



EMPLOYMENT TRIBUNALS

Claimant: Mr D Hadam

Respondents:

1. Clearfield Recruitment Ltd
2. Smart Electrical & Security Limited
3. Exchequer Solutions Limited

Heard at: Leeds **on:** 20 February 2023
10 March 2023 (reserved decision in chambers)

Before: Employment Judge Cox

Representation:

Claimant: In person
First Respondent: Mr Jarrold, Managing Director
Second Respondent: No attendance or representation
Third Respondent: Mr Sangha, counsel

RESERVED JUDGMENT

1. The claim of unfair dismissal against the Third Respondent is dismissed on withdrawal by the Claimant.
2. The claim against the Third Respondent under Section 111 of the Equality Act 2010 is dismissed on withdrawal by the Claimant.
3. The remaining claim against the Third Respondent under Section 112 of the Equality Act 2010 is dismissed as having been brought out of time and not within another just and equitable period.

REASONS

Procedural background

1. On 18 February 2022, after a period of early conciliation running from 10 December 2021 to 20 January 2022, the Claimant presented a claim against the First and Second Respondents alleging direct race and disability discrimination, harassment related to race and disability, discrimination arising from disability and victimisation (claim no. 1800868/2022). The race discrimination allegations relate to him being Polish and Eastern European. The Claimant alleges that he is a disabled person as a result of anxiety, depression, post-traumatic stress disorder and psychosis.
2. The First Respondent, Clearfield Recruitment Ltd (“Clearfield”) presented a response defending the claim but the Second Respondent Smart Electrical & Security Limited (“Smart Electrical”) did not, having gone into creditors’ voluntary liquidation on 14 February 2022. The Tribunal did not consider it appropriate to enter a Judgment against the Second Respondent under Rule 21 because the claim against the First Respondent was defended and the allegations against the two Respondents are linked.
3. The claim was originally listed for a Preliminary Hearing for case management on 29 April 2022. On 13 April 2022 the Claimant applied for it to be postponed for five months. He provided medical evidence of a diagnosis of “paranoid schizophrenia” and “mixed anxiety and depressive disorder with PTSD symptoms” and two GP fit notes confirming that he was not fit for work due to “anxiety disorder” from 3 February to 17 June 2022. He said that his mental illness had deteriorated and he did not feel fit to deal with the proceedings at the moment. He could not guarantee that he would feel any better within four or five months but at least he would have more time to prepare for the Hearing, time which he needed because of his anxiety. He did not mention that he was due to have a Preliminary Hearing in another of his claims (to date, he has brought nine claims), Torque Retail Services Limited (“Torque”), on 28 April 2022. The First Respondent did not object to a postponement but suggested that one month would be long enough and would give the Claimant time to find help with his claim. In the event, the Tribunal decided to postpone the Hearing for five months as the Claimant had requested and re-listed it on 7 September 2022.
4. On 16 May 2022, notwithstanding his statement that he was unable to deal with these proceedings until September, the Claimant made a clear and detailed application to amend his claim to add further allegations.
5. On 16 May 2022, after a period of early conciliation from 12 to 16 May 2022, the Claimant also presented a new claim, this time against Exchequer Solutions Limited (“Exchequer”). In this claim, the Claimant alleges that Exchequer instructed, caused or induced Clearfield and Smart Electrical to breach the Equality Act 2010 (the EqA), contrary to Section 111 EqA. He also alleged that

Exchequer had aided Clearfield and Smart Electrical to breach the EqA, contrary to Section 112 EqA. As explained below, this claim had been presented outside the time limit of three months laid down by Section 123 EqA.

