EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R T Labno	v	Legal and General Homes Modular Limited

Heard at: Sheffield (by CVP) **On**: 23 January 2024

Before: Employment Judge James

Representation

For the Claimant: In person, assisted by Ms E Cadbury, CAB Adviser, as a McKenzie Friend

For the Respondent: Ms K Sheridan, counsel

Translator: Mrs J Widdop (Polish language)

JUDGMENT

(1) The claimant was a contract worker for the purposes of section 41 Equality Act 2010.

(2) The claims were presented in time, the Judge having decided that it is just and equitable to extend the usual three month time limit, as extended by Acas Early Conciliation, by five days (section123 Equality Act 2010).

(3) The name of the respondent is amended by consent to **Legal and General Homes Modular Limited**.

REASONS

The issues

1. The issues which the tribunal had to determine at this Preliminary Hearing were:

1.1. Was the claimant 'in employment' for the purpose of s.83 Equality Act 2010; and if so, was he a Contract Worker for the respondent within the meaning of section 41 Equality Act 2010?

1.2. The claim having been presented outside of the usual three month time limit plus any Acas Early Conciliation extension, would it be just and equitable to extend time by five days from 9 to 14 June 2023?

The proceedings

2. Acas Early Conciliation took place between 28 March and 9 May 2023. The claim form was issued on 14 June 2023. The claim was for unfair dismissal and race discrimination. The claimant has since accepted that he cannot bring an unfair dismissal claim because he did not have two years service by the time of his dismissal and that claim has been dismissed on withdrawal.

3. This preliminary hearing was listed to consider, amongst other things, the issues set out in paragraph 1 above. By the time of this hearing, those were the sole remaining preliminary issues.

The hearing

4. The hearing took place over half a day. Evidence was heard from the claimant. There was a witness statement from him. There were also witness statements submitted on behalf of the respondent from Mr Oliver Sullivan, and Ms Amanda Fox, neither of whom appeared before the tribunal. Ms Sheridan asked that their witness evidence be taken into account. I have done so, although the weight to be given to that evidence is less than it would have been, if the witnesses had attended and the evidence had been tested in cross-examination.

5. There was a bundle of documents of 105 pages, to which was added a limited number of medical records/fit notes. Submissions were heard from counsel for the respondent. Neither the claimant nor Ms Cadbury made submissions on the claimant's behalf. Given the time by this stage of the hearing, judgment was reserved. A further preliminary hearing was listed, as a precaution, in case the issues were decided in the claimant's favour. Limited case management orders were also made.

Findings of fact

6. The claimant started work for the respondent in or about July 2021. The claimant worked at the respondent's site at Sherburn in Elmet, which has since been closed.

7. He worked via a work agency, 360 Recruitment Ltd. Apart from a period of about two months during 2021, when the claimant did not work for family reasons, (and presumably, during holidays), the claimant continued to work for the respondent from then until his dismissal. During the periods when the claimant was not available, the respondent asked 360 recruitment to provide someone else, which they did. The claimant worked over 40 hours a week, when he did work.

8. The claimant was employed initially as a labourer. He was then employed as a Gateman. His duties included

    8.1. closing and opening the construction site;

8.2. security;

8.3. assistance to subcontractors;

8.4. organising deliveries in and out of delivery trailers to and from the site;

8.5. any other duties required by senior leadership.

9. When carrying out his duties, the claimant was under the direction of managers working for the respondent, not 360 Recruitment.

10. The tribunal has been shown the contract for 'services and deliverables' between the respondent and 360 Recruitment Ltd. Under the agreement, there was no guarantee that the respondent would purchase any particular level of services etc – see for example, (B) and 2.1. Personnel supplied by 360 Recruitment Ltd were under a duty to comply with all legal and general policies including health and safety and security. 360 Recruitment has to invoice the respondent for payment in relation to the supply of services etc.

