. Ms Miller invited me to focus on the length of the delay, the reasons for it and whether there was prejudice to the respondent. The claim had been lodged some 6 weeks late. The reason for the delay was a little unclear. Ms Miller suggested that the claimant and Mrs Massey had been aware of the existence of a time limit from around 24 May 2020. There had then been no impediment to submitting the claim. No reasonable explanation was offered as to why the claimant had waited 3/4 weeks after speaking to the CAB.

37. The respondent was a small charity. It had been impacted negatively by Covid-19. It would not be just and equitable to extend time.

38. The claimant argued that it was inconsistent with the alleged voluntary nature of the position she had applied for that it involved payment. That was what the respondent's website confirmed.

Applicable law

39. So far as the claim of alleged discrimination in terms of section 39 EqA is concerned, I have already set out the relevant parts of sections 39 and 83 EqA (at paragraphs 3 and 28 above) so I will not repeat them here.

40. So far as the time bar issue is concerned, the time limit is found in section 123(1) EqA, as follows –

"*Subject to sections 140A and 140B, 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."

41. Section 120 EqA confers jurisdiction on the Tribunal to deal with claims under the Part of the EqA which includes section 39. Section 140A EqA is not relevant. Section 140B EqA deals with the extension of time to facilitate EC. This means that the claimant should, not later than 3 months after the act complained of, have initiated EC or lodged her ET1.

Discussion and disposal

42. I deal first with the issue of time bar. If the act of alleged discrimination was the rejection of the claimant's application to participate in one of the respondent's project placements, then that occurred on 25 February 2020. I say "*If*" because it might have been argued by the claimant that the rejection of her complaint on 16 June 2020 was a further act of discrimination. That said, I rather doubt whether the claimant would have been able to persuade a Tribunal that there had been *"conduct extending over a period"* for the purpose of section 123(3) EqA. In other words, her claim based on the letter of rejection would still have been out of time.

43. If the act of alleged discrimination took place on 25 February 2020 then the primary time limit for presenting a claim to the Employment Tribunal was 24 May 2020, in terms of section 123(1) EqA. The claimant should have notified ACAS to commence EC by that date. She did not do so. I had to look at the circumstances in which the claim had been presented out of time.

44. I considered each of the factors set out in section 33(3) of the Limitation Act 1980. The first of these was the length of the delay and the reason for it. The length of the delay was 47 days (from 24 May 2020 to 10 July 2020). This was quite a significant period and counted against the claimant.

45. The reason for the delay was in my view a combination of factors. The claimant was unaware of Employment Tribunals in general and the time limit in particular until her mother's third conversation with ACAS in May 2020. It was not clear why the existence of the time limit for pursuing a complaint of

alleged discrimination did not apparently arise in Mrs Massey's earlier conversations with ACAS. When it did arise, the advice was that it was "*within a day or two"* which seems imprecise when the date of the letter of rejection was known.

46. Another factor was the claimant's mental state at the time. She described herself as "*put off"* doing anything about matters relating to the respondent. A further factor was the lack of any real understanding on the part of the claimant and her mother as to the nature of the remedy for unfair dismissal and the Employment Tribunal process. They were under the impression that there was some alternative option but unable to articulate what this was.

47. I reminded myself that the reason for the claimant's delay in presenting her claim had itself to be reasonable. It was not a matter of reasonable practicability (to present the claim in time) which was the test in a case of unfair dismissal, but whether it was just and equitable to extend time. My view was that the claimant was in genuine and reasonable ignorance of the time limit and this counted in her favour when considering an extension of time.

48. The next factor in section 33(3) was the extent to which the cogency of evidence was impaired. I did not consider that this operated against extending time. The act of alleged discrimination was the letter of rejection. The matter had been revisited in the exchange of correspondence on 19 May 2020 and 16 June 2020. The existence of this documentary evidence countered the risk of recollections fading through delay. This factor counted in favour of the claimant.

49. The next section 33(3) factor was the conduct of the defendant (ie the respondent in this context). It could be argued that some of the delay was due to the time taken by the respondent to reply to the letter of 19 May 2020. However, given the impact of Covid-19, I did not consider that the respondent was open to criticism here. I regarded this factor as neutral.

50. The next section 33(3) factor was the duration of any disability of the plaintiff (ie the claimant in this context) after "*the date of the accrual of the cause of action".* The experience of her rejection had impacted negatively on the claimant (as described at paragraph 46 above). On the other hand, I had no medical evidence to support this. I found that this factor favoured the claimant but only to a small extent.

