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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101671/2017

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Held in Glasgow on 1 February 2022

**Employment Judge: J Young
Tribunal Members: Ms JS Anderson
Mr J McCaig**

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Mr Robert Bartosik

**Claimant
In Person**

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PRL Realisations 1 Ltd (In Administration)

**Respondent
Not Present and
Not Represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that:-

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1. the claims of discrimination presented to the Tribunal against the respondent because of the protected characteristic of race are dismissed;

2. the claim presented to the Tribunal under Regulation 5 of the Agency Workers Regulations 2010 was lodged timeously and allowed to proceed having regard to Regulation 18(5) of those Regulations;

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3. the claimant had a right under Regulation 5 of the Agency Workers Regulations 2010 to the same basic working terms and conditions as those employed directly by Argos (XPO Logistics) for doing the same job in the

period 9 December 2016 to 18 January 2017 but received less pay and working hours in that period than those employed directly; and

4. in respect of that breach the respondent shall pay to the claimant the sum of **One Thousand Three Hundred and Seventy Eight Pounds and Forty Seven Pence (£1378.47)** being the amount of compensation the Tribunal considers is just and equitable under Regulation 18(8)(b); 18(10) and 18(11) of the Regulations.

REASONS

Introduction

1. In this case the claimant had presented a claim to the Employment Tribunal complaining that:-

(1) in terms of the Agency Worker Regulations 2010 (Regulations 5, 6, and 18) he had been paid less favourably than comparable workers employed directly by Argos in the role of "*Warehouse Picker*" in the period 9 December 2016 to 21 January 2017 as identified in payslips covering the period with a final payslip being dated 27 January 2017.

(2) he had been directly discriminated against because of the protected characteristic of race (he being Polish) at the hands of a Lithuanian supervisor when working at Kinnerton Confectionery and;

(3) that he had been directly discriminated against because of the protected characteristic of race (he being Polish) in events when working at Argos including actions of managers and Scottish workers who "*picked on*" other nations.

2. The less favourable treatment complained of in respect of his discrimination claims were:-

(1) a failure on the part of his Lithuanian supervisor to offer him work in circumstances where he offered work to comparator Lithuanian

workers whose circumstances the claimant sought to prove were substantially the same as his with the exception of their protected characteristic of race and;

5 (2) treatment of him and other “*nations*” when working with Argos in that Scots workers “*threw away printed labels, hid cages, took labels off cages, blocked the ways, swore and shouted, damaged equipment, sent text to agency workers with blackmails*”; actings of managers including that he had been told to leave by a supervisor there; and a failure by PMP Recruitment Ltd to investigate the issues raised by
10 the claimant when working with Argos.

3. The ET1 by the claimant had been presented on 25 May 2017 with early conciliation being commenced on 22 April 2017 and certificate issued 22 May 2017.

15 4. His initial claim was raised against PMP Recruitment Ltd but it was placed in Administration by order of the High Court of Justice Business and Property Court on 2 March 2020 with the appointment of Rachael M Wilkinson, Zelf Hussain and David R Baxendale as Joint Administrators. The company number was 03485614.

20 5. On 27 May 2020 the company had made a change of name to PRL Realisations 1 Ltd (In Administration) being the respondent.

6. On 2 June 2020 the Administrators had consented to these proceedings which had previously been sisted.

7. Prior to Administration PMP Recruitment Ltd had entered appearance and lodged a response to the claim. That response advised that:-

25 (1) the claimant was on a “*Swedish Derogation (Regulation 10) contract*” during the period in which he claims he was not fully paid and on that basis he was not entitled to pay parity in terms of Regulation 5 of the Agency Workers Regulations 2010 (“the Regulations”);

