



## EMPLOYMENT TRIBUNALS

**Claimant**  
**Mr P Creane**

**Respondents**  
v (1) **ENGIE Regeneration Limited**  
**Proposed respondents**  
(2) **WW Scaffolding Limited**  
(3) **John Paul Walker-Smith**  
(4) **Tony Walker-Smith**

### OPEN PRELIMINARY HEARING

**Heard at:** London South

**On:** 6 March 2019

**Before:** Employment Judge Truscott QC

#### **Appearances:**

<b>For the Claimant:</b>	in person
<b>For the First Respondent:</b>	Ms J Bryan of Counsel
<b>For the Proposed Respondents</b>	Ms L Farris of Counsel

### JUDGMENT on PRELIMINARY HEARING

The claimant's application to amend his claim by adding the proposed second third and fourth respondents is refused.

### REASONS

#### **Preliminary**

1. This Preliminary Hearing was fixed in order to address the application made by the claimant to add the proposed Second, Third and Fourth Respondents.
2. The issue concerned only the claimant and the proposed respondents. The first respondent had no locus in these proceedings.
3. Ms Farris provided a skeleton argument and oral submissions. The claimant was unrepresented at the hearing and did not insist on the application, nonetheless the Tribunal considered whether or not it should be granted.

## Findings

4. The First Respondent is a housing and construction business that was acquired by Engie Regeneration Ltd. on 1 May 2017.

5. The Claimant was employed by it from around 2013 and he works as a Site Manager.

6. The Proposed Second Respondent is a scaffolding business that sub-contracts to the First Respondent from time-to-time **[WS/TWS para.3]**. The Proposed Third and Fourth Respondents are its Directors.

7. The Claimant issued proceedings against the First Respondent on 13 August 2017. He later submitted an email on 12 October 2017 setting out complaints of sexual harassment and whistleblowing. The Proposed Respondents were not made aware of this claim nor were they – or have they ever been – privy to the claim. They accessed the relevant pleadings from the Tribunal.

8. In a letter dated 25 June 2018, solicitors acting for the Claimant wrote to the London South Employment Tribunal applying to have the Proposed Respondents joined as Respondents to his claim. They wrote:

“WW and/or John Paul Walker-Smith and/or Tony Walker-Smith were engaged by Engie as contractors to carry out work on the Lairdale Estate Site in order to carry out scaffolding work from October 2016. The Claimant was Site Manager for the site. JWS and TWS are and were at all material times directors of WW.

During the time that the Claimant worked with WW on the site the Claimant claims that he was subjected to a systematic campaign of bullying and harassment by WW and/or JWS and/or TWS.

The respondents named above are liable for the discrimination and harassment claimed by the Claimant.”

This letter did not disclose the protected characteristic that is relied upon nor did it set out any particulars.

9. The Proposed Respondents objected to this application to add them to the claim in a letter dated 27 July 2018 arguing that they were not in any legal relationship with either the First Respondent that would entitle the Claimant to bring claims against them. In addition, that the claims were not sufficiently particularised.

10. The application to add the additional respondents was made by solicitors for the claimant by letter to the Employment Tribunal dated 20 August 2018 on the basis of allegations set out in paragraphs 6-10 in the amended grounds of complaint which narrate incidents from 24 February to 1 March 2017. The Amended Grounds of Complaint set out claims under ss. 13 and 26 EqA 2010 against the Proposed Respondents (Paragraph 27(a)-(k) and Paragraph 29).

11. Mr. Walker-Smith sets out in his witness statement the nature of the relationship between WW Scaffolding Ltd. and the First Respondent:

- a. WW Scaffolding is a sub-contractor of the First Respondent working on site engagements for them from time to time;
- b. WW Scaffolding secures work via a competitive tendering process and their success is dependent on price, and the overall contractor winning the work [WS/TWS para.4].
- c. They tender for work to the First Respondent against other competitors [WS/TWS para.5]. An example of a tender request letter is attached.
- d. Their work for the First Respondent accounts for approximately 10% of their overall business for the year. [WS/TWS para8].
- e. They are one of a number of sub-contractors who may be hired for any particular construction job alongside electricians, brick layers, plumbers and window fitters [WS/TWS para.9].

