



EMPLOYMENT TRIBUNALS

Claimant: Ms U A Opara

Respondent: Medicines & Healthcare Products Regulatory Agency (R1)
Brook Street Bureau PLC (R2)

Heard at: Bury St Edmunds (via CVP) **On:** 04 August 2022

Before: Employment Judge Laidler

Representation

Claimant: In person

Respondent: R1 – Mr A Bershadski, Counsel
R2 – Ms A Beech, Counsel

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant commenced ACAS Early Conciliation against both respondents on 29 April 2021 until 10 June 2021. The ET1 form was received on 7 July 2021. This open preliminary hearing was listed to determine whether:

1.1 the tribunal has jurisdiction to determine the complaints it appearing they had been submitted out of time.

1.2 If the Tribunal allows the claims to proceed whether as argued by the second respondent the claim should be struck out or a deposit ordered as a condition of the claimant continuing with the claims.

2. The tribunal was provided with a bundle of 149 pages and a supplemental bundle from the claimant of 56 pages. The claimant's witness statement was 20 pages and 100 paragraphs. A lot of the statement and documents went to the claim and not the issues before this tribunal of jurisdiction. The claimant had also obtained witness statements from Rene Kiliaan and Anne Ekwulugo of the first respondent. Again these went to the merits of the claim. Neither representative intended to put any questions to them and they were released. The claimant was cross examined on the relevant parts of her witness statement. From the evidence heard the tribunal finds the following facts.

The Facts

3. The claimant was an agency worker in the employment of the second respondent and was placed in the role of a procurement officer and later credit controller with the first respondent. In the proceedings the claimant claims against both respondents an alleged underpayment of wages of £4018.58. £2174.48 was paid to the claimant in September 2021 in respect of salary and holiday pay owed to the claimant at the administrative officer grade with the first respondent beginning September 2019 and terminating January 2021. The complaint is therefore pursued for the balance of £1844.10.

4. It is submitted on behalf of the respondents that the last payment received from them was on 29 January 2021 so the relevant limitation period would have expired on 28 April 2021. The claimant did not invoke ACAS Early Conciliation until 29 April 2021 i.e. after the three-month primary limitation period had expired. It is their contention that she does not therefore benefit from the extension of time in Regulation 18A Agency Workers Regulations 2010 ('the Regulations')

5. The claimant is by profession a qualified lawyer and in her own words "a member in good standing with the Law Society of Ontario". Prior to starting work with the first respondent she was studying for her Masters degree in law and was working as both a self-employed person with her own boutique Canadian immigration practice and as a part-time agency worker fulfilling a variety of assignments with the second respondent. Within her own firm she worked remotely servicing clients all around the world and had an active website which she utilised to advertise the business services. In anticipation of taking the bar transfer test to qualify as a barrister in England and Wales the claimant decided to study for her Masters in law as well as work at the second respondent.

6. In her CV the claimant listed her core skills and competencies as including Civil Litigation and confirmed in evidence that she had experience in it and that in Ontario there were time limits for proceedings.

7. The claimant gave evidence that in December 2020 she and her husband discovered they were expecting their first child. The claimant was diagnosed with diabetes following routine blood tests and her pregnancy was classified as high risk. Although medical letters have been disclosed there is no evidence of the claimant suffering any untoward symptoms and indeed there is reference to her monitoring her own blood sugar levels and managing with a change of diet and lifestyle.

8. The claimant's husband had also begun a new job and was commuting from Bedfordshire to East Sussex daily for work. They subsequently moved.

9. On 31 January 2021 the claimant's father sadly died after a short illness.

10. The claimant states that it was when she ran into a former employee of the first respondent Joanne Collins that she was told that her earnings should have been increased after 12 weeks of continuous employment with the first respondent. The claimant then went away and conducted her own research and was surprised to learn that not only was it wrong that she was underpaid it was equally illegal. The claimant produced a copy of a page of the Government Website confirming that (page 54)

11. The claimant raised a query with Ms Josie Thompson team leader with the second respondent on 2 February 2021 about her hourly rate of pay, stating that she 'did not know that I was actually entitled at law to be paid the same rate as permanent staff members or even the temporary staff members doing the same job performing the same duties.'

12. On 2 February 2021 the claimant emailed the second respondent and attached a screenshot from the Government website referred to above 'Agency workers – your rights/pay' which explained that after 12 weeks she was entitled to be paid the same as a permanent employee doing the same job and pointing out – with a link – that you could bring a claim to the Employment Tribunal. The claimant's evidence is that she did not research that herself.

13. At paragraph 92 of her witness statement the claimant gave evidence that after a period of approximately 13 weeks from 2 February to 29 April 2021 she "tirelessly chased up the second respondent" (pages 47 to 54, 57 to 88). The claimant states that she was continually ignored each time being told the matter was being looked into. The emails do however show that Josie Thompson was raising the issue with the first respondent.