- (2) in any event the claim under Regulation 18 of the Regulations lacked specification and the claimant should specify the sums which he claimed should have been paid and the actual comparator/comparators upon whom he relied;
- 5 (3) the discrimination claims were out of time and it would not be just and equitable to extend time.
8. By Note of a Preliminary Hearing issued to the parties on 21 October 2020 the claimant was ordered (amongst other matters) to provide further details of the rate of pay which he was paid and the amount received in the period
10 09/12/2016 to 27/01/2017; the rate of pay which comparator workers were being paid; the rate of pay the claimant asserts he should have been paid in the period, the total hours worked by him in the period in respect of which he maintained he was underpaid; and the total of additional pay he asserts he should receive.
- 15 9. On 26 October 2020 the claimant provided further particulars of his claim. He stated that the dates when he was not offered work by the supervisor at Kinnerton Confectionery was between 24 February 2016 until 8 March 2016. He advised of three Lithuanian workers to whom work was offered and that the work "*which was offered on each such occasion was a factory operative
20 at Kinnerton Confectionery*".
10. In relation to the complaint that he was not paid comparable amounts in terms of Regulation 18 of the Agency Worker Regulations 2010 he advised :-
- 25 (1) the rate of pay at which he was paid was £7.90 - £8.21 per hour and the amount of pay received by him in the period 9/12/2016 until 27 January 2017 was £2,023.53.
- (2) the rate of pay at which comparator workers directly employed by Argos were paid for the same work was £9.45 per hour and they worked a minimum of 45 hours a week.

- (3) the rate of pay at which he should have been paid in the same period is £9.45 and he should have worked 45 hours a week.
- (4) the total hours worked by him in the period in respect of which he was underpaid was 257 hours.
- 5 (5) the total amount of additional pay which he should have received for work carried out in that period is £1,378.47.
11. A final hearing was set down for 1/2 February 2022. The respondent had previously advised that they would not be attending hearings in the case to keep costs of Administration to a minimum as the prospects for unsecured
- 10 creditors making a recovery was “*very remote*”. The progress to a final hearing in the case had been affected by various case management issues, appeals to the EAT by the claimant, postponed hearings, and obtaining consent of the Joint Administrators to these proceedings.

Issues for the Tribunal

- 15 12. The issues for the Tribunal were:-
- (1) From the evidence was the alleged act of discrimination complained of by the claimant at Kinnerton Confectionery Ltd perpetrated by that entity and so the claim against the respondent fails.
- (2) Was there in any event an act of discrimination against the claimant
- 20 at Kinnerton Confectionery Ltd.
- (3) Is that claim time barred.
- (4) From the evidence was the alleged act of discrimination complained of by the claimant at Argos perpetrated by that entity and so the claim against the respondent fails.
- 25 (5) In any event was there discrimination at Argos.
- (6) Is that claim time barred.

- (7) Is there a claim under Regulation 5 of the Agency Worker Regulations 2010.
- (8) Did the claimant have the necessary qualifying period to make a claim under Regulation 5.
- 5 (9) Is the claim under those Regulations time barred.
- (10) Was there a Swedish Derogation which would prevent this claim being made.
- (11) Was the claimant being paid at a different rate of pay from workers who were directly employed by Argos.
- 10 (12) If there was a breach of Regulation 5 of the Regulations what is the quantification of the claim having regard to Regulation 18 of the Regulations

The hearing

13. At the hearing the Tribunal heard evidence from the claimant. An interpreter familiar with the Polish language (Ms Moore) had been organised to attend the hearing but the claimant indicated that it was unlikely he would require assistance. While the interpreter remained in the event that the claimant found difficulty in language no such assistance was in fact required.
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Documents

- 20 14. The claimant produced for the hearing an index of documents paginated 1 – 33 (C1-33) and in the course of the hearing produced one further document (C34).
15. From the evidence led, documents produced and particulars of claim the Tribunal were able to make findings in fact on the issues.

Findings in Fact

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16. The respondent accepted that claimant was employed by PMP Recruitment Ltd (PMP) as from 19 December 2014. PMP were a recruitment business supplying workers to client hirers for temporary assignments.

Assignment at Kinnerton.

5 17. From 29 September 2014 until February 2016 the claimant worked on an assignment for Kinnerton Confectionery Ltd (Kinnerton) in Norfolk. On 1 July 2017 he made a request for a written statement providing information on working and employment conditions of employees in the role of production operatives at Kinnerton but received no response (C23).

10 18. Following orders made by the Tribunal he had received information from PMP on 30 November 2017 of rates of pay at Kinnerton (C25). His issue with that information was that it apparently advised of the rate of pay that he had received rather than rates of pay for employees of Kinnerton. He had made no further request for information. He indicated that he had not made been
15 able to "*make any claim against Kinnerton for wages*" as he did not have sufficient information.

