EMPLOYMENT TRIBUNALS

Claimant: **Mr B Petrov**

Respondent: **(1) Merlin Supply Chain Solutions Ltd**
(2) Fair Pay Services Limited

Heard at: **London North (CVP)** **On:** **26 August 2022**

Before: **Employment Judge A.M.S. Green**

Representation
Claimant: In person
First Respondent: Mr H Wiltshire - Counsel
Second Respondent: Mr A Holby – Managing Director

RESERVED JUDGMENT

The claimant's claim was out of time for the purposes of Equality Act 2010, section 123(1) and there are just and equitable grounds to extend time.

REASONS

Introduction

1. For ease of reading, I refer to the claimant as Mr Petrov, the first respondent as Merlin and the second respondent as Fair Pay.

2. Mr Petrov claims that he suffered from disability discrimination and was unfairly dismissed. His claim for unfair dismissal cannot succeed as he has less than two years qualifying service. He claims that he suffers from type II diabetes. In his claim form, he states that his period of employment was between 19 March 2020 and 5 June 2020. He lodged his claim form at the tribunal on 10 April 2021 which followed a period of early conciliation which began on 30 July 2020 and ended on 17 August 2020. Merlin states that the latest date upon which Mr Petrov should have brought his claim in time was 22 September 2020.

3. Merlin applied to the Tribunal on 10 June 2022 to have the claim struck out on the basis that it has no reasonable prospect of success because they say they

did not employ Mr Petrov. They say that at all times, Fair Play employed Mr Petrov. This is a jurisdiction issue. Merlin also says that the claim was lodged more than seven months out of time and there it would not be just and equitable to extend time to allow the claim to be heard. It is common ground that the claim was lodged out of time. This is a limitation issue. Merlin does not concede that the claimant is disabled and have applied to have the question of disability determined as a preliminary issue. On 6 July 2022, employment Judge Tynan wrote to the parties and requested Merlin to consider the application of the Equality Act 2010, section 41 which confers extended protection against discrimination on contract workers. This is a jurisdictional matter.

4. The purpose of this preliminary hearing is for me to consider the following:

    a. Would it be just and equitable to extend time to allow the discrimination claim to be lodged late? This is a preliminary issue which will be determined pursuant to rule 53 (1) (b).

    b. Should the claim against Merlin be struck out on the basis that it has no reasonable prospect of success in that Merlin did not employ Mr Petrov and the contract work extension does not apply. This is a jurisdictional matter and will be determined under rule 53 (1) (c).

5. We worked from a digital bundle. Mr Petrov gave oral evidence through an interpreter; the language was Bulgarian. He did not prepare a witness statement but adopted his email of 12 June 2022 [47-48] and was cross-examined by Mr Wiltshire and Mr Holby. Mr Wiltshire and Mr Holby made closing oral submissions. Thereafter, we adjourned for one hour for lunch and also to enable Mr Petrov to gather his thoughts and make his own closing submissions.

Findings of fact

6. On considering the evidence, I make the following findings of fact:

    a. Mr Petrov is a Bulgarian national and was born on 7 April 1982. He is 40 years old. Although Mr Petrov chose to give his evidence through a Bulgarian interpreter, he does speak some English. He took private lessons over a period of four or five years whilst living in Bulgaria. He also picked up some English by watching CNN on television and also when he was doing his national military service. In particular, he said that he had served in Afghanistan and had picked up some English in that country. He did not learn English at school and was taught mainly Russian and German as foreign languages.

    b. After leaving school he spent a period of time doing various jobs and then enlisted in the army. He attended what he called the “Sergeants College.”

    c. Mr Petrov came to the United Kingdom 23 September 2019.

    d. Merlin is a recruitment agency that supplies workers to various clients on a temporary basis. They organised temporary work for Mr Petrov where he be engaged by their client the Knights of Old

e. Fair Pay is an outsourced employment company that operates in the recruitment industry to deal with workers payroll and HR requirements.

f. On 21 October 2019, Fair Play and Merlin entered a Service Level Agreement, a copy of which was produced [59]. In that agreement, I note the following:

   i. Fair Play is designed as the "Company" and Merlin is designed as the "Client."

   ii. The recitals narrate that Merlin wishes to contract with Fair Play for the provision of Workers (as defined) in accordance with the terms and conditions of the agreement. Fair Play agreed to supply the services of the Workers in accordance with the terms and conditions of the agreement.

