# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms J Campbell**

**Respondents:** **(1) London Borough of Waltham Forest**
**(2) Ms A Jacobs**
**(3) Sellick Partnership Limited**
**(4) Danbro Employment Umbrella Limited**

**Heard at:** **East London Hearing Centre (by Cloud Video Platform)**

**On:** **4 November 2021 (without the parties) and 5 November 2021**

**Before:** **Employment Judge Gardiner**

**Representation**

Claimant: In person

Respondents: (1) and (2) Ms J Bann, solicitor
(3) Mr S Brochwicz-Lewinski, counsel
(4) Mr D Campion, counsel

# RESERVED JUDGMENT

**The judgment of the Tribunal is that:-**

1. **The claim against the Third Respondent is struck out under Rule 37 as having no reasonable prospect of success.**

2. **The complaint against the Fourth Respondent based on its alleged liability for acts carried out by the Third Respondent as agent is also struck out as having no reasonable prospect of success.**

3. **The complaint against the Fourth Respondent based on its potential liability as the Claimant's employer is not struck out.**

4. **The application that the claim against the Second Respondent should be struck out is refused.**

**5. The Second Respondent's application for an anonymity order is refused.**

# REASONS

1. Today's hearing has been listed to consider applications from the Respondents that the cases against the Second, Third and Fourth Respondent should be struck out pursuant to Rule 37 of the Employment Tribunal Rules 2013, or alternatively the subject of a deposit order. In addition, there is an application from the Second Respondent that a restricted reporting order should be made under Rule 50 of the 2013 Rules. The Final Hearing has been listed to take place over three days from 22 to 24 June 2022.

2. I have been provided with a bundle of relevant documents comprising 393 pages. In addition, I have been sent written submissions in the form of Skeleton Arguments from Ms Bann, solicitor for the First and Second Respondents, from Mr Brochwicz-Lewinski, counsel for the Third Respondent, and from Mr Campion, counsel for the Fourth Respondent. The Skeleton Arguments have referred to several cases setting out relevant principles in relation to the arguments raised on these applications.

3. The Claimant is a qualified barrister. From 17 December 2018, she was engaged by London Borough of Waltham Forest, the First Respondent, as a Contracts and Procurement Lawyer. In that role she had the status of a worker but was not an employee of the First Respondent. Since about July 2019, her line manager was Alexandra Jacobs, the Second Respondent. The Claimant was supplied to Waltham Forest by Sellick Partnership Limited, the Third Respondent, who also supplied Ms Jacobs to Waltham Forest. The Claimant was employed by Danbro Employment Umbrella Limited, the Fourth Respondent. The Fourth Respondent's only day to day involvement with the Claimant was in relation to administering the Claimant's remuneration and benefits through its umbrella payroll. The Fourth Respondent also employed Ms Jacobs.

4. The Claimant's case is that the conduct of Ms Jacobs towards her during the period from August 2019 until her dismissal in July 2020 amounts to direct and indirect race discrimination, harassment and discrimination by way of victimisation. On that basis, if the Claimant is correct, there would be personal liability on behalf of Ms Jacobs, the Second Respondent. The Claimant also alleges that there is liability for Ms Jacobs actions on the part of the First, Third and Fourth Respondents.

5. Proceedings were issued on 2 November 2020. On 22 December 2020, in its ET3, Waltham Forest accepted that it would be liable for any conduct by Ms Jacobs which was held to amount to unlawful discrimination.

6. In a document dated 28 May 2021, the Claimant has sought to explain why there should be liability on the part of the Third and Fourth Respondents. So far as the Third Respondent is concerned, the Claimant alleged:

   a. The Third Respondent is liable under Section 109(2) Equality Act 2010 on the basis that the Second Respondent is an agency worker with the Third Respondent;

   b. The Third Respondent is liable under Section 111 on the basis that "the Third Respondent acted together with the First and/or the Second Respondent and/or caused and/or induced (directly or indirectly) and/or instructed the First and/or the Second Respondent to terminate the Claimant's contract. It is said that the Third Respondent had direct knowledge of the details of the sequence of events said to amount to discrimination and harassment between 6 July 2020 and 15 July 2020; and in particular their detailed knowledge of the email sent by the Claimant to the First Respondent on 12 July 2020".

   c. The Third Respondent is said to have liability under Section 41(1)(d) and 41(3(d) Equality Act 2010, on the basis that as principal, the Third Respondent is liable for the actions of its agent, Ms Jacob.

   d. Finally the Third Respondent is said to be liable under Section 55(2)(d) and 55(5)(d) of the Equality Act 2010 as Employment Services Providers.