11. The claimant said he did not receive any contract from 360 Recruitment Ltd, which is why he has not provided a copy to the tribunal. The respondent's solicitors have written to 360 Recruitment, to ask for any relevant contractual documentation, including with the claimant himself. None was provided. The claimant did not have a contract directly with Legal and General.

12. It appears that 360 Recruitment Ltd used a payroll provider, Orbital Payroll Group, to pay wages. Wage slips shown to the tribunal are headed 'Self Bill'. The claimant did not provide an invoice to 360 recruitment however; he completed timesheets showing the hours worked each week.

13. The pay slips show a deduction of £15 by Orbital, and then a CIS deduction of 20% from the net receipt. The claimant gave evidence to the tribunal, and the tribunal accepts, that he understood the 20% deduction to be a deduction for tax. He was mistaken in that respect, but it was his understanding. The claimant has not completed a tax return, or tried to claim back from HMRC, any of the 20% deducted from the payment from 360 Recruitment for the hours worked for the respondent.

14. It is noted that at the bottom of the payslip it states: '*Employment status - please inform us ASAP if you feel that your employment status is no longer self-employed*'. When asked about this, the claimant replied that if he was self-employed, he would have had to provide an invoice for payment. He never did so; he just provided his 'time sheets'.

15. During his employment, there were regularly issues with the claimant being paid for the hours he said he worked. The claimant understood that his rota came from the respondent and Mr Sullivan's statement at para 21 appears to support that. Eventually, the claimant was told to upload an app on his mobile phone to record his hours. He can't remember who asked him to do so or who they worked for. It could have been Orbital, 360, or the respondent. In any event, he uploaded the app and that made claiming for the hours worked much easier and more reliable. An example is at page 90 of the bundle, headed Legal and Gen Homes Modular Limited - CSC… (whatever follows is not visible).

16. The claimant received a high viz jacket from the respondent in summer, as well as a thick orange jacket to wear in winter. He provided his own footwear.

When he wore a hard hat on site, that was given to him by the respondent's employees.

17. The tribunal was also referred to any email from Mr Sullivan to Ms Fox dated 16 January 2023 in which he states that the claimant: '*is supplied by an agency 360 recruitment - they have been made aware of his dismissal'*. There is a dispute about who told the claimant he was 'no longer required', but it is not necessary to resolve that dispute for the purpose of the issues before me today.

18. Following his dismissal, the claimant received a fit note from his GP. The notes between 16 January and the end of July 2023 show that the claimant was unfit for work because of anxiety and depression. There is no fit note for August. The fit notes from September onwards refer to the claimant being unfit to work because of low back pain. Prescription records show that the claimant was prescribed Citalopram, at least from the end of April 2023.

19. The claimant sought advice from North Yorkshire Citizens Advice and Law Centre. It is not entirely clear when he first sought advice, although the claimant said that he sought advice around the time he contacted Acas on 28 March 2023. The claimant recalls that Acas told the claimant about the three month time limits but 'other people' told him about other time limits. The claimant also said that the translation from Acas did not make the time limit clear.

Submissions

Submissions of the respondent

20. Ms Sheridan reiterated that the onus is on the claimant to show the extension of time is justified. That is a relatively high hurdle; there is no presumption that an extension should be allowed. The claimant has to convince the tribunal otherwise. There is a strong public interest in time limits being enforced.

21. The respondent will be put to prejudice if the claim is allowed to proceed. The site has been closed. The tribunal has been told about the difficulties in ensuring that Mr Sullivan attended the hearing today. Ms Sheridan relies on the *Adedeji* case, where the extension requested was only three days. [The tribunal notes that in that case, the claimant was arguing that his resignation amounted to a discriminatory constructive dismissal, in relation to which he was relying on matters which had occurred 12 months or more prior to his resignation.]

22. The claimant is relying on two explanations, his mental health, and not understanding the nature of time limits. Whilst he is a litigant in person, he has the assistance of a McKenzie friend. He should still make reasonable efforts to understand when the time limit expired.