6. Both claims relate to a short period from 13 to 16 September 2021 during which the Claimant worked as an electrician's mate on works being carried out at a premises in Leeds. The works were being performed by Smart Electrical, who employed Clearfield, an employment agency, to source workers for the contract. Clearfield in turn employed Exchequer as what is known as an "umbrella company" to issue those workers with contracts and administer the payroll. The Claimant was supplied to Smart Electrical by Clearfield and Exchequer administered his employment.
7. On 25 May 2022, the Tribunal directed that the Preliminary Hearing be converted to a public Hearing at which the Tribunal would decide whether the two claims should be considered together. It would also decide whether the allegations against Exchequer should be struck out as having no reasonable prospect of success and/or whether that the claim should be struck out because the Claimant had no reasonable prospect of establishing that his claim had been presented within "another just and equitable period". As a result of a further direction on 13 July 2022, the agenda for the Preliminary Hearing was extended to enable the Tribunal to consider whether all or any of the allegations in the two claims should be struck out as having no reasonable prospect of success or should be made the subject of a deposit order because they had little reasonable prospect of success.
8. On 29 July 2022, another claim that the Claimant had brought against his union was dismissed at a public Preliminary Hearing.
9. On 11 August 2022, the Claimant asked for the Preliminary Hearing in these claims to be adjourned again for a further six months because his mental ill-health was getting worse. He could not even think about legal proceedings, he said, and he would not be able to prepare for the Hearing and properly present his case. He provided a letter from his community psychiatric nurse stating that the Claimant was medically unfit to participate in any court procedures because of his ongoing mental health issues and supporting a six-month postponement so that the Claimant could concentrate on improving his mental health. The Claimant also provided a medical care plan from his consultant psychiatrist that confirmed his diagnosis of paranoid schizophrenia and stated under a heading "Other legal information": "His insight might impact upon capacity decisions in future".
10. On 17 August 2022, the Tribunal granted the Claimant's application and postponed the Preliminary Hearing again, to 20 February 2022.

11. On 27 December 2022, in the context of his claim against Torque, the Claimant wrote to the Tribunal saying that his mental capacity was in question in a claim that he had brought in the County Court and asking what the next steps should be. He attached a draft letter he had sent his GP requesting various adjustments that he would require for “court proceedings”. The Claimant also attached a copy of an Order made in the County Court proceedings on 16 December 2022 adjourning a hearing to consider the Claimant’s application to amend his particulars of claim and staying the claim to allow the Claimant’s consultant psychiatrist to write to the Court with his preliminary view as to whether the Claimant has capacity to conduct litigation.
12. On 4 January 2023 the Claimant wrote to the Tribunal again and asked that the Tribunal discuss at the Preliminary Hearing in these claims what adjustments he might need because of his mental ill health or his mental capacity. He wrote again on 16 January 2023 asking for the Preliminary Hearing to be converted from an “in person” hearing to one held by video link. He said that due to social anxiety and paranoid schizophrenia he did not feel comfortable attending the Tribunal building.
13. On 6, 7, 9, 10 and 14 February 2023 the Claimant took part in the Hearing of his claim against Torque by video link.
14. On 9 February the Tribunal informed the Claimant that the Preliminary Hearing in these claims would now be conducted by video link and that any further adjustments he needed would be discussed at the start of the Hearing.

Application to postpone

15. On 13 February 2023 the Claimant wrote to the Tribunal saying that it was “a little unfair that I am being overwhelmed with all those legal proceedings at the same time”. He had invested all his energy in the hearing of his claim against Torque and he would not be ready for the Preliminary Hearing. He had had help from the Equality and Employment Law Centre (EELC), who had drafted his original claim, but they had “abandoned” him because of a conflict of interest after he complained about their solicitor. He had tried to find another solicitor but nobody wanted to help him. He applied for the Preliminary Hearing to be postponed for another six weeks.
16. On 15 February 2023 the Claimant’s application was refused. The Tribunal stated that his application would be considered when he provided medical evidence that he was unfit to take part in the Hearing and indicating when he would be fit to attend. If he produced that evidence by the time of the Hearing, the application for a postponement would be reconsidered at the start of the Hearing as a preliminary matter. At that point, the Respondents’ comments on the application would be sought.