   iii. In terms of the agreement, Merlin appointed Fair Play as its nonexclusive agent to determine the suitability of any Eligible Individual (as defined) for employment with the Company or any Worker in relation to the provision of the Services.

   iv. In clause 3.1, it is agreed that Fair Play would be the employer of Workers and shall ensure that the Worker does not hold him/herself out as being an employee of either Merlin or the Hirer. In clause 1 of the agreement, Hirer is defined as the person, firm or corporate body together with any subsidiary or associated person, firm or corporate body name from time to time in the relevant Assignment Schedule, to whom Workers are supplied or will potentially be supplied by Merlin to work temporarily for and under the supervision and direction of that person, firm or corporate body.

   v. In clause 5, it is agreed that Merlin would be responsible for providing the Worker with timesheets which the Worker shall have signed by the authorised representatives of the Hirer on the completion of each Working Day (as defined) or at the end of each working week or month depending on whether the timesheet is completed daily, weekly, or monthly.

   vi. In clause 6, it is agreed that when Merlin requires Fair Play to provide the services of one or more Workers, Merlin shall procure that each Worker submits accurate timesheets and shall execute a Work Order at the end of the week. The Work Order shall detail the name of each Worker, the role for which each Worker, the number of hours for which each Worker was required together with the gross charge rate per hour. The Work Order is then submitted by Merlin to Fair Play for processing.

   vii. Clause 15 provides that all Workers supplied in accordance with the agreement are Fair Pay's employees. Fair Play undertook to treat all Workers as employed learners of tax and national insurance and also to maintain a payroll facility for the purposes of the Workers. Workers are paid their salary on a weekly basis

in accordance with the provision of the contract of employment with Fair Pay.

viii. Clause 24 provides that the agreement does not operate to create a partnership or joint venture between Merlin and Fair Pay or to authorise either party to act as an agent for the other.

g. Mr Petrov signed a contract of employment with Fair Pay on 24 March 2020. A copy of the contract was produced [84-88]. The contract that designs Fair Pay as the "Company." Mr Petrov is designed as the employee. Under cross-examination, he accepted that he was employed by Fair Pay. He also accepted that he was paid by them, and that Fair Pay issued him with his payslips. Copies of his payslips have been produced [90-101]. Fair Pay also accept that they employed Mr Petrov.

h. Mr Petrov was assigned by Fair Pay to work for a client called Knights of Old. Knights of Old are a Hirer in terms of the Service Level Agreement. He worked as a cleaner at their factory in Luton. His supervisor was a Polish man called Thomacz. Under cross examination, Mr Petrov accepted that Nights of Old employed Thomacz. Mr Petrov also named a man called Gari in his claim form. Under cross examination he accepted that Gari was employed by Knights of Old. He also refers to somebody called Pavel, who was a manager, but he was not sure for whom he worked. Under cross-examination he accepted that Merlin did not manage him on a day-to-day basis. They would only contact him if there were any problems. He was required to submit timesheets to Merlin which they would pass on to Fair Pay for processing.

i. During his employment, Mr Petrov complained that he was treated badly by Thomacz. He says his treatment of him deteriorated after he disclosed to Thomacz that he suffered from diabetes. He also shared with Thomacz and his colleagues that he had been to Brighton on holiday. He claims that Thomacz said that Brighton was the gay capital and alleged that Mr Petrov was a gay person and could not work at the site. Under cross examination, Mr Petrov confirmed that he left work on 6 June 2020 because of how he felt he been treated because of his diabetes and the comments that were made about his holiday in Brighton. He knew that at that time that he had been treated badly and hoped that the matter would be sorted out internally.

j. After leaving work at the Knights of Old Mr Petrov immediately started to look for work. He accepted under cross examination that he had been able to work notwithstanding at Knights of Old despite his diabetes. After leaving work, he struggled to find another job because of the pandemic although he was fit for work. He applied for Job Seekers Allowance having been advised to do so by the DWP personnel who administered Universal Credit.

k. In his email dated 12 June 2022 Mr Petrov explains why it took him more than seven months to file his complaint at the Tribunal. He states:

as to my late application for the Employment Tribunal, i want to be considered the following:

> *At that time i was unemployed for a long time, it was really very hard for me scrapping the living as it was the spike of COVID pandemic outbreak. Apart from that, my blood sugar levels were extremely high and i was monitored constantly from Diabetes and endocrinology clinic Luton hospital (i supplied you with documents enclosed in the bundle i have already sent to you). I was recognised as a number of people due to disabilities, who are susceptible to infected and having adverse health complications from getting COVID-19.*

l. Mr Petrov said that his diabetes deteriorated from September 2020 onwards.

m. Mr Petrov was cross-examined about his delay in lodging his claim form. He said did not understand English law. He said that he was not concentrating on lodging a claim to the Tribunal because he was suffering from stress and was looking for alternative accommodation. His home was damaged in a fire and the local authority issued a prohibition notice on the landlord. His landlord told him to find somewhere else to live. This was in January 2021, and it took him approximately 2 ½ months to find alternate of accommodation. In March 2021, Mr Petrov went to the Citizens Advice Bureau for advice about his claim. They gave him some examples of claim forms to look at as well as giving him advice. He told me that he filled the claim form himself. He wrote his claim in English. He said that he could not afford to go to a solicitor.

Applicable law

7. The Tribunal may hold a preliminary hearing to determine any preliminary issue (rule 53(1)(b)). A 'preliminary issue' is defined in rule 53(3) as 'any substantive issue which may determine liability'. The wording implies that the substantive issue should have some bearing on liability but that in some cases the issue may not be determinative of the claim. In Mr Petrov's case, limitation is a preliminary issue.

8. Limitation is dealt with by the Equality Act 2010, section 123(1) ("EQA") which says that proceedings of this nature 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.

    EQA, section 123 and its legislative equivalents do not specify any list of factors to which a tribunal is instructed to have regard in exercising the discretion whether to extend time for 'just and equitable' reasons. Accordingly, there has been some debate in the courts as to what factors may be relevant to consider.

9. Previously, the EAT suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals

would be assisted by considering the factors listed in section 33(3) of the Limitation Act 1980 (**British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT**). That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

10. Subsequently, however, the Court of Appeal in **Southwark London Borough Council v Afolabi 2003 ICR 800, CA**, confirmed that, while the checklist in section 33 of the Limitation Act 1980 provides a useful guide for tribunals, it need not be adhered to slavishly. In that case a claimant had brought a race discrimination claim nearly nine years after the expiry of the statutory time limit and the tribunal exercised its discretion to allow the claim as it was just and equitable to do so in all the circumstances. The Court of Appeal decided that the tribunal did not err in law by failing to consider the matters listed in section 33 when considering whether it was just and equitable to extend time, provided that it left no significant factor out of account in exercising its discretion. In other words, the checklist in section 33 should not be elevated into a legal requirement but should be used as a guide. However, the Court went on to suggest that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

11. The Court of Appeal considered the matter again in **Department of Constitutional Affairs v Jones 2008 IRLR 128, CA**, and emphasised that the factors referred to by the EAT **Keeble** are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases and tribunals do not need to consider all the factors in each and every case. In **Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA**, the Court of Appeal pointed to the fact that it was plain from the language used in EQA, section123 ('such other period as the employment tribunal thinks just and equitable') that Parliament chose to give employment tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains such a list.

12. This general guidance from the Court of Appeal was heeded by the EAT in **Hall v ADP Dealer Services Ltd EAT 0390/13** where H appealed from a tribunal's decision that it was not just and equitable to extend time to hear her age discrimination claim. She argued that the employment judge had failed to take account of relevant factors, including the balance of hardship, prejudice, and the possibility of a fair trial. However, the EAT held that there is no

necessity for the employment tribunal to follow a formulaic approach and set out a checklist of the variety of factors that may be relevant in any case, particularly where no reliance has been placed on any of them or other factors have been addressed in the evidence as being of greater significance. In the instant case, these factors were either of neutral evidential value or outweighed by other, more important, factors that related to H's health and the progress of an internal grievance which were specifically raised and canvassed in evidence and in submissions before the tribunal.