14. Whilst waiting for an update during the month of March 2021 the claimant contacted the Citizens Advice Bureau by phone seeking advice as to her possible options. The claimant gave evidence at paragraph 93 of her witness statement that she explained to the adviser the dates she received her last pay and holiday pay being the 2 and 29 January 2021. The claimant also mentioned about her discovery of a former male colleague who performed the same duties as herself and had been paid a higher wage. The claimant was told that her best course of action would be to bring a claim before the Employment Tribunal for equal pay and that she had 6 months to do so beginning with the 29 January 2021.

15. The claimant's evidence in cross examination was not credible on this point. At no time had she suggested to the respondents that her issue was about gender and make a comparison with her male colleagues. At all times she had stated it was about her pay rate compared with that of permanent members of staff. She had even provided the second respondent with information she had obtained on line about the agency worker provisions. Yet, the claimant a qualified lawyer, took no steps herself to research the situation.

16. Having been provided with that information from the CAB the claimant decided it would not be in her best interests to allow the entire 6 month period to expire and decided to approach ACAS and started Early Conciliation on the 29 April 2021. It is of note that was one day after the expiry of the primary 3 month limitation period.

17. The claimant was responsible for the repatriation of her father and funeral arrangements and she was not able to successfully repatriate her father until January 2022. This she says prevented her from seeking the intervention of ACAS sooner than she did and she finally contacted them on 29 April 2021. Whilst the tribunal has every sympathy with the claimant having to deal with that situation it did not in fact prevent her from corresponding with the second respondent or from contacting ACAS.

18. On 19 February 2021 the claimant sent a detailed letter with supporting documents and spreadsheet of the monies she was claiming. She accepted the spreadsheet would have taken time to prepare. Neither the death of her father nor her pregnancy prevented her dealing with that.

19. The claimant sought to suggest to Ms Luximon of second respondent that the second respondent had deliberately 'run her out of time' by the delay in dealing with the matter. There is absolutely no evidence of that. The second respondent was powerless to deal with the claimant's concerns without the input of the first respondent who she was assigned to and were the only entity that could provide information on the claimant's role and pay grades.

20. The claimant gave birth in July 2021 and a couple of days after she received an email from ACAS advising that the respondent had fully investigated her claim and had concluded there was no case to answer. Within weeks however she received a call from Ms Thompson advising that she had been instructed to pay the claimant £2174.48 in full and final settlement of her claim against both respondents. Although the claimant rejected that in full and final settlement she acknowledges that she did receive payment directly into her bank account for that amount. She made it clear that she would continue with proceedings for the balance.

21. The claimant has suggested that paying her this sum even whilst arguing that the claim is out of time in some way weakens that argument. The tribunal does not accept that submission. The second respondent ascertained that there was a sum due and they paid it and that does not detract from the fact that time limits go to the jurisdiction of the tribunal and would have to be considered even if not raised by the respondents

Relevant Law

22. Agency Workers Regulations 2010

Regulation 18

(4) Subject to paragraph (5), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning—

(a) in the case of an alleged infringement of a right conferred by regulation 5, 12 or 17(2) or a breach of a term of the contract described in regulation 10(1)(a) or of a duty under regulation 10(1)(b), (c) or (d), with the date of the infringement, detriment or breach to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the infringement, detriment or breach, the last of them;

(b) in the case of an alleged infringement of the right conferred by regulation 13, with the date, or if more than one the last date, on which other individuals, whether or not employed by the hirer, were informed of the vacancy.

(5) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

Extension of time limit to facilitate conciliation before institution of proceedings

18A.— (1) In this regulation—

(a) Day A is the day on which the worker concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the worker concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(2) In working out when the time limit set by regulation 18(4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(3) If the time limit set by regulation 18(4) would (if not extended by this paragraph) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(4) The power conferred on the employment tribunal by regulation 18(5) to extend the time limit set by paragraph (4) of that regulation is exercisable in relation to that time limit as extended by this regulation.

23. In British Coal Corp v Keeble EAT/496/96 the EAT indicated facts that the tribunal should consider in deciding whether to exercise its discretion to extend time:

23.1 the length of, and reasons for, the delay;

23.2 the extent to which the cogency of the evidence is likely to be affected by the delay;

- 23.3 the extent to which the party sued has cooperated with any requests for information;
- 24.4 the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and
- 25.5 the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

24. More recent authorities have however made it clear whilst the above factors maybe helpful the tribunal should not follow the list slavishly. In Southward London Borough Council v Afolabi [2003] ICR 800 the Court of Appeal suggested 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). The tribunal should apply the words of the appropriate statute and no gloss is required on those words.