17. On 17 February 2023 Exchequer's representative sent its skeleton argument to the Tribunal and the other parties, including the Claimant. At 8am on 20 February, the day of the Preliminary Hearing, the Claimant sent the other parties and the Tribunal his clear and detailed comments on the skeleton argument.
18. At the beginning of the Preliminary Hearing, the Claimant confirmed that he had not submitted any medical evidence in support of his most recent postponement application. He said that he did not want to pursue that application, he would rather get on with the Hearing. The Tribunal discussed with him what reasonable adjustments he would need for the main Hearing and he indicated that those made by the Tribunal at the Hearing of his claim against Torque would be sufficient. For the Preliminary Hearing, he said that it would be sufficient if the Tribunal and the Respondents' representatives agreed to speak slowly and simply, and all agreed to do that.
19. The Claimant explained that he had not realised he needed to deliver the County Court Order asking for a letter on his capacity to litigate to his consultant psychiatrist himself and so he had done so only the previous week. The Tribunal told the Claimant that it did not itself consider that it had sufficient evidence to indicate that the Claimant might not have capacity to conduct litigation, but it asked the Claimant to keep the Tribunal informed of any decision made in the County Court proceedings that he did not have capacity to litigate. He agreed to do so.
20. At this point, the Claimant indicated that he felt unwell and wanted to renew his application for a postponement. He said that he had had to prepare for this Hearing at the last minute and felt under pressure. The Tribunal adjourned the Hearing to enable the Claimant to submit medical evidence that he said he had in support of his application, but which he had not chosen to provide until now. This consisted of a letter from his mental health social worker dated 14 February 2022 which stated that the Claimant's mental health was being exacerbated by the current ongoing legal proceedings. The Claimant said that the date of this letter was incorrect and it should read 14 February 2023. In the letter, the social worker requested that the Tribunal consider delaying the date of the Tribunal to a later date "in order to accommodate [the Claimant's] needs".
21. When the Hearing resumed, in order to assist the Tribunal to put his application for a postponement into context, the Claimant summarised the current state of play with the nine claims he has presented to the Tribunal and three claims he has made in the County Court. He said that he could manage the conduct of two claims at any one time but no more. Two of his claims in the County Court had been stayed and he had applied that day for the other to be stayed. Of the Tribunal claims, the claim against Torque had been successful in part only and he was considering whether to apply for a reconsideration. The claim against his union had been decided against him but he had already applied for a reconsideration of that Judgment. All the other claims, other than those involved

in these proceedings, had been dismissed. He had no current plans to bring further Tribunal proceedings. The Claimant said that he needed a postponement to recover from the anxiety and stress of the Hearing against Torque, which had ended on 14 February, that is, six days earlier.

22. In response to the Claimant's postponement application, Clearfield expressed sympathy for the Claimant's ill health but wanted the Hearing to go ahead. It had already been postponed twice because of the Claimant's ill-health and he had had time to prepare for it. Exchequer also opposed a postponement, arguing that the Claimant had demonstrated by his response to the skeleton argument and his contribution at the Hearing thus far that he was well enough to participate.
23. The Tribunal decided to refuse the Claimant's application for a postponement. The Hearing had already been postponed twice for a total of 10 months at the Claimant's request because of his mental ill-health and to allow him more time to prepare. During that time he had proved to be well enough to make an application for his claim to be amended, bring a fresh claim and conduct Hearings in two other claims. The present claims were now his only ongoing claims in the Tribunal and his claims in the County Court had either been stayed or were likely to be so. When the Tribunal asked the Claimant how the present claims were ever going to make progress if the Tribunal continued to grant postponements because the Claimant's mental ill-health was being exacerbated by the stress of conducting the claims, he was unable to suggest a way forward. In any event, the Tribunal was satisfied from the Claimant's response to Exchequer's skeleton argument and his contribution at the Hearing before he renewed his postponement application that he had in fact had time to prepare and was well enough to participate. The Tribunal confirms that there was nothing to indicate in the Claimant's subsequent participation in the Hearing that he was unable to take a full part in it.
24. The Tribunal decided to adjourn the Hearing for an early lunch break to give the Claimant an opportunity to prepare for the continuation of the Hearing.
25. At the resumed Hearing, the Tribunal began by clarifying with the Claimant the nature of the existing claims against Clearfield and Smart Electrical.
26. The Claimant alleges that:
 - 26.1 Between 13 and 16 September 2021, Mike Kampster would not speak to the Claimant, failed to provide him with instructions directly, and failed to introduce him to the team on the work site. This is alleged to be harassment related to the Claimant's race or direct discrimination because of his race.
 - 26.2 On 16 September 2021, someone called Ben shouted at the Claimant for using his mobile 'phone on site. This is alleged to be harassment related to the Claimant's race or direct discrimination because of his race.