13. The relevance of the factors set out in **Keeble** was revisited in **Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5, CA**. In that case, the Court of Appeal upheld an employment judge's refusal to extend time for a race discrimination claim presented three days late. It noted that the judge had referred to the factors set out in section 33(3) of the Limitation Act 1980, following **Keeble**. As to the first factor, the length of and reasons for the delay, the judge had been entitled to take into account that, while the three-day delay was not substantial, the alleged discriminatory acts took place long before A's employment terminated, and that he could have complained of them in their own right as soon as they occurred or immediately following his resignation. As for A's assertion that he had mistakenly believed that he could benefit from an automatic extension of time under the early conciliation rules, the judge was entitled to take the view that this did not justify the grant of an extension, given that A had left it until very near the expiry of the primary deadline to take advice and then chose not to act on that advice because he thought that the solicitors had misunderstood the position. With regard to the **Keeble** factors, the Court pointed out that the EAT in that case did no more than suggest that a comparison with section 33 might help 'illuminate' the task of the tribunal by setting out a checklist of potentially relevant factors; it certainly did not say that that list should be used as a framework for any decision. In the Court's view, it is not healthy for the **Keeble** factors to be taken as the starting point for tribunals' approach to 'just and equitable' extensions, as they regularly are. Rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may occur where a tribunal refers to a genuinely relevant factor but uses inappropriate **Keeble**-derived language. The best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular – as Mr Justice Holland noted in **Keeble** – the length of, and the reasons for, the delay. The Court noted that, while it was not the first to caution against giving **Keeble** a status that it does not have, repetition of the point may still be of value in ensuring that it is fully digested by practitioners and tribunals.

14. The Court of Appeal's approach in **Adedeji** was followed by the EAT in **Secretary of State for Justice v Johnson 2022 EAT 1**. There, an employment tribunal had concluded that J's harassment claim was issued only a few weeks out of time at the most and that it would be just and equitable to extend time. In doing so, it decided that a lengthy delay in the claim being brought to trial, which was neither party's fault, was not relevant. The delay in question was due to J's concurrent personal injury claim, which

resulted in the harassment claim being stayed for several years. On appeal, the EAT held that the tribunal had erred in directing itself that it was only the period by which the complaint was out of time that was legally relevant. It was clear from **Adedeji** that tribunals should consider the consequences for the respondent of granting an extension, even if it is of a relatively brief period. Those consequences included whether allowing the claim to proceed would require the tribunal, for whatever reason, to make determinations about matters that had occurred long before the hearing. Accordingly, in the instant case, although it was neither party's fault that there had been a considerable delay in the claim being heard, this was nevertheless a factor that the tribunal was required to consider.

15. The strength of the claim may be a relevant factor when deciding whether to extend time. In **Lupetti v Wrens Old House Ltd 1984 ICR 348, EAT** the Appeal Tribunal noted that tribunals may, if they think it necessary, consider the merits of the claim, but if they do so they should invite the parties to make submissions. However, this is not necessarily a definitive factor: even if the claimant has a strong case, time may not be extended for it to be heard.

16. Rule 53 (1) (c) of the Rules of Procedure confirms that a Tribunal has the power to consider the issue of strike at out a preliminary hearing. Rule 37 sets out the grounds on which a Tribunal can strike out a claim or response (or part). A claim or response (or part) can be struck out on a variety of grounds including that it is scandalous or vexatious or has no reasonable prospect of success (rule 37 (1) (a)). In this case, Merlin says that Mr Petrov's claim has no reasonable prospect of success and should be struck out. It says that it never employed Mr Petrov, and he cannot rely on the contract worker extension set out in EQA.

17. Discrimination and victimisation against employees are dealt with in EQA sections 39(2) and (4), the combined effect of which is that an employer (A) must not discriminate against or victimise an employee of A's (B):

    a. As to B's terms of employment (sections 39(2)(a) and (4)(a)).

    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 (sections39(2)(b) and (4)(b)).

    c. By dismissing B (sections 39(2)(c) and (4)(c)); or

    d. By subjecting B to any other detriment (section39(2)(d) and (4)(d)).

    It is clear that this provision only protects employees.

18. The EQA contains specific provisions prohibiting discrimination against contract workers (such as agency workers) by the end-user of their services (known in the Act as a 'principal'). Section 41 provides that a principal must not discriminate against or victimise a contract worker:

    a. As to the terms on which the principal allows the worker to do the work (section 41(1)(a) and (3)(a)).

b. By not allowing the worker to do, or to continue to do, the work (section 41(1)(b) and (3)(b)).

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 (Section 41(1)(c) and (3)(c)).

d. By subjecting the worker to any other detriment (Section 41(1)(d) and (3)(d)).

19. EQA, section 41(2) further provides that a principal must not, in relation to contract work, harass a contract worker, while section 41(4) states that a duty to make reasonable adjustments applies to a principal (as well as to the employer of a contract worker).