### Legal Principles

12. The Presidential Guidance – General Case Management makes clear at Paragraph 17 that:  
“Asking to add a party is an application to amend the claim. The Tribunal will have to consider the type of amendment sought.”

13. The usual principles on amendment apply (set out at Paragraph 5 of the Presidential Guidance), namely:

- a. The nature of the proposed amendment;
- b. The application of relevant time limits;
- c. The timing and manner of the application to amend.

### Agency

14. *Bowstead and Reynolds on Agency* defines agency [at 1-003] as:  
“The word “agency” to a common lawyer, refers in general to a branch of the law under which one person, the agent, may directly affect the legal relations of another person, the principal, as regards yet other persons, called third parties by acts which the agent is said to have the principal’s authority to perform on his behalf and which, when done are in some respects treated as the principal’s acts.”

15. In **Yearwood (& others) v Commissioner of Police for the Metropolis (and others)** UKEAT/0310/03 HHJ McMullen QC said [at para 37]:  
“The justification for the agent’s power is a unilateral manifestation by the principal of his or her willingness to have their legal position changed by the actions of the agent. The result of this manifestation is that the agent has the power to affect the principal’s legal relations.”

16. In **Kemeh v Ministry of Defence** [2014] EWCA Civ. 91 the Court of Appeal revisited the conclusion of the EAT in *Yearwood*. Lord Justice Elias said [at 38]:

“In fact, the authors of *Bowstead and Reynolds* (see para. 1-04) recognise that someone might quite properly be described as an agent even where this feature is missing (see para. 1-04). An example is someone who merely introduces or canvasses custom on behalf of the principal without in fact having the power to bind the principal contractually. An estate agent is a typical example”

17. However in relation to the facts of that particular case – concerning an employee of a contractor, Elias LJ concluded [at para. 40]:

“In my view, it cannot be appropriate to describe as an agent someone who is employed by a contractor simply on the grounds that he or she performs work for the benefit of a third-party employer. She is no more acting on behalf of the employer than his own employees are, and they would not typically be treated as agents.”

18. Where the individuals are not employees of a company but are Directors, the Employment Appeal Tribunal has held that in so far as they may undertake managerial duties as part of their authority as Directors they may be acting as its agent. The law goes no further than saying that a Director may be an agent of their own company when conducting certain duties. **Bungay v Saini and others** [2011] UKEAT/0331/10 at 31-32.

## Decision

19. There are no rights in relation to third-party acts of harassment since the repeal of s.40 EqA 2010.

20. The Proposed Second Respondent is not an employee or agent of the First Respondent. No employee of the Proposed Second Respondent is either an employee or agent of the First Respondent (**Kemeh**); and, to the extent that the Proposed Third and Fourth Respondent – as Directors - are in any position of agency, this is only in relation to the Proposed Second Respondent (**Bungay**).

21. The relationship between the First Respondent and the Proposed Second Respondent is that of contractor and sub-contractor. The Proposed Second Respondent is not authorised to “*affect legal relations*” on behalf of the First Respondent (**Yearwood**) or “*to introduce or canvass custom*” on their behalf in the manner of an estate agent (**Kemeh**).

22. The Claimant’s application to add the Proposed Respondents is an application to amend and was made a year after the expiration of the primary limitation period (if time is allowed for Early Conciliation, which did not take place in relation to them). Even if the Claimant had pursued early conciliation against the Proposed Respondents (which he has not) the latest date on which he could have brought proceedings against them is on 30 June 2017.

23. Putting his claim at its highest, the last incident relied upon took place on 1 March 2017 (Amended Claim, Paragraph 10). In a case of this nature, where the allegations concern remarks made orally and the veracity of evidence will depend on witness recollection, the Proposed Respondents will be very significantly disadvantaged by this claim. The Claimant’s amendment seeks to introduce claims

that are very significantly out of time. It is not just and equitable for the Tribunal to extend time to permit this application.

24. The Claimant's primary claim is against the First Respondent and if successful, he will be able to pursue remedies against them including for injury to feelings. None of the Proposed Respondents are employees or agents of the First Respondent within the meaning of ss. 109 or 110 EqA 2010.

25. In these circumstances, the application is refused.

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Employment Judge Truscott QC

Date 8 March 2019