26.3 When the Claimant told Ben that he had anxiety and that his tone might cause him to have a panic attack, Ben told the Claimant that he did not care about his anxiety. This is alleged to be harassment related to the Claimant's disability or direct discrimination because of his disability.

26.4 On 17 September 2021, Steve Burdass, an employee of Clearfield, told the Claimant that working in a fast-paced environment was not for everyone. This is alleged to be harassment related to the Claimant's disability or direct discrimination because of his disability.

26.5 On 17 September 2021, either Clearfield or Smart Electrical or both decided to terminate the Claimant's assignment with Smart Electrical. This is alleged to be

26.5.1 direct discrimination because of the Claimant's disability or

26.5.2 victimisation because the Claimant had complained to Mr Burdass in an email on 16 September 2021 that Ben shouting at him about using his 'phone had exacerbated his mental ill-health and breached the EqA and he would not be able to attend work the following day or

26.5.3 discrimination because of something arising in consequence of the Claimant's disability, namely, his sickness absence on 17 September 2021 due to exacerbation of his mental ill-health caused by Ben shouting at him.

26.6 After the Claimant presented a complaint of race discrimination to Clearfield on 6 October 2021, Clearfield failed to investigate it. This is alleged to be victimisation because of the Claimant having raised this complaint.

27. The Claimant does not know who employed Ben and Mr Kampster. He believes they either had a direct contract with Smart Electrical or may have been supplied by another agency. Mr Jarrod, Managing Director of Clearfield, confirmed at the Preliminary Hearing that these two individuals were not supplied by his company. If that proves to be the case, the claim against Clearfield in relation to their acts appears to have no reasonable prospect of success. That matter cannot be decided, however, until the Tribunal hears evidence on this point.

The application to amend

28. The Claimant's application to amend his claim against Clearfield and Smart Electrical was made on 16 May 2022. After discussion with the Tribunal about the nature of his application, the Claimant confirmed that he wanted to proceed with only part of that application.

29. The additional allegations that the Claimant wants to make are these:

29.1 On or around 16 September 2021 Mr Burdass of Clearfield decided that the Claimant should be issued with a contract that would put him outside the scope of the EqA, to enable his assignment to be terminated without breaching that Act

29.2 From 3 December 2021 to 13 May 2022, Clearfield offered the Claimant 18 jobs as a general labourer but failed to offer him any work as an electrician's mate. This is alleged to be post-employment discrimination contrary to Section 108 EqA and either:

29.2.1 direct discrimination because of the Claimant's disability or

29.2.2 harassment related to his disability or

29.2.3 victimisation because of his emails of 16 September and 6 October 2021 to Mr Burdass.

The claim against Exchequer

30. The claim against Exchequer is of unfair dismissal, race discrimination and disability discrimination. The Claimant withdrew his claim of unfair dismissal at the Preliminary Hearing and it was dismissed. He also withdrew his allegation that Exchequer had instructed or induced Clearfield and Smart Electrical to discriminate against him, contrary to Section 111 EqA, and that claim was also dismissed.

31. At the Preliminary Hearing, the Claimant clarified his remaining allegation. He alleges that Exchequer knowingly aided Clearfield and Smart Electrical to discriminate against him in the ways alleged in his claim against them, contrary to Section 112 EqA. It did this by issuing the Claimant with a contract that excluded him from the scope of EqA. As it did this immediately after he had made his complaint of 16 September 2021 to Mr Burdass, it was clear, he says, that the sole purpose of Exchequer in issuing the contract was to aid the other two Respondents to discriminate against him and mislead him about his right to bring a claim under the EqA.