20. EQA, section 41(5) defines a 'principal' as 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).

21. EQA, section 41(6) defines 'contract work' as work of the type mentioned in section 41(5), i.e. work made available by a principal.

22. EQA, section 41(7) goes on to define a 'contract worker' as an individual supplied to a principal in furtherance of a contract to which the principal is a party.

23. According to the Explanatory Notes, section 41 is designed to replicate the effect of previous legislation, while codifying case law to make it clear that there does not need to be a direct contractual relationship between the employer and the principal for the protection to apply. This point is further emphasised in the EHRC Employment Code, which states: 'There is usually a contract directly between the end-user and the supplier, but this is not always the case. Provided there is an unbroken chain of contracts between the individual and the end-user of their services, that end-user is a principal, and the individual is therefore a contract worker' (para 11.8).

24. It is a requirement of EQA section 41(5) that the contract worker is 'employed' by one person and supplied to another. Accordingly, the contract between the individual and the agency must be one of 'employment,' albeit the wide definition of 'employment' set down by EQA section 83 rather than the more restrictive definition of 'contract of service' that applies to some employment protections such as unfair dismissal. EQA, section 83 covers any contract to do work personally and does not therefore require the same level of mutual obligations required for a classic contract of service. An unbroken chain of contracts was found to exist in **MHC Consulting Services Ltd v Tansell and anor 2000 ICR 789, CA**, where T was not an employee of the agency that supplied his services to the end-user. He was a computer specialist who, in order to secure the benefits of limited liability, had chosen to provide his services through the establishment of his own company. He was employed by this company, which contracted with an employment agency, which in turn supplied his services to an insurance company. The Court of Appeal upheld the EAT's decision that T could bring a complaint of disability discrimination

against the insurance company (the end-user, or — to use the language of the EqA — the principal). Lord Justice Mummery, delivering the judgment of the Court, thought it irrelevant that there was no direct contractual relationship between the limited company that employed the individual and the insurance company that made the work available. Taking into account the underlying purpose of the discrimination legislation, the Court considered it more probable than not that Parliament had intended to confer protection in these circumstances.

25. Where an employer or principal is liable for the discriminatory acts of employees and agents under EQA, section 109, the employees and agents may themselves be personally liable under EQA, section 110. While incorporating some aspects of the equivalent provisions in the previous discrimination enactments, section 110 makes it explicit that an employee or agent who commits an act of discrimination is personally liable: previously, the same result was achieved by the circuitous route of making the employee or agent liable for knowingly aiding the employer to do an unlawful act. One key difference is that under the new provisions it is not necessary to show that the employee or agent knew that the act was unlawful. However, it is still necessary that the employer or principal be liable under section 109 (or would be so liable but for the fact that the 'all reasonable steps' defence has been made out).

26. A person (A) contravenes section110 if:

    a. A is an employee or agent;

    b. A does something that by virtue of section109(1) or (2) is treated as having been done by A's employer or principal (as the case may be); and

    c. the doing of that thing by A amounts to a contravention of EQA by the employer or principal (as the case may be) (section110(1)).

27. Before a Tribunal can strike out a claim it must take a view on the merits of the case and only where it is satisfied that the claim or response has no reasonable prospect of succeeding can it exercise its power to strike out. In **Balls v Downham Market High School and College 2011 IRLR 217, EAT** Lady Smith stated that where strike out is sought or contemplated on the ground that the claim has no reasonable prospect of success the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success. The test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail stop it is not a test that can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written words or assertions regarding disputed matters are likely to be established as facts. It is a high test. The tribunal should have regard not only to material specifically relied on by parties but also to the employment tribunal file. There may be correspondence or other documentation which contains material that is relevant to the issue of whether it can be concluded that the claim has no reasonable prospect of success, or which assists in determining whether it is fair to strike out the claim. If there is relevant material on file and it is not reflected by the parties an employment judge should draw their attention to it so that they have the opportunity to make submissions regarding it. It is unfair

to strike out a claim where crucial facts are in dispute and there has been no opportunity for the evidence in relation to those facts be considered.