23. There is no general principle that a person with mental health problems is entitled to delay - see the *Jones* case. The tribunal cannot take judicial notice of any such principle, nor that Citalopram, or antidepressants more generally, affect the mental processing or concentration etc of patients taking them. The fact that the claimant was taking antidepressants did not stop him taking advice or contacting Acas; nor did it prevent him, In August 2023, replying to correspondence about these proceedings.

24. Finally, Ms Sheridan argues that the merits of the claim are weak. The claimant admitted to two people she says, according to emails at pages 93 and 94 the preliminary hearing bundle, that he had taken the boots. The tribunal is entitled to take this into account, and the effect of that on the merits of the claim, in deciding whether time should be extended.

25. Ms Sheridan also made submissions in relation to employment status which have been taken into account in deciding that issue.

Claimant's submissions

26. Neither the claimant nor Ms Cadbury sought the opportunity to respond to the submissions made. Thery were content for the tribunal to make a decision, based on the evidence, the submissions from Ms Sheridan, and the law.

Relevant law

Employment status

27. S.41 Equality Act 2010 provides:

41 Contract workers

(1) A principal must not discriminate against a contract worker – …

(b) by not allowing the worker to do, or continue to do, the work …

(5) A 'principal' is a person who makes work available for the 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).

28. Section 83 Equality Act 2010 provides:

83 Interpretation and exceptions

(1) This section applies for the purposes of this Part.

(2) "Employment" means—

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

29. S. 83(4) states that a reference to employing or being employed is to be read with sub-section (2). In other words, if a person is 'in employment', they are employed by that employer, in the wider sense of that term.

30. In Pimlico Plumbers and another v Smith *[2018] IRLR 872* Lord Wilson states at para 33:

33. The terms of the contract made in 2009 are clearly directed to performance by Mr Smith personally. The right to substitute appears to have been regarded as so insignificant as not to be worthy of recognition in the terms deployed. Pimlico accepts that it would not be usual for an operative to estimate for a job and thereby to take responsibility for performing it but then to substitute another of its operatives to effect the performance. Indeed

the terms of the contract quoted in para [18] above focus on personal performance: they refer to 'your skills', to a warranty that 'you will be competent to perform the work which you agree to carry out' and to a requirement of 'a high standard of conduct and appearance'; and the terms of the manual quoted in para [19] above include requirements that 'your appearance must be clean and smart', that the Pimlico uniform should be 'clean and worn at all times' and that '[y]our [Pimlico] ID card must be carried when working for the Company'. The vocative words clearly show that these requirements are addressed to Mr Smith personally; and Pimlico 's contention that the requirements are capable also of applying to anyone who substitutes for him stretches their natural meaning beyond breaking-point.

<u>Time limits - Equality Act 2010 claims</u>

31. The relevant parts of section 123 EA 2010 provide:

    (1) Subject to section … 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.

15. Therefore, where a claim is presented outside the primary limitation period, i.e. the relevant three months (as extended by Acas Early Conciliation), the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable.

16. In <u>British Coal Corporation v Keeble</u> *1997 IRLR 336,* the EAT said that the exercise of discretion to extend time *requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to –*

    - *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 had cooperated with any requests for information;*
    - *the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;*
    - *the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.*

17. Ultimately, it is a matter for the tribunal which of the above or other relevant factors to take into account, provided that those matters taken into account are properly relevant to the exercise of the discretion, and relevant factors are not ignored.

18. Time limits are to be applied strictly in Employment Tribunal proceedings. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant. The onus

is on a claimant to show to the tribunal that his is a case in which the time limit should, exceptionally, be disapplied (see *Robertson v Bexley Community Centre [2003] IRLR 434*, at para 25:

> *It also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.*

19. As explained in *Caston v Lincolnshire Police [2010] IRLR 327*, para 26:

> *Plainly, the burden of persuading the ET to exercise its discretion to extend time is on the claimant (she, after all, is seeking the exercise of the discretion in her favour). Plainly, Schedule 3 of DDA does not give rise to a presumption in favour of extending time. In my judgment, Auld LJ's use of the word 'convince' in paragraph 25 of his judgment adds little.*

