



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr J Apple**

**v**

**Fibro TX**

**Heard at:** Watford (by CVP)

**On:** 25 September 2020

**Before:** Employment Judge Loy

## **Appearances**

**For the Claimant:** In person

**For the Respondent:** Mr A MacPhail, Counsel

## **RESERVED JUDGMENT**

The reserved judgment of the tribunal is that:

1. The tribunal has no jurisdiction to make a declaration of the claimant's employment status, and his application to that effect is struck out.
2. The claimant's claim of racial discrimination was not brought within the prescribed time limit under s.123(1)(a) or (b) of the Equality Act 2010 ("EQA"), and it is not just and equitable to extend time. Accordingly, the tribunal has no jurisdiction to hear the claim, and it is struck out.
3. The proceedings are therefore struck out in their entirety.

## **REASONS**

### **Introduction**

1. The respondent is a company based in Tallin, Estonia. It provides tools for personal dermatology and skin care. The claimant was engaged by the respondent under a contract entered into on 5 February 2019 as its Operations Director, UK. The contract on its face is described as a contract for services. The claimant says that it is a contract of employment.
2. The respondent had not previously entered into the UK market. The claimant was engaged to launch its products. Unfortunately, the

relationship between the parties was not a success and soon deteriorated and became litigious. These proceedings are one of many that have been brought between the parties.

3. By a letter dated 4 April 2019 from the respondent's solicitors in Estonia, the respondent purported to terminate the contract. The claimant maintains that this letter was not a valid termination of the contract which he submitted still continued at the date of this hearing. The respondent submits that the letter of 4 April is an unequivocal, valid termination of the contract.

### **Claims and Issues**

#### The claim

4. The ET1 (presented on 4 December 2019) stated that employment began on 5 February and remained in being. There are two claims. The first is set out in Box 8.2 of the ET1 as,

'Claim to determine that contract is 'employment' despite the false self-employment established by the company.'

5. I have understood that be an application for a declaration that the claimant is an employee of the respondent.

6. Secondly, there is a claim in Box 8.2 which is set out in full as,

'Claim for race discrimination whereby Estonian workers on the same organisational chart were on Employment contracts ad I was denied because I am English.'

7. In Box 8.1 of the ET1, the claimant wrote,

'For the court judge to determine 'employment' or otherwise. The company have to be found to be liable for 'false self-employment' and are suing the claimant in the Harju Court of Estonia, denying 'employment.'

8. Both claims are denied by the respondent. Box 4 of the ET3 stated,

'The Claimant was never employed. He was engaged under a contract for services signed on 5 February 2019 which was terminated on 4 April 2019.'

#### The issues

9. This was an open preliminary hearing to consider the respondent's application that both claims should be struck out on jurisdictional grounds. Their submissions were in short that the application for a declaration should be struck out because it is not within the jurisdiction of the tribunal to provide the remedy sought; and that the race discrimination claim is time barred, has no reasonable prospects of success (and should therefore be struck out) or has little prospects of success (and therefore should be subject to a deposit order).

## Chronology

10. It is helpful to set out a brief chronology of the key events. Although there is much factual dispute between the parties, the following outline is not materially in dispute.

5 February 2019	A contract labelled "Service Agreement" is signed by the parties.
4 April 2019	The respondent's legal advisers wrote to the claimant to terminate the contract of 5 February 2019 with immediate effect.
May 2019 to November 2019	The claimant brings seven claims against the respondent (and one claim against a Director of the respondent personally) for unpaid salary under the contract in the Barnet County court.
September 2019	The respondent brings legal proceedings against the claimant in Estonia.
7 November 2019	Early conciliation commences; Day A.
3 December 2019	Early conciliation ends and certificate issued; Day B.
4 December 2019	ET1 claim form presented.
24 January 2020	Claimant's claim against a Director of the respondent personally is struck out by Barnet County Court, with a costs order against the claimant of £4,375.94)
6 March 2020	Claimant's application to vary the costs order to 28p per month is rejected by the Barnet County Court.
9 March 2020	All the claimant's claims in the Barnet County Court are struck out for lack of jurisdiction and as abuse of process.
16 March 2020	ET gives notice of this open preliminary hearing.

## Key documents

11. The tribunal is mindful that no evidence was taken at this hearing. I therefore proceeded on the basis of taking the claimant's claims at their realistic highest. I had before me the two foundation documents, which were the Agreement of February 2019 and the letter of 4 April 2019, along with a number of other items, many of them on the subject of EU jurisdiction.

12. The material provision of the Agreement was:

**'Term and Termination**

- 4.1 The Agreement enters into force from the moment it was signed by both Parties for a definite period until 05.02.2020.
- 4.2 Both Parties have the right to terminate the Agreement giving a written notice to the other Party with a notice period of 1 (one) month.
- 4.3 The Agreement may be terminated at any time with Parties' mutual written consent ..'