Discussion and conclusions

28. I am not satisfied that it would be just and equitable to extend time so that Mr Petrov's claim for disability discrimination can be determined by the Tribunal for the following reasons:

    a. Mr Petrov presented his complaint to the Tribunal significantly out of time. On the evidence, he was able to engage in ACAS early conciliation. He believed he had a claim and would have known that he had to engage with early conciliation as an essential precursor to issuing proceedings.

    b. In his email of 12 June 2022 he suggested that the reason for the delay in filing his complaint was because of Covid. However, if Mr Petrov was capable of engaging with ACAS, it follows that he was capable of submitting his form to the Tribunal in time or much sooner.

    c. Mr Petrov also says that he was struggling to make a living; I do not see that this can be a reason for delaying him presenting his form to the Tribunal.

    d. Mr Petrov refers to problems that he had with his blood sugar levels connected with his diabetes. However, on his own admission, he said that he was quite capable of working at the Knights of Old and there is nothing to suggest that there was anything to prevent him from presenting his claim to the Tribunal before September 2020 (i.e. the time that he says that his diabetes deteriorated).

    e. Another reason relied upon for the delay is the house fire in January 2021. Mr Petrov did not mention this in his email of 12 June 2022. This evidence only emerged when he was cross examined. However, I do not see why the house fire is relevant because it does not cast any light on the reason for not presenting his claim in 2020.

    f. Not only did Mr Petrov go to ACAS, but he also went to the Citizens Advice Bureau in March 2021. On his own evidence, they helped him by providing him with examples of particulars of claim which he could look at so that he could understand what to do with his own claim. Furthermore, he prepared the claim form himself and wrote it in English. He did not appear to have any difficulties in doing so. He has not provided an adequate explanation about why he delayed going to the Citizens Advice Bureau until March 2021 especially as he quite clearly had a sense of grievance at the time when his employment ended in June 2020. Furthermore, he had engaged with government agencies when applying for Job Seekers Allowance and was quite capable of seeking help with his employment claim. Whilst I accept that he could not afford to go to a solicitor this did not preclude him from pursuing other avenues of advice such as the Citizens Advice Bureau, the Pro-Bono Unit, and other sources of free advice both on the Internet and law centres.

g. The underlying strength of the claim is very weak. He has no claim against Merlin because he was never employed by them. He cannot rely upon the contract work extension because Merlin was not the principal. The principal was the end-user Hirer (i.e. the Knights of Old). Following the principles set out in **Lupetti** the underlying merits of the claim are relevant to considering extending time on just and equitable principles.

h. I must also consider the prejudice that Merlin would suffer if I was to exercise discretion under the just and equitable principle. Whilst I accept that Mr Petrov will lose his right to pursue his claim, this must be balanced against the length of delay in filing it with the Tribunal and how this will impact on Merlin. Seven months is a significant period of time. This will impact on Merlin's ability to defend the proceedings. I further note that the particulars of claim are very vague in terms of when the alleged discriminatory acts were committed. The passage of time will have an impact on the ability of witnesses to recall what happened.

i. Finally, Mr Petrov understands English. He has demonstrated that he was quite capable of writing in English having completed his claim form in that language and also in his email correspondence with the parties. There is nothing to suggest that he delayed filing his claim because of an English language barrier.

29. If I am wrong in not extending the time limit under the just and equitable principle, I am not satisfied that the Tribunal has jurisdiction to determine Mr Petrov's claim and I would have struck it out on the basis that it has no reasonable prospect of success for the following reasons:

a. Merlin never employed Mr Petrov. At all material times he was employed by Fair Pay. This corresponded with the arrangements set out in the Service Level Agreement and this is further evidenced by the written contract of employment between Mr Petrov and Fair Pay. Both Mr Petrov and Fair Pay accepted this. Fair Play accept it employed Mr Petrov and Mr Petrov accepted he was employed by them.

b. Mr Petrov cannot rely upon the contract worker extension under EQA, section 41 to impute liability on Merlin. Merlin was not a principal. It provided Workers such as Mr Petrov to the Knights of Old (a Hirer under the Service Level Agreement). Merlin was not responsible for the day-to-day management of Mr Petrov. That lay with Knights of Old. There was nothing in the relationship between Merlin and Fair Pay that suggested that Merlin was an agent and Fair Pay a principal.

In fact such a relationship is explicitly excluded under the Service Level Agreement. The principal in this relationship was Knights of Old. EQA, sections 109 and 110 are not engaged.

Employment Judge Green

Date 29 August 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

16 September 2022

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FOR EMPLOYMENT TRIBUNALS