20. As set out by the Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23*, 15 January 2021 at 37:

> *The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay"*

21. Further, at 24, 31 and 32 of *Adedeji*, Lord Justice Underhill held:

> *24. At para. 35 she says that there is a public interest in the enforcement of time limits and that they are applied strictly in employment tribunals. The former point is unexceptionable. The latter reflects a statement made by Auld LJ at para. 25 of his judgment in Robertson. That statement was the subject of some discussion in the later decision of this Court in Chief Constable of Lincolnshire Police v Caston **[2009] EWCA Civ 1298**, **[2010] IRLR 327** (per Wall LJ at paras. 24-25 and Sedley LJ at para. 31), but it is not a ground of appeal that the Judge's reference to that statement constituted a misdirection, and in any event I do not think that it did. …*
>
> *31. However, I do not believe that the substantive point that the Judge was making at para. 33 of her Reasons was about the impact of that very short delay, which she herself described as "not substantial". Rather, she was making the point that the substance of the claim concerned events which had occurred long before the formal act complained of, and that the evidence of those events was likely to be less good than if a claim about them had been brought nearer the time: see para. 22 above. I appreciate that, if that was her point, her reference to "impact on the cogency of evidence" is rather inapt because if taken by itself it would suggest that she had in mind "Keeble factor (b)", which is indeed focused specifically on the impact of the delay following the expiry of the relevant deadline; but we are concerned with the substance of her reasoning, which is in my view adequately clear, and we should not be distracted by any mere looseness of expression.*

> *32. So understood, I see no error of law in this element in the Judge's reasoning. Of course employment tribunals very often have to consider disputed events which occurred a long time prior to the actual act complained of, even though the passage of time will inevitably have impacted on the cogency of the evidence. But that does not make the investigation of stale issues any the less undesirable in principle. As part of the exercise of its overall discretion, a tribunal can properly take into account the fact that, although the formal delay may have been short, the consequence of granting an extension may be to open up issues which arose much longer ago.*

22. In *Department of Constitutional Affairs v Jones [2008] IRLR 128* at para 58 the court stated:

> *58. I am far from stating any general principle that a person with mental health problems is entitled to delay as a matter of course in bringing a claim. What I am sure about is that upon the careful consideration given by this chairman, he was entitled to reach the conclusion he did on the particular facts and combination of circumstances present in this case.*

Conclusions

32. In arriving at the following conclusions on the issues before the Tribunal, the law has been applied to the facts found above. The Tribunal will not repeat every single fact, in order to keep these reasons to a manageable length. The issues are dealt with in turn.

    Employment status

33. I conclude that the claimant was not an employee of the respondent under a contract of employment. There is no evidence of any such contract between him and the respondent; rather, the evidence points to the claimant being supplied to provide work to the respondent by 360 Recruitment Limited.

34. However, taking into account the nature of the duties carried out by the claimant, which I find are akin to those of an unskilled manual labourer, and the nature of the contractual relationship between the respondent and 360 Recruitment Ltd, I conclude that when the claimant worked for the respondent, he was in employment for the purpose of section 83 Equality Act 2010 and further, that he was a contract worker within the meaning of section 41.

35. I have taken due notice of what the payslips say, and that the claimant was paid under the Construction Industry Scheme, CIS. I conclude however that the claimant did not fully understand the nature of that scheme, or its tax implications. As far as he was concerned, as he told the tribunal, tax was deducted by the payroll company. The reality of the situation was that he was not genuinely self-employed.

36. Rather, it appears to me that the claimant was in the same position as an agency worker usually would be, who was provided by a work agency to work for an end user. The most likely reason that the construction industry scheme was used was due to the nature of the work as a whole carried out by the respondent, i.e. house-related construction work. I take judicial notice that in that industry, tradespeople such as bricklayers or plumbers are often treated as if they were self-employed. That is not however determinative of the question whether they are in fact self-employed; and on the basis of the

particular factual circumstances pertaining to the claimant, including the nature of his duties, and the agency worker/end user type relationship, I find that the claimant was not genuinely self-employed.