32. Exchequer accepts that it sent the Claimant a contract on 17 September 2021. The Claimant alleges that this contract is "very unusual" and submitted another contract with which he had been issued in the past by another agency, Focus Payroll. He said that the terms of the Focus contract were what would normally be expected. He highlighted the fact that the Focus contract made clear that, whilst he was to be treated as self-employed for tax purposes under the terms of the Construction Industry Scheme ("CIS"), his employment status was that of an agency worker. In contrast, he said, the contract he was sent by Exchequer specified that he was a fully independent self-employed sub-contractor for all purposes, with the right to send others in his place to the work site, which, had it

reflected the reality of his case, would mean he fell outside the protection of the EqA.

33. Under the CIS scheme, contractors in the construction industry are required to deduct 20% from payments to subcontractors and pass it to HM Revenue and Customers. The deductions count as advance payments towards the subcontractor's tax and National Insurance liabilities. The subcontractor remains liable to account for any further tax and National Insurance contributions that may be due.

Time limit for the claim against Exchequer

34. A claim of discrimination must be presented within three months or within "such other period as the employment tribunal considers just and equitable" (Section 123(1) EqA).
35. The Claimant acknowledged in his claim form that this claim had been presented "significantly late". The act of alleged discrimination occurred on 17 September 2021. The claim should therefore have been presented by 16 December 2021, subject to any extension of time to allow for early conciliation through ACAS. The claim was not presented until 16 May 2022, five months late.
36. The Claimant said in his claim form that the reason for the delay was that his union had refused to give him any advice. EELC had advised him initially and drafted his other claim for him but had told him that he did not have a case against Exchequer. In his evidence to the Tribunal, he said that EELC did not consider that he had suffered a detriment because Exchequer had subsequently changed his contract to a PAYE contract, but they did not identify that by that time he had already been dismissed and so he had in fact suffered a detriment. Having later done some reading for himself, he had realised that Exchequer had contravened Sections 111 and 112 EqA and he immediately brought this claim. The Claimant submitted in evidence a letter of advice that he had received from the EELC before bringing his other claim. He confirmed that he wanted this to be read, even though it was a document he had the right to keep confidential. It did not mention a claim under Sections 111 and 112 EqA.
37. From all the documents that the Tribunal has seen, whether they be the Claimant's correspondence with the Tribunal, his application to amend his first claim, the contents of his second claim, his correspondence with Clearfield and his witness evidence, the Tribunal is satisfied that the Claimant is an intelligent man who at all times material to these claims has been very well aware of his rights under the EqA, to a level of detail that would overshadow the knowledge of some lawyers. The Tribunal takes into account all the evidence that the Claimant has provided about his mental ill-health. The Claimant has said that litigation is very stressful for him because of his disability and that he struggles with reading, understanding and researching law. Nevertheless, he has clearly been very

successful in finding out about his rights. “To be honest”, he said in his evidence to the Preliminary Hearing, “I think that despite all this I am doing very well and most probably I am doing more than average person would do in [my] situation”. The Tribunal endorses that view.

38. The Tribunal considers that, if the Claimant had concerns that Exchequer was colluding with Clearfield and Smart Electrical to exclude him from his rights under the EqA, he was fully able to raise that claim when he presented his claim against the other two Respondents in February 2022. In the email exchanges between the Claimant and Exchequer from September 2021 that the Tribunal has seen, the Claimant was already complaining about the terms of the contract Exchequer had sent him and saying that the contract was intended to deprive him of his rights as an employee or agency work and to allow them to discriminate against him: “Please be aware that what you are doing is an attempt to victimise me and therefore I am considering to take this matter further to employment tribunal for discrimination and conspiracy.” Indeed, the Claimant says that he approached ACAS under the early conciliation procedure in relation to Exchequer as well as the other two Respondents in December 2021 and an early conciliation certificate was issued in relation to Exchequer at that time (presumably on 20 January 2022, when the certificates were issued in relation to the other two Respondents). The Tribunal acknowledges that when EELC was advising him about his rights it did not appear to have highlighted his right to bring a claim against Exchequer under Section 112. But the Claimant is an assertive individual, in spite of his mental ill-health, and was well able to include a claim against Exchequer in his earlier claim if he himself thought Exchequer was guilty of victimisation, discrimination and conspiracy.
39. The Tribunal is also satisfied that the claim against Exchequer has no reasonable prospects of success, for the reasons set out below. It does not consider that it would be in the interests of justice to require the Respondent to respond to a claim that has been presented out of time and has no merit.
40. The claim against Exchequer is therefore dismissed as having been brought out of time and not within another just and equitable period.