7. The Claimant argues that the Fourth Respondent is liable as the employer of the Second Respondent under Section 109(1) EqA 2010, unless it can succeed in relying on the statutory defence. In the alternative, the Claimant argues that the Fourth Respondent is liable under Section 109(2) EqA 2010 for the actions of the Second Respondent as its agent.

8. The relevant principles to apply where there is an application to strike out a claim at a Preliminary Hearing were recently summarised by the President, Mr Justice Choudhary, in the case of *Malik v Birmingham City Council* UKEAT/0027/19 as follows:

   > "30. It is well-established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases: see *Anyanwu & Another v South Bank University and South Bank Student Union [2001] ICR 391* . The applicable principles were summarised more recently by the Court of Appeal in the case of *Mechkarov v Citibank N.A [2016] ICR 1121* , which is referred to in one of the cases before me, *HMRC v Mabaso* UKEAT/0143/17.
   >
   > 31. In *Mechkarov* , it was said that the proper approach to be taken in a strike out application in a discrimination case is that:
   >
   > (1) only in the clearest case should a discrimination claim be struck out;

> (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
> (3) the Claimant's case must ordinarily be taken at its highest;
> (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and
> (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."
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> 32. Of course, that is not to say that these cases mean that there is an absolute bar on the striking out of such claims. In *Community Law Clinics Solicitors Ltd & Ors v Methuen* UKEAT/0024/11, it was stated that in appropriate cases, claims should be struck out and that " *the time and resources of the ETs ought not be taken up by having to hear evidence in cases that are bound to fail."*
>
> 33. A similar point was made in the case of *ABN Amro Management Services Ltd & Anor v Hogben* UKEAT/0266/09, where it was stated that, " *If a case has indeed no reasonable prospect of success, it ought to be struck out".* It should not be necessary to add that any decision to strike out needs to be compliant with the principles in *Meek v City of Birmingham District Council [1987] IRLR 250 CA* and should adequately explain to the affected party why their claims were or were not struck out."

9. The leading case on whether it is appropriate to make a deposit order remains *Van Rensberg v Royal Borough of Kingston-Upon-Thames* UKEAT/0095/07. At paragraph 27, Elias J said as follows:

> "27. Moreover, the test of little prospect of success in rule 20(1) is plainly not as rigorous as the test that the claim has no reasonable prospect of success found in rule 18(7). It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."

## Conclusions

### *Liability of the Second Respondent*

10. The First and Second Respondents accept that the Claimant has a legal right to bring a claim against the Second Respondent. The strike out application is not premised on the basis that the claim has no prospect of success. The contention from the First and Second Respondents is that there is no practical or legal advantage in doing so, because the First Respondent has accepted legal liability for the actions of the Second Respondent.

11. If the Claimant makes good her case in relation to the conduct of the Second Respondent, she will establish that there is personal liability on the part of the Second Respondent. This personal liability remains, notwithstanding that the First

Respondent accepts it is liable for the actions of the Second Respondent. There would be joint and several liability on the part of the First and Second Respondents. If statute provides the Claimant with potential recourse against either the First or the Second Respondents or both, then it cannot be the case that pursuing a claim against both parties is unreasonable and/or vexatious conduct.

***Liability of the Third Respondent***

*(a) Liability in negligence*

12. It is clear from pages 92 and 98 of the bundle, that negligence is the primary basis on which the Claimant argues that the Third Respondent is liable to the Claimant. The same points are made on pages 245, 347 and 348. The Claimant argues that the Third Respondent knew of the manner in which Ms Jacobs was treating her yet failed to address the situation by failing to remove and thereby permitted Ms Jacobs to discriminate against her. As the Claimant puts it: "*Sellick is therefore negligent and failed in its duty of care*."

13. The Tribunal does not have jurisdiction to consider claims brought in negligence. It only has jurisdiction to consider claims to which it has been given specific jurisdiction by statute. Therefore, even if the Third Respondent knew of the Second Respondent's alleged conduct towards the Claimant and was negligent in failing to stop it, this does not provide the Claimant with a potential cause of action in the Employment Tribunal. Insofar as the Claimant is still advancing a case in negligence (given that no such case is included in the document dated 28 May 2021), that particular complaint is struck out as having no reasonable prospect of success.

*(b) Liability as Ms Jacobs' 'employer'*

14. At one point, the Claimant had been contending that the Third Respondent was vicariously liable for