51. The next section 33(3) factor was the extent to which the claimant had acted promptly and reasonably once aware that she might have a claim. Not all of the delay of 47 days could in my view be described as unreasonable. It was explained to some degree by the claimant's ignorance of her rights, the apparent lack of precision in the advice from ACAS and her general lack of understanding of the Tribunal process. Looking at matters in the round, I found this factor neutral.

52. The final section 33(3) factor was the action by the claimant to obtain expert advice and the nature of the advice received. The claimant and her mother had engaged with ACAS and the CAB but this did not appear to have given the claimant clarity as to what she should do to present her claim timeously (and of course the contact with the CAB was after the time limit had already expired). Again, I found this factor neutral.

53. I then considered the issue of prejudice to the respondent if time was extended. They would require to face a claim which would otherwise be time barred. Conversely the claimant would lose a claim which she would be able to pursue if time was extended. It seemed to me that these balanced each other out, ie the balance of prejudice favoured neither party over the other.

54. Taking all of these matters into account, and mindful of the decision in ***Robertson***, I decided that this was a case where it would be just and equitable to extend time. The section 33(3) factors weighed in her favour, as described above.

55. I turn to the jurisdiction issue. This depends on the meaning of *"employment"* in section 39 EqA. That takes me to section 83 EqA and the need to consider whether the relationship between the claimant and the respondent, had her placement gone ahead, would have been under *"a contract of employment"* or "*a contract personally to do work".*

56. I noted that *"a contract personally to do work"* was not the same as the definition of a "*worker"* in the Employment Rights Act 1996 ("ERA"). That definition refers to "*an individual who has entered into or works under"* a contract of employment or –

> *"any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."*

57. The starting point is to determine whether there is a contract. I was satisfied that there would have been a contract between the claimant and the respondent if the claimant had been selected and offered a placement. Each party would have assumed obligations to the other. The claimant would have agreed to fund raise, attend training, obtain a visa and inoculations, participate in the placement (observing the Code of Conduct and being subject to the disciplinary procedure) and attend debriefing. The respondent would have provided the training, arranged the placement including travel and medical insurance, paid the living allowance if not paid by the Project Host, provided the services of the country coordinator and organised the debriefing.

58. Would this have been a contract of employment? In my view, no. The respondent would not have exercised day to day control over the claimant while on placement. The respondent would not have provided the work to be undertaken by the claimant. These were the role of the Project Host. The claimant would not have been integrated into the respondent's organisation in the same way as, for example, their country coordinator or any of the respondent's staff based on Coll. The claimant would not have been working in the respondent's business.

59. Would this have been a contract personally to do work? In my view, arguably yes. I do not think the arrangement would have made the claimant a worker in the ERA sense because the claimant would not have been undertaking work personally for the respondent as the other party to the contract. The work was undertaken for the Project Host. However, while that took the arrangement outside the ERA definition of "*worker",* it remained "*a contract personally to do work".* It was, at least potentially (and subject to what I say below), *"employment"* within the meaning of section 83 EqA and therefore within the meaning of section 39 EqA.

60. However, at the heart of the relationship which would have existed between the claimant and the respondent had she been selected, was the fact that she would have been a volunteer. The whole *raison d'etre* of the respondent was to provide overseas placements for the young people who volunteered. It was to build their skills of communication and collaboration, leadership, self-confidence, resilience and awareness. It was not to provide work in exchange for pay in the conventional sense.

61. In her ET1, the claimant described herself as a volunteer. She used the words "*volunteer(s)"* and *"volunteering"* five times within the details of her claim at section 8.2 of her ET1. That is not a criticism of the claimant. It is a reflection of the fact that she applied to the respondent as a volunteer, to undertake voluntary work overseas. It is very much to the claimant's credit that she wanted to do so.

62. Unfortunately for the claimant, her status as a volunteer would in my view, in legal terms, have been on all fours with that of Ms X in the ***Mid Sussex*** case. Payment of *"living allowance"* was akin to expenses. It was not pay for work done. The Supreme Court held in effect that *"employment"* for the purpose of Part 5 of EqA did not include "*voluntary activity".* If she had been selected the claimant would have been engaging in voluntary activity.

63. Accordingly, even if the respondent had contravened section 39 EqA, the Tribunal did not have jurisdiction to deal with that. This was because the relationship would not have been one of "*employment"* for the purpose of section 39 EqA. The claim required to be dismissed.

Employment Judge	**W A Meiklejohn**
Dated	**19th of January 2021**
Date sent to parties	**19th of January 2021**