Strength of the claim against Exchequer

41. The claim that Exchequer knowingly aiding the other Respondents to discriminate against the Claimant rests on the Claimant’s allegation that the contract with which Exchequer issued him was very unusual. At the Preliminary Hearing, the Tribunal had sight of the paperwork generated during the administration of the Claimant’s employment. The candidate registration form that the Claimant completed is dated 9 September 2021 and records the payment method as “CIS”. Subsequent records of contact between Exchequer and the Claimant show that the company tried to contact the Claimant on 16

September, his fourth day on site, to register for his agency payroll but he was busy and would call back later.

42. On 17 September 2021, in what appears to be a standard form letter, Exchequer sent the Claimant information about the company, various company policies, and information about how to register with them as a “potential subcontractor”. In his replies on registration submitted at 10.08, the Claimant confirmed that he was registered as self-employed with HMRC, decided how to carry out his own work, no-one supervised or directed him on how he did his work and he considered that he was responsible for his own management of his services. He provided some of his own tools and equipment, had not engaged helpers or used a substitute previously and did not have his own insurance. At 10.13 Exchequer emailed Clearfield to let it know that the Claimant would be registering with them under the CIS scheme. It said that he had been offered the opportunity to be employed on a self-employed basis as he was not subject to supervision, direction or control as to the manner in which the services are provided and Exchequer was relying on that information.
43. Exchequer then sent the Claimant a “Self-Employed Contract for Services” and asked him to confirm that he accepted the terms. This document, which appears from its design and layout to be a standard form contract, provided that the Claimant was working for Exchequer as an independent sub-contractor, with the right to send someone with similar experience and qualification in his place. He did not have to work fixed hours and would have the right to leave site without permission, provided he had notified the contractor. He was responsible for his own tax and National Insurance contributions and public liability insurance.
44. The contract that the Claimant produced issued by Focus Payroll also provided that the Claimant was engaged as a self-employed worker under a “Contract for services”. He would use his own initiative in how the services were completed and would have flexibility as to hours worked. No one else would have the right to supervise, direct or control him as to the manner in which the services were provided. Payment for work would be made “subject to deductions in respect of the CIS scheme”.
45. The principal relevant difference between the two contracts were therefore that under the contract with Exchequer the Claimant had the right to send a replacement. Under the contract with Focus there was no right to send a replacement. The Tribunal accepts that if a worker has the right to send a substitute worker in his place to perform the work under a contract, that indicates that the worker is not “employed” for the purposes of the EqA. In Section 83(2), the Act defines employment as employment under a contract of employment or apprenticeship or a contract personally to do work.
46. The Tribunal does not accept, however, that the Claimant has any reasonable prospect of establishing that Exchequer sent him a contract in the terms it did in

order to “knowingly help” Clearfield and Smart Exchequer to discriminate against him. The contract it sent, like the contract that Focus used, described him as a self-employed worker and the two contracts were in fact broadly similar in their terms. The Claimant has no reasonable prospect of establishing that Exchequer included a right to use a substitute in order to put him outside the scope of EqA, for several reasons.