37. The claimant himself had no right of substitution. If he was not available, he personally could not provide a substitute. The fact that 360 Recruitment would send someone in his place, cannot reasonably be argued to amount to a right of substitution, meaning the claimant was not obliged to give personal service. Either he gave personal service himself, or 360 Recruitment found somebody else to replace him.

38. It follows that the claimant is entitled to bring a discrimination claim against the respondent under Part 5 of the Equality Act 2010.

Time limits

39. The question of time limits has been a more difficult issue to determine. In particular, I understand the potential prejudice to the respondent, if the claim is allowed to proceed, despite it being submitted five days outside of the primary time limit, as extended by the Acas EC process.

40. I also not that the evidence from the claimant is not particularly detailed. I conclude that is partly a result of his first language being Polish; and partly because he does not have the benefit of legal representation. The claimant's language difficulties have been in evidence today, by the fact that he has communicated with the tribunal via an interpreter. It appears plain to me that the claimant will have been at a disadvantage when it came to finding out about, and understanding the nature of time limits in Employment Tribunal proceedings, compared to a person whose first language is English.

41. Further, I accept Ms Sheridan's submission that the fact that somebody suffers from depression does not mean that time limits should automatically be extended. Nevertheless, the fact of the depression is something, on the authority of *Jones*, which a tribunal can take into account.

42. On the balance of probabilities, I conclude that the claimant's ability both to find out about, and to understand the nature of time limits in employment tribunal proceedings was adversely affected by him suffering anxiety and depression, for which he was in receipt of medication, during the relevant period. (In so concluding, I am not concluding that it was the medication itself which affected that ability; simply that the anxiety and depression were serious enough for medication to be prescribed).

43. In deciding whether it is just and equitable to extend the time limit in the circumstances, I take into account two further factors. First, that the claim was submitted just five days late. As the *Adedeji* case shows, that does not automatically mean that time should be extended; just that a delay of five days is more likely to lead to discretion being exercised in favour of the claimant, than a delay of five weeks, or even five months. The claimant in *Adedeji* however did not have language difficulties, nor did he have mental health difficulties. He had also received specific advice from reputable solicitors as to when the time limit expired, which he chose to ignore. That is a very different set of circumstances to the case before me today.

44. Further, I conclude that it is not the delay of five days that has caused potential prejudice to the respondent. I consider that *Adedeji* can be further

distinguished from the claimant's case, in that we are concerned here with matters taking place, at most, no more than a month or two before the dismissal itself. Since the claim was submitted, the respondent has been on notice that there is a potential claim in relation to the dismissal. Whilst the claimant's race discrimination claim is not abundantly clear from the claim form, it would have been within the respondent's reasonable contemplation, properly advised by experienced solicitors as they are, that the claimant may not only be arguing that his dismissal was unfair, but also that it was discriminatory.

45. I have also considered the merits of the case. Whilst Mr Sullivan and another are asserting that the claimant admitted theft, that is not admitted by the claimant today, whose first language is not English. Exactly what the claimant admitted can only be properly determined after hearing witness evidence from relevant witness, including the claimant and Mr Sullivan. Whilst I note the difficulties in ensuring that Mr Sullivan was present at this hearing today, it will of course be open to the respondent to apply for a witness order in due course, to ensure that Mr Sullivan attends the final hearing, if it goes ahead.

46. Bearing in mind all of the above; despite the well structured and well-thought out submissions from Ms Sheridan; and whilst I have found the issues more finely balanced than on the employment status point; I consider that it is just and equitable to extend the usual time limit by five days on the facts of this particular case. Again therefore, on time limits, the tribunal has jurisdiction to hear this claim and it will now proceed to a further preliminary hearing, in order for the issues to be finalised, the date for the final hearing set, and related case management orders made..

Employment Judge James
North East Region

Dated 26 January 2024

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