13. The letter of 4 April was headed, in bold and block capitals, 'Termination notice of services contract.' It appears written in accordance with Estonian law and norms, (LOA is identified as the Estonian Law of Obligations Act) and is not always easy to follow. After a preamble it states the following, in bold in the original,

**'Therefore, and pursuant to #631 of LOA, Fibro Tx hereby terminates the Agreement unilaterally effective immediately.'**

**Limitation**

14. There were a number of time and time-related points in this case.

- 14.1 If the issue to the claimant of the Agreement of 5 February was itself an act of race discrimination, was it a single act on that day; or was it a continuing act; and if a continuing act, when did it end?
- 14.2 Was the letter of 4 April valid and effective to end the Agreement on that day?
- 14.3 If it was not, until what date did the Agreement subsist?
- 14.4 In light of the above, was Day A within or outside the primary limitation period?
- 14.5 Has the claim been brought within time, and if not is it just and equitable to extend time?

15. The claimant submits that there has been no valid termination of the February contract, and that he remains an employee. The claimant refers to the termination provision in the February contract, which provides for only two ways in which the contract can be terminated, either by giving one month's notice (para 4.1), which the claimant submits was not given, or, with the mutual consent of both parties (para 4.2), which was not forthcoming. Neither method of termination was complied with by the respondent. He submits that the contract therefore continues.

16. The tribunal finds that the contract was validly terminated by the letter of 4 April 2019. It is easy to understand why the claimant believes it has not been validly terminated. The respondent did not follow either of the express termination provisions set out in the contract itself. It appears to have relied on a provision of Estonian statute.
17. The claimant has not understood that in English law, a contract is validly terminated (ie brought to an end) even if it was terminated in breach of the terms of the contract itself. The rights of the other party are then converted to a right to claim damages for loss suffered as a result of the breach. That model is followed in the definition of 'effective date of termination' found in s.97(1)(a) Employment Rights Act 1996.
18. It may help the claimant to give an every day example by way of analogy. Say a contract of employment says that the employer must give 4 weeks notice. The employer gives 2 weeks notice, and pays in lieu of those 2 weeks. The employee cannot claim to remain employed in weeks 3 and 4 (and subsequently, until the employer gives another 4 weeks notice). The employee's true position in law is that her employment has ended at the end of week 2, and she has the right to be paid damages, limited to net pay in lieu for weeks 3 and 4, and no more.
19. It follows that the tribunal finds that the claimant's relationship with the respondent terminated on 4 April 2019, and time limits ran from that date. It follows that primary limitation expired on 3 July 2019. As the claimant did not enter into early conciliation until 7 November 2019, he does not have the benefit of any 'stop the clock' provision. The claim was presented out of time by 5 months and 1 day. In that period, the claimant issued eight County Court claims in Barnet, and the respondent issued a claim against the claimant in Harju Court in Estonia.
20. The claimant was on 4 April 2019 aware of the facts which he needed to know to bring an ET claim. He told the tribunal that he contacted Acas in July 2019. That contact with Acas is confirmed at paragraph 8 of the claimant's list of issues and states:

"Acas were originally contacted in the summer my phone records show."
21. Unless the claimant contacted Acas on any of Monday to Wednesday 1-3 July, (on which he did not given specific evidence) he did so too late to gain the benefit of 'stop the clock.' The claimant says that he was wrongfully advised by Acas in July 2019. The claimant said that initially Acas refused to transmit his notification to Estonia. They later corrected that error.
22. The only other potential cause of delay which was referred to was the claimant's obligation to take care of his mother. That alone cannot explain a delay of nine months from the initial act complained of, five months from the termination of contract.

### **Employment status claim**

23. The claim for a declaration of employee status is struck out on the basis that it is not a claim within the jurisdiction of an employment tribunal. The employment tribunal can only decide the question of employee status where it is a necessary gateway to other types of claim for which jurisdiction is given to the tribunal by statute. The tribunal (unlike the County Court) has no standalone power to make the declaration sought.
24. Even if I were able to read the ET1 (#4 above) as a litigant in person's formulation of an application under s.11 ERA 1996, it would be brought out of time in accordance with s.11(4)(a). In light of my findings above, it was reasonably practicable for the claim to be brought in time, and the claim would be dismissed.