47. First, the contract in which the clause appears is in standard form terms. In the Tribunal’s experience, it is common for contracts for self-employed workers to contain a right to use a substitute, even though sometimes these clauses are found to be a sham, not reflecting the true situation.
48. Second, the contemporaneous records and correspondence give no indication that Exchequer had any understanding of the significance of a clause giving the right of substitution. The initial reason the Claimant queried the terms of the contract was because he wanted another way of receiving his pay. In previous jobs the company who paid him had deducted tax, and public liability insurance was included in the payroll fee. Exchequer confirmed to him that they would in fact be deducting tax at 20% under the CIS scheme. The Claimant then said that the terms of the agreement were not right and the agreement was just to deprive him of his rights as an employee/agency worker and “to allow you to discriminate against me”. He said that he wanted a contract under which he could have his payments administered under the PAYE system or a contract under which his pay could be administered under the CIS scheme but it would be stated that he was an employee or agency worker for employment law purposes. In its internal records, Exchequer records this as the Claimant wanting “to be both self employed & employed at the same time”. There is a record of a conversation on 6 October between the Claimant and an employee of Exchequer during which Exchequer agreed to change the Claimant’s payment terms so that he was paid under PAYE rather than under the CIS scheme and confirmed that the contract it had sent him was no longer applicable. The Claimant did not dispute that this had happened.
49. Third, it is difficult to see how Exchequer could have deprived the Claimant of his rights under the EqA by issuing him with a contract after the alleged acts of discrimination had already occurred. The Claimant accepts that Mr Burdass of Clearfield told him on 17 September that his assignment at Smart Electrical was to end. At the Preliminary Hearing, he said he was unclear about the time at which that happened. At 9.15am the Claimant emailed Mr Burdass making reference to a comment that Mr Burdass had made that the job might be too high pressure for the Claimant. In an email at 14.17 on the same day, the Claimant made reference to that same comment as being the reason Mr Burdass had given for telling him his services were no longer required. This indicates that the termination was communicated to the Claimant before his first email at 9.15. Exchequer did not send him the contract at issue until 15.02 on 17 September.

50. In summary, if the Tribunal had accepted for some reason that the claim against Exchequer had been presented within “another just and equitable period”, it would have dismissed it on the ground that it had no reasonable prospect of success.

The application to amend the claim against Clearfield

51. In considering the Claimant’s application to amend his claim against Clearfield, the Tribunal has had regard to the guidance given in Selkent Bus Co Ltd v Moore [1996] ICR 836.

52. The Claimant’s has applied to amend his claim to allege that Mr Burdass of Clearfield decided on or before 17 September 2021 that he would be issued with a contract that would put him outside the protection of the EqA.

- a. This proposed new allegation raises different factual matters to those covered in the original claim.
- b. The application to amend was not made until 16 May 2022 and was therefore five months outside the time limit set by Section 123 EqA. For similar reasons to those set out above in relation to the related allegation against Exchequer, the Tribunal considers that the Claimant was well able to present this allegation as part of his original claim to the Tribunal.
- c. The Tribunal considers that this new allegation would have little or no reasonable prospect of success. The Claimant wants to rely on a conversation he said he had with Mr Burdass in which Mr Burdass said that the Claimant was not employed, he was a subcontractor, and the Employment Tribunal did not exist for the Claimant. He had taken the Claimant on and given him a contract,” just on a day notice and that is it”. It is more likely than not that, even if Mr Burdass did say that, he was referring to the fact that many employment rights, including the right to minimum periods of notice and to complain of unfair dismissal, are restricted to employees and do not cover agency workers. It is highly unlikely he was making reference to having decided to give the Claimant a contract that included a right of substitution so as to put him outside the protection of the EqA. As explained above, the Tribunal does not accept that the terms of the contract that was in fact issued were “very unusual”, as the Claimant alleges. As already mentioned, there would seem little point in Mr Burdass asking Exchequer to issue the Claimant with a contract with a right of substitution that took him outside the scope of the EqA once the acts of alleged discrimination had already occurred.
- d. The Claimant has other claims that will continue, even if this amendment is refused.

53. The Tribunal is satisfied that the injustice to the Respondent in allowing an amendment to add an allegation that has been presented out of time and that has little or no reasonable prospect of success outweighs the injustice to the Claimant in not allowing him to add this allegation. This part of the Claimant's application is therefore refused.
54. The Tribunal allows the other part of the Claimant's application, to add an allegation that Clearfield has discriminated against him, harassed him or victimised him by not offering him work as an electrician's mate. This allegation appears to have been raised in time, it could have been the subject of a fresh claim presented on the date of the application to amend, and it would be in the interests of justice to allow it to be made as part of this claim. It is not clear what the strength of the allegation is until Clearfield responds to it.

Employment Judge Cox
Date: 14 March 2023