CONCLUSIONS

25. The burden is on the claimant to establish that it is just and equitable to extend time and on the facts of this case the tribunal has concluded that it should not exercise its discretion to do so.

26. The claimant is a trained lawyer and has run her own practice. She has a number of English degrees including a BA in Law. She has a Masters in Law also from a UK university. She was called to the Ontario bar in 2016. She is not what could be called an 'ordinary' litigant in person. Yet she made no enquiries of her own or conducted any research into the claims she was seeking to bring.

27. A screenshot she produced to the second respondent in February 2021 showed quite clearly that the claim she believed she had was one by an agency worker to be paid as the equivalent permanent member of staff. The claimant did not take any action even though threatening to do so.

28. The claimant sought advice from the CAB but cannot be certain when that was but believes it was during March 2021. She says she was advised that the 'best course of action' was an equal pay claim suggesting that perhaps other causes of action were discussed. Even though she had never thought that gender was the issue and explained that in cross examination. As a qualified lawyer she still did not research the issue herself. The tribunal does not find she acted reasonably

29. The claimant invoked ACAS EC on 29 April and then did not issue proceedings until the 7 July. The claimant is in a very different situation to claimants who have no way of ascertaining their rights to a court/tribunal. The cases the claimant therefore referred to can as such be distinguished on the facts of her case. The claimant referred in her written submissions to DPP v Marshall [1998] IRLR 494 that the claimant's unawareness of their statutory right to bring a claim meant it was not reasonably practicable to have brought it within the three month time limit. The claimant did however know of her right to bring a claim from when she searched on

line and even sent a link to the Government website to the second respondent on 2 February 2021.

30. The claimant also referred to London International College v Sen [1992] IRLR 292 that reliance on erroneous advice as it related to the limitation period to initiate proceedings provided by an industrial tribunal employee or CAB rendered it not reasonably practicable to present the claim in time. She also relied upon Marks and Spencer plc v Williams-Ryan [2005] EWCA Civ 470. This tribunal however has not found the claimant's evidence about her contact with the CAB credible. She had never argued with the second respondent that this was a gender issue. She had obtained her own information and argued that it was a breach of the Agency Worker Regulations. When the CAB suggested she could bring an Equal Pay claim the claimant never then conducted her own research. The facts can be distinguished from the cases the claimant relies upon.

31. The delay may only be a matter of months and no evidence has been adduced that the respondents would be in difficulties in continuing to deal with the proceedings. However the length of the delay is only one of the factors to be taken into account.

32. Sad as it may have been the repatriation of her father did not stop her dealing with matters and neither did her pregnancy.

33. In all the circumstances the tribunal has concluded it would not be just and equitable to extend time in this case and the claim is therefore dismissed.

Strike out application by second respondent

34. The other matter before this tribunal was whether the claims should be struck out as against the second respondent or a deposit ordered. The judge decided it would be appropriate to still give a decision on that matter.

35. It was submitted that pursuant to Regulation 14 of the Regulations the liability as between the hirer and temporary work agency would be apportioned 'to the extent that it is responsible for the breach'.

36. The argument put forward on behalf of the second respondent was that the only outstanding dispute was whether the claimant was entitled to Executive Officer (EO) pay. The changes in the claimant's role, if there were any, it is submitted were a matter between the first respondent and the claimant. It argues that neither advised it of any changes to the claimant's job. It was clear from the correspondence that the first respondent did not at any point consider that the claimant had taken on an EO role during her employment. Reference was in particular made to emails between the two respondents of 5 February 2021 and 25 June 2021 in which the first respondent made it clear that the claimant was hired as an Admin Officer (AO)

37. The second respondent therefore argues that it took all reasonable steps pursuant to Regulation 14(3) to obtain relevant information from the first respondent and it acted reasonably during the assignment in determination of the claimant's

correct rate of pay. The claimant did not raise the issue of pay until the assignment had ended. The second respondent submits that it could have done no more. It refuted the suggestion made by the claimant at paragraph 24 of her written submissions that it 'had a positive duty to make prudent and rigorous enquiries with the First Respondent's human resources department as to the complaint laid as they had later done in July 2021 after the expiration of the primary limitation period and not passively accept the responses of a staff member of the First Respondent as the truth with respect to the Claimant's complaints'.

Conclusions on strike out

38. The tribunal accepted that the complaints against the second respondent had no reasonable prospects of success for all the reasons given by the respondent as set out above. Had the tribunal not already dismissed the claim as out of time it would have struck it out on this basis.

Employment Judge

Date: 06 September 2022

REASONS SENT TO THE PARTIES ON

26/09/2022

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J Moossavi

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FOR THE TRIBUNAL OFFICE