**Discrimination claim(s)**

25. The claimant said that in September 2019 the respondent brought legal proceedings against him in Estonia, which he claimed is referred to in his ET1 claim form under race discrimination. (The importance of this point arose in reply to Mr McPhail's submission that the only pleaded act of discrimination was issue of the contract in February 2019). He said that the Estonian proceedings, which remain in being, include reference to breach of confidentiality, and were issued in retaliation for receipt by the respondent of notification from Acas. He said that the discrimination claim may require amendment (indicated in Box 8.2 as a future possibility).
26. The claimant became agitated during the hearing when he was asked by the tribunal to say where in the ET1 he pleads an act of discrimination in September 2019. He asked the Judge to refer himself to the European Union. I said that any referral or complaint is a matter for Mr Apple, and that I was and am not aware of any self-referral power. The claimant also asked for a transcript of the hearing. I informed him that no transcripts were kept of employment tribunal proceedings.
27. Mr MacPhail rejected the suggestion by the claimant that there was an act of discrimination in the claim form that was pleaded to have taken place in September. He submitted that there is no such act of discrimination pleaded in the claim form.
28. The wording of Box 8.1 is set out in full above. The claimant does not express any dates for the Estonian claim against him, or expressly refer it to race, or set it out in Box 8.2, which is headed 'background and details of your claim.' It is in Box 8.1, which is headed, 'another type of claim which the ET can deal with.'
29. I agree with Mr McPhail. Taking this claim at its highest the tribunal finds that there is no act of race discrimination in September 2019 pleaded in the ET1 claim form. The tribunal does not consider it possible to read into Box 8.2 any act of discrimination taking place in September 2019. The only allegation of discrimination made in the ET1 relates to Estonian workers' employee status and the claimant being treated as a self-employed worker. Making every allowance for the claimant as a litigant in person, and not

reading the ET1 over legalistically, I find that there is no reference, express or implied, in the ET1 to an act of alleged discrimination in September 2019, or to an allegation that by issuing the Harju proceedings the respondent either discriminated against the claimant, or victimised him. I therefore find that the only claim of race discrimination before the tribunal was that set out at Box 8.1 above. I determine the limitation issue on that basis.

### **Respondent's submissions**

30. Mr MacPhail submitted that the claim for racial discrimination is based on Mr Apple not being given employee status. His primary submission was that the act complained of took place on 5 February 2019, when the contract was entered into. The claim form was presented on 12 December 2019. The three-month primary time limit therefore expired on 4 May 2019. Acas conciliation took place after expiry of primary limitation, and therefore without any application of 'stop the clock.' Mr MacPhail submitted that entering into a contract is a one-off act of discrimination with continuing consequences, rather than a series of separate acts and consequences, or a continuing act.
31. He submitted that the letter of 4 April 2019 is categorically a termination of the contract entered into on 5 February 2019. He referred to the heading and language of the letter, and submitted that there was nothing in the letter that detracts from unequivocal termination. The claimant's contention that the contract was continuing at date of this hearing was, he said, simply unsustainable in fact and law.
32. Even if (which is not expressly pleaded, and which the respondent denies) the termination of the contract was an act of discrimination, then the matter is still out of time. Termination took effect on 4 April 2019 and the time limit expired on 3 July 2019. That left the claim still five months out of time.
33. In the alternative, Mr MacPhail said as to the merits of the claim that the claim for race discrimination has no factual foundation. He says that the claimant makes a bare assertion that other people on the chart are Estonian and have received employment status in Estonia but he did not receive employment status in the UK. There is no "something more" to move the burden of proof. That assertion does not disclose a cause of action and should be struck out under rule 37, on the basis that it has no reasonable prospect of success. Alternatively, Mr McPhail relies upon the same grounds for a deposit order in that he says that if there is no reasonable prospect of success then there are little reasonable prospects of success.

### **Discussion**

34. I have set out above, under other headings, the claimant's submissions that the claim was in time because it included an allegation of discrimination in September 2019, and / or because it is just and equitable to extend time. The former point has been rejected for the reasons set out above.

35. When was the act of discrimination which has been pleaded, ie issue of the contract of February 2019? I agree with Mr McPhail that that was a single discrete act, with continuing consequences. It took place on 5 February 2019. It was the only act of race discrimination in the ET1, and therefore the only act of discrimination alleged before the tribunal.
36. The claimant relied on what he said was mistake and / or misleading advice given by Acas (who, he says, initially refused to enter into early conciliation with a company based in Estonia).
37. In some cases, mistake or delay by Acas may be good grounds to extend time on just and equitable grounds. However, in this case, the primary time limit had already expired by the time of contact with Acas. Mr Apple also showed familiarity with the legal process throughout 2019, as he issued his claims in the Barnet County Court between May and November 2019.
38. Even taking a liberal view of s.123 of the Equality Act, and of the difficulties of a litigant in person, the tribunal finds that the claimant has not made good any explanation for the delay both before and after the primary time limit of three months expired.
39. The claim is struck out on grounds that it has been presented significantly out of time and that it has not been shown that it is just and equitable to extend time.
40. The tribunal was invited to strike out on the alternative grounds that the claim has no reasonable prospect of success. It is not necessary for the tribunal to make that decision, or to consider a deposit order. It is however noted there is a clear explanation why the claimant was retained on a contract for services. That is because the respondent sought an entrepreneurial person to break into the UK market, where it had never before sold. It committed to an initial one year contract on what may well have been a speculative basis.

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Regional Employment Judge Foxwell

Signed on behalf of Employment  
Judge Loy pursuant to Rule 63

Date: ...3 March 2021 .....

Sent to the parties on:

.....3 March 2021 .....

For the Tribunal:

.....T Henry-Yeo.....