19. However he considered that he had a discrimination claim against Kinnerton arising out of matters which occurred in February 2016. At that time he advised that approximately 100 agency workers worked at Kinnerton across
20 a number of shifts and approximately 50% of those worked as production operatives alongside production operatives employed directly by Kinnerton. The agency workers were mostly Polish with some Lithuanian.

20. His supervisor at Kinnerton was named "*Aivaras*" who was Lithuanian. The claimant did not know if "*Aivaras*" was employed directly by Kinnerton or was
25 an agency worker. Around 23 February 2016 the claimant was told by his supervisor that he was not to come back to work. He was aware that there was still work available and his claim was that his supervisor preferred to offer work to his colleagues from Lithuania in preference to him as a Polish national.

21. He was told at that time that he would paid the appropriate amount of accrued holiday pay and did not work any longer for Kinnerton.
22. He stated he became aware that the supervisor must have offered work to other Lithuanian nationals as he *“stood outside the gate and saw same people I worked with before going to work”*. He said he did that *“two/three times”* but did not speak to anyone.
23. He sent an email on 25 February 2016 to Ms Biggs of PMP on this matter. (C26) He indicated that he had been *“enforced to take my holidays in full”* having been advised that work was stopping at Kinnerton. He stated *“I’ve spoken today with Aivaras who was booking shifts on site and he told me that they finish work this week. Later on I was in the Kings Lynn office and I have spoken with Anne and she told me that they still have work for the next two weeks. Therefore I treat this as discrimination by Aivaras who was Lithuanian and he preferred to offer work to his colleagues from Lithuania sometimes with very poor English skills”*.
24. The email to Ms Biggs also described incidents involving the claimant and his supervisor and in evidence he advised his supervisor was *“very unhappy with him – tried to force me to something against the rules. Not first time I had problem with Aivaras”*. He wished the complaint investigated. There was no evidence of any response from Ms Biggs.

Assignment at Argos

25. The claimant then moved to Scotland, was in receipt of benefits for a *“couple of months”* and then found agency work with PMP at McVitie’s. Thereafter he had an assignment at Argos (XPO Logistics) as a *“Warehouse Picker”* which commenced on 11 September 2016.
26. He completed 12 weeks in that assignment by 9 December 2016. He continued to work at that assignment until 18 January 2017. His earnings in the period from 9 December 2016 until 27 January 2017 (being the date of the final payment) were conform to payslips produced (C1-20). The rate of

pay in that position varied between £7.20 per hour to £8.21 per hour (depending on shifts).

27. The information he received regard rates of pay paid by Argos to direct employees in the same role was payment at £9.45 per hour across all shifts which lasted nine hours each being five shifts over a seven day period. (C25).
28. His calculation of the appropriate pay that he should have received under the Regulations meant an additional payment of £1,378.47 being the difference in the pay that he had received from PMP conform to the payslips as compared with direct employees of Argos in the same role.
29. He advised that his last day at work at Argos was around 17/18 January 2017 with final payment coming thereafter. His complaint was that he had been discriminated against because he was Polish. He claimed that there were three discriminatory issues arising because he was Polish.
30. Firstly, his team leader Robert Jarvie "*sent him home*" on 17 and 18 January 2017. He stated in evidence there was no explanation for this. He did not know whether Robert Jarvie was an employee of Argos or not. In an email to PMP of 18 January 2017 (C27/28) he stated that "*because of my whistleblowing Mr Robert Jarvie sent me home twice on 17 and 18 January 2017 and told me I will no work any more because there is no more work in Argos*". He stated that because Mr Jarvie would not do anything about work issues he had raised he had gone to his superior which had annoyed Mr Jarvie.
31. Secondly, operatives being Scottish "pickers", discriminated against others which he indicated was a common complaint amongst the agency staff. He advised that they "*may be acted that way to all*". He thought some of the Scottish pickers were agency workers and some were direct employees. His email of 18 January 2017 (C27/28) describing this matter advised that there was "*discrimination from Scottish pickers towards another nation's pickers*" and gave indications of "*throwing away printed labels; hiding cages; taking off labels from cages; blocking ways; swearing and shouting; damaging*

equipment (the LLOP)". He also maintained that SMS had been sent to "agency workers with blackmails". He conceded that such texts could have been sent to others but the person he had spoken to in the matter was Polish.

5 32. Thirdly, he maintained PMP had not investigated properly his complaints on these matters as raised within his email of 18 January 2017 (C27/28). He had received a letter from PMP of 27 February 2017 which had confirmed receipt of his grievance and invited him to a grievance meeting to discuss the issues raised on 2 March 2017 (C29). He had not attended that meeting as he had requested that the matter be dealt with on the basis of the written complaint that he had made on 18 January 2017. PMP had than come back with a response that they did not uphold his complaint. That letter was not produced. He stated he had requested an appeal as he did not consider that a sufficient investigation had been made but that appeal was unsuccessful. He had received a letter turning down his appeal from PMP on 17 May 2017 but it was not produced.

10 33. The claimant advised that he did not accept that PMP had been placed in Administration. He referred to an email from Sarah Lovell of 9 May 2020 (C37) and Paul Brill of 27 October 2021 (C33). He explained that these were individuals who had been involved with PMP and it was not true (as stated in the emails) that they had left the business or had not acted on the matter as they claimed. The correspondence with the Tribunal would show that they had worked. Also he referred to a printout (C34) showing that PMP still existed and giving information on how the company might be contacted. The printout advised that "*PMP Recruitment is part of the Challenge – trg Group*" and that their company number was 08030122.

25 Time limit on application to Tribunal

34. The claimant advised that he did not consider that he could make a complaint of discrimination until he had made some research as a result of the treatment in Argos. He had not made any research on rights he might have in relation to the actions of the supervisor at Kinnerton because he "*left in February 2016 and tried to forget about it*".

35. In respect of the assignment at Argos he had made complaint to PMP about treatment there and awaited a response. He had to investigate the claim under the Agency Regulations and had made application for information which was not forthcoming. He advised that the research after leaving Argos did not disclose to him the three month time limit for making a claim. Neither had he spoken to ACAS or other body about making an application to a Tribunal. He had completed the forms himself. He did not consider he should be prejudiced as a result of time bar in the whole circumstances.
36. He had worked as a Taxi driver for a “*couple of months*” after January 2017 but had stopped before lockdown commenced in March 2020.

Discussion

Relevant law

Discriminatory treatment

37. An employer must not discriminate against an employee as to the terms of employment; in the way that access is afforded to opportunities for promotion, transfer, training or receiving any benefits; by dismissing the employee or objecting the employee “*to any other detriment*”.
38. In this case the protected characteristic relied on is race under s1 of the Equality Act 2010 (EqA). Race includes nationality (s9 of EqA) and the claimant asserts that he was discriminated against because of his Polish nationality.
39. In terms of section 13(1) of the EqA direct discrimination occurs where “*a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*”.
40. EqA therefore provides that direct discrimination can occur against an employee because of a protected characteristic if he is treated less favourably than others would be treated or subjected to “*another detriment*”. The difference in treatment requires to be because of the protected characteristic.

41. Direct discrimination is rarely blatant. Where an employer behaves unreasonably that does not mean that there has been discrimination but it may be evidence supporting that inference if there is nothing else to explain their behaviour.

5 42. In order to claim direct discrimination under section 13 of EqA a claimant must have been treated less favourably than a comparator who was in the same or not materially different circumstances as the claimant. A successful direct discrimination claim depends on a Tribunal being satisfied that the claimant was treated less favourably than a comparator because of a protected
10 characteristic. The fact that the claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment. A claimant who simply shows that he was treated differently than others in a comparable situation would not necessarily succeed with a complaint of unlawful direct discrimination. EqA outlaws less
15 favourable not different treatment and the two are not synonymous.

43. A complaint of direct discrimination will only succeed where the Tribunal finds that the protected characteristic was the reason for the claimant's less favourable treatment or suffering detriment.

Agency workers and discrimination

20 44. Section 41 of EqA provides that a "*principal must not discriminate against a contract worker*" The definition of a "*contract worker*" is a "*person who is supplied to the principal and is employed by another person who is not the principal*".

45. EqA at s41(5) defines "*principal*" as a person who makes "*work available for an individual who is employed by another person, and 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)*".
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46. A worker may be employed by one employer and work for another; the typical case (as here) being that the worker has a contract within an employment
30 business (the agency) which supplies the worker (agency worker) to do work

for another business. If there is discrimination by the real employer (the agency) then they may complain to the agency.

47. However, where the discrimination has been perpetrated by the agency's customer in most cases the customer will not be the "*employer*" of the worker. Exceptionally there may be a contractual relationship between the worker and the customer (express or implied) which would meet the definition of employment under EqA but usually there is not. In this case there was no evidence of any express or implied contractual relationship between the claimant as an agency worker and the customer. This was the usual case where there is no contract between the worker and customer and the remedy for the agency worker is under section 41 of EqA namely action against the "*principal*".

48. The protection provided by section 41 of EqA is that it is unlawful for a "*principal*" to discriminate against or victimise a contract worker:-

- In the terms in which the principal allows a contract worker to work;
- By not allowing the contract worker to do or to continue to do the work;
- In the way the principal affords the contract worker access to benefits or by failing to afford access to benefits or;
- By subjecting the contract worker to any other detriment.

49. Section 41 of EqA also says it is unlawful for a principal to harass a contract worker.

Time limits on discrimination claims

50. The general rule is that a complaint of work related discrimination under EqA (other than equal pay) must be presented to an Employment Tribunal within the period of three months beginning with the date of the act complained of – s.123(1)(a) EqA.

51. This is not an absolute bar on claims being presented outside the three month period because s.123(1)(b) allows a claim to be brought within “*such other period as the Employment Tribunal thinks just and equitable*”. A claim is “*presented*” when it is received by an Employment Tribunal. The principal factors to be taken into account when exercising discretion is the length of and reasons for the delay and the issue of prejudice each party might suffer as a result of extending time.

Agency Worker Regulations

52. The Agency Worker Regulations 2010 (the Regulations) provide by Regulation 5(1)(a) and (b) that temporary work agencies and hirers must ensure that an agency worker who has completed a twelve week qualifying period receives the same basic working and employment conditions as he or she would be entitled to for doing the same job had he or she been recruited directly by the hirer at the time the qualifying period commenced.

53. The Regulations do not affect the employment status of agency workers or their entitlement to other employment rights.

54. By virtue of Regulation 6 of the Regulations “*relevant terms and conditions*” means terms and conditions relating to pay, the duration of working time, night work, rest periods, rest breaks, and annual leave. Regulation 6(5) defines “*working time*” as “*any period during which that individual is working, at the disposal of the employer of that individual and carrying out the activity or duties of that individual*”.

55. The right to “*equal treatment*” extends to the terms and conditions that would have been “*ordinarily included*” in the agency worker’s contract had he or she been recruited directly by the hirer to do the same job (Regulation 5(2)). That would cover terms and conditions as if the agency worker had been directly employed being the terms and conditions normally set out in standard contracts, a pay scale or structure, a relevant collective agreement or the company Handbook.

56. An exception to the right to equal treatment is where there is what is known as “the Swedish Derogation”. That occurs where an agency worker has a permanent contract of employment with the agency which satisfies certain requirements and is paid a minimum amount between assignments. The contract is required to include terms and conditions in writing relating to:-
57. the minimum scale or rate of remuneration or the method of calculating remuneration
- the location or locations where the agency worker may be expected to work
 - the expected hours of work during an assignment
 - the maximum number of hours of work that the agency worker may be required to work each week during any assignment
 - the minimum number of hours of work per week that may be offered to the agency worker during any assignment provided that is at least one hour and;
 - the nature of the work that the agency worker may expected to be offered including any relevant requirements relating to qualifications or experience
58. There are other provisions which require to be entered into such a contract for there to be an exemption or equal treatment including obligation on the agency to seek out suitable work and propose the agency worker to a hirer where there is such work available.
59. That derogation was repealed by the Agency Workers (Amendment) Regulations 2019 with effect from 6 April 2020. However that would not affect complaints relating to breaches of the 2010 Regulations occurring prior to 6 April 2020.
60. Under Regulation 18 a complaint to a Tribunal of breach of Regulation 5 has to be made within 3 months of the last date of an act of breach or infringement.

Again the Tribunal can extend time if it considers it just and equitable to do so.

Conclusions

Appointment of Administrators

5 61. The claimant maintained that PMP had not been placed in Administration as it still existed. He considered that misleading information had been supplied from former and present employees of PMP.

62. The Tribunal were of the view that Administrators had been appointed to PMP and that entity had subsequently changed its name to the respondent. The
10 the copy Notice of Administration which had been produced to the Tribunal in the course of the claim noted that the High Court of Justice had on 2 March 2020 appointed Joint Administrators to PMP Recruitment Ltd under the company number 03485614.

63. The printout produced by the claimant showing the existence of “PMP
15 Recruitment” contained the company number 08030122. That company was formerly known as Cordant Recruitment Ltd (according to Company House information) and which changed its name to PMP Recruitment Ltd on 30 July 2021. As narrated on 27 May 2020 PMP Recruitment Ltd (in Administration) had changed its name to the respondent and so the company name PMP
20 Recruitment Ltd was available for use in July 2021. The Tribunal recognised the confusion likely to occur as a consequence. It may well be that there are employees who were with the respondent under its former PMP name who are now again with a company named PMP Recruitment Ltd but the Tribunal did not consider that was the same legal entity as the respondent in this case.

25 Discrimination claim while at Kinnerton

64. As indicated above an agency worker such as the claimant has protection against discrimination under the EqA. However where that discrimination occurs at the hands of the “*principal*” it is against that entity that the case must be taken.

65. The recruitment agency business is not liable for acts of discrimination at the hands of the "*principal*" i.e. the hirer or end user of the services supplied by the agency.

5 66. In this case the complaint by the claimant was that he was not offered work at Kinnerton by a Lithuanian supervisor who preferred to offer work to individuals of his own nationality rather than the claimant who was Polish. The claimant did not know who employed the Lithuanian supervisor. The onus is on a claimant to establish his/her discrimination claim. The Tribunal were unable to make any finding that this was an act by an employee of PMP.
10 There was no evidence to establish that fact. It was more likely in the Tribunal's view that a supervisor would be directly employed by Kinnerton. The actings were in the course of work at Kinnerton. and so the act of discrimination was a liability on Kinnerton and not PMP.

15 67. Additionally the evidence was uncertain that it was in fact Lithuanian workers who were offered employment in preference to the claimant because of his Polish nationality. While the claimant saw the same workers going in and out of the factory that had been there previously there was no evidence that any role had been given to Lithuanian workers in preference to Polish workers. The evidence suggested that there had been a dispute with the supervisor over certain issues and it was for that reason that the claimant was told not to return to the work place,
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68. Further, the Tribunal considered that this claim was time barred. The events occurred in February 2016 and it was not until 24 April 2017 that the claimant instituted early conciliation with ACAS some fourteen months after the event.
25 The Tribunal considered that there was no scope in this case for extending the three month time period on a just and equitable basis. There was ample opportunity for the claimant to have researched the position if he considered that he had a claim and to take the appropriate steps to mount that claim. His evidence was that he considered that he should "*forget about it and get on with life*". The time lag between February 2016 and April 2017 would likely affect the cogency of any evidence and the capacity of any offending party to
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properly attend to the claim and in those circumstances the balance of prejudice did not favour the claimant.

69. In the circumstances therefore; (1) the Tribunal considered that there was no claim against the respondent as they were not the "*principal*" who might have been involved in a discriminatory matter; (2) on the facts there did not appear to be disclosed any cogent case of discrimination and (3) it was a claim which was time barred.

Discrimination claim while at Argos (XPO Logistics)

70. Separate claims of discrimination are made in respect of the claimant's assignment at Argos (XPO Logistics) ("Argos").

Incidents with managers

71. The claimant in his email to PMP of 18 January 2017 (C27/28) complains that his managers Alisdair Wallace and Robert Jarvie at Argos ignored a complaint he made about a Scottish driver. He makes a further complaint that the Manager Robert Jarvie ignored his representation that he had found empty boxes which may be evidence of stolen goods. When Robert Jarvie ignored that complaint and told him to throw away the boxes he reported that incident to stock control for investigation. He states that he couldn't start work normally because "*voice packs*" were not working properly. He wrote on the voice packs "*shit*". It was the responsibility of Mr Jarvie to prepare those packs. He made no reference in his evidence to these matters as being discriminatory of him.

72. A particular matter relied upon as being discriminatory was being told not to come back to work on 18 January 2017 by Robert Jarvie "*without explanation*" albeit he was placed on a rota to work at Argos on 17, 18 and 19 January 2017. In his email he states that "*because of my whistleblowing Mr Robert Jarvie sent me home twice on 17 and 18 January 2017 and told me that I will no work anymore because there is no more work at Argos.*"

73. In respect of these incidents the claimant was not able to say whether these individuals (Alisdair Wallace and Robert Jarvie) were contract workers of PMP or employees of Argos. Again the onus is on the claimant to establish facts. Again it was more likely that the managers would be employees of Argos and acting in course of their employment with Argos and any acts of discrimination arising out of these events would not be conducted by the claimant's employer i.e. PMP. These were actings of the end user or "*principal*" as defined in section 41 of EqA. Accordingly any complaint of discrimination would require to be made against Argos who are not party to the action.

74. Even if there was a claim that could be made against PMP in respect of these incidents there is nothing to suggest that the treatment that the claimant received was because he was Polish. His main complaint is that he was sent home as he indicated in his email "*because of my whistleblowing....*" His claim is for discrimination on the grounds of his race and not for other reasons. In those circumstances there is no evidence that the reason for the behaviour of Alisdair Wallace or Robert Jarvie was because of the protected characteristic of race.

Incidents with Scottish "*pickers*"

75. The claimant was unable to say whether the Scottish "*pickers*" who he complained discriminated against him were employed by Argos or were contract workers. There was insufficient evidence to identify these matters as being actings which could be held to be the responsibility of PMP. Again if there was discrimination by the Scottish pickers acting in course of their employment with Argos because he was Polish then that was a claim he could make against Argos. However they are not party to this claim.

76. Further he narrates in his e mail of 18 January 2018 various actings which he states was discrimination "*from Scottish pickers towards another nation's pickers*". It appears that this treatment was not directed against him wholly or indeed Polish workers generally but all contract workers. He described this in evidence as a "*common complaint*" and that they "*may be acted that way to all*".

77. In those circumstances it was not possible for the Tribunal to identify that there had been unfavourable treatment because of the protected characteristic of race. It seemed to the Tribunal likely that the behaviour was directed against contract workers generally rather than any particular nationality.

5 Complaint of lack of investigation by PMP

78. A further complaint was that PMP had failed to conduct an appropriate investigation into his complaints because he was Polish and thus he was discriminated against.

79. There was no evidence that was the case. After making his complaint by email of 18 January 2017 the claimant was advised by letter of 27 February 2017 that a grievance meeting had been arranged to discuss his complaint on 2 March 2017. The claimant did not attend that meeting but asked that the matter be dealt with on the basis of his written complaint.

80. After that procedure had been conducted he received a letter indicating that the complaint was not upheld. He did not produce that letter.

81. Thereafter there was an appeal against that decision which was unsuccessful. No letter was produced in respect of that decision.,

82. The complaint was that PMP Recruitment had not investigated the matter by making appropriate interviews. However there was no evidence to suggest that had it not been for his nationality a better investigation would have occurred. There was no reference to a non Polish comparator who had been treated more favourably by appropriate interviews.

83. Neither was there evidence to suggest directly or by inference that a hypothetical comparator namely an individual who had made the same complaint but who was not Polish would have been treated in a different way in the investigation.

84. In those circumstances the complaint of discrimination in failing to investigate his complaint effectively could not be upheld.

Time limit on discrimination against Argos

85. The actings complained of terminated at best on 18 January 2017 when the claimant was sent home. Any discrimination by way of harassment from Scottish pickers would end at that time. He had three months to raise his complaint. He made an approach to ACAS for early conciliation on 24 April 2017 and so was outside the three month time limit in raising his complaint which was not done until after the ACAS certificate was received.
86. At the same time he had a further complaint of discrimination namely that his complaint to PMP had not been appropriately investigated. That did not unfold until sometime later and that particular matter would be within the time limit.
87. He also had a claim under the Agency Worker Regulations in relation to pay which was included within his claim form. In that respect he had written to Argos on 18 March 2017 seeking a request for a written statement containing details of basic working and employment conditions of those who were directly employed as warehouse pickers. He had previously made a request of PMP on 27 January 2017 (letter to Argos C21/22) and awaited information. It would not appear that the information was forthcoming at that time and so he made his claim.
88. In those circumstances the Tribunal considered that while he had not intimated his claim on alleged discrimination at Argos within the three month period it was just and equitable to extend time to 25 May 2017 being the date when he lodged his ET1. The ACAS conciliation period lasted between 24 April and 22 May 2017 and once he received his certificate he did not delay in making his claim.
89. Given the very short time period between the expiry of the three month period (17 April 2017) and the lodging of the claim on 25 May 2017 the Tribunal did not consider that there would be prejudice caused to the respondent in being able to respond to the claim and that the cogency of the evidence would not be lost. It appeared that PMP still investigated matters into May 2017.

90. However albeit there was no time bar in relation to this particular complaint of discrimination involving Argos the Tribunal considered that (1) any discriminatory acts were perpetrated by the principal (Argos) but they were not party to the claim; and (2) in any event the evidence was insufficient to
5 identify discriminatory actions because of the protected characteristic of race.

Claim under Agency Worker Regulations 2010

Time limits

91. Under Regulation 18 of the Regulations a complaint to a Tribunal under Regulation 5 (which is founded on by the claimant in this case) requires to be
10 made within three months beginning 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 failure comprising the infringement, detriment or breach the last of them”*.

92. A Tribunal may consider any such complaint which is out of time if in all the
15 circumstances of the case it considers that it is *“just and equitable to do so”*.

93. In this case the last payslip was issued to the claimant on 27 January 2017 and given that his claim related to underpayment the Tribunal considered that would be the last date of the infringement. As he made application for early conciliation on 24 April 2017 with the certificate being issue on 22 May 2017
20 his application would be in time.

94. His last day of working was 18 January 2017 and if that were taken to be the last date of infringement the claim in respect of pay should have been raised by 17 April 2017. The claim would then be outwith the three month time limit and the issue would then be whether it is *“just and equitable”* to extend time.

25 95. The Tribunal considered that it would have been appropriate to exercise that discretion. The claimant had some work to do in relation to his claim.

96. In terms of his letter to Argos (C21) he had made an approach to PMP on 27 January 2017 for information on the working and employment conditions at Argos but he had not received any response within 30 days of that request,

He then approached Argos on 18 March 2017 (C21) . Again there appeared no response to that particular letter. He stated that he was researching claims on his own at that time.

5 97. The claimant had requested information but there was a delay in any response being gained from either PMP Recruitment or Argos. The delay in presentation was not great and the cogency of evidence had not been affected in this particular matter. The balance of prejudice in the view of the Tribunal lay with the claimant. He would be left without a claim were it time barred. The respondent not responding to his request for information could
10 be seen to have been unhelpful in the provision of information to allow progress to be made by the claimant in his claim.

15 98. In those circumstances the Tribunal considered it would have been just and equitable to extend time to 25 May 2017 when the claim was presented even if the last date of the alleged infringement was when he left work rather than the date of the final payslip .

The Swedish Derogation

199. Within the ET3 response from the respondents it was indicated that because the contractual documentation with the claimant contained the appropriate terms to allow the “Swedish Derogation” then no claim could be made.
20 However no documentation was produced at any stage from the respondent on that issue and so the Tribunal could make no finding that the derogation existed.

The claim for wages

25 100. The provision within Regulation 5 of the Agency Worker Regulations 2010 entitles the claimant to the same “*basic working and employment conditions*” as he would have been entitled to for doing the same job had he been recruited by Argos directly. Those terms and conditions would include pay and the duration of working time (Regulation 6).

101. Regulation 5 does not apply unless an agency worker has completed the qualifying period of twelve weeks in the same role with the same hirer (Regulation 7). The claimant completed that qualifying period and so was entitled to make his claim under Regulation 5.

5 102. The email of 20 November 2017 (C25) gave information on rates of pay at Argos "*across all shifts*" at £9.45 per hour. The hours of work were identified as shifts of nine hours. In terms of the payslips produced the claimant was being paid at a lower rate than the comparable worker with Argos. The claimant made a calculation of the sums due to him in terms of the statement
10 of further particulars dated 26 October 2020 in the relevant period between 9 December 2016 and 27 January 2017. The sum brought out was £1,378.47.

103. The Tribunal was satisfied that there was a breach of Regulation 5 of the Regulations in that the claimant was entitled to the same rate of pay and working time as those employed directly at Argos once completing 12
15 continuous calendar weeks in the role of "*picker*". The remedy is such compensation as the Tribunal consider is "*just and equitable*" having regard to the loss attributable to the infringement to include the loss of any benefit which the claimant might have reasonably expected [Regulation 18(8)(10) and (11)]. The Tribunal was satisfied it was just and equitable to award the
20 sum calculated by the claimant.

Employment Judge: Jim Young
Date of Judgment: 03 March 2022
Entered in register: 04 March 2022
25 and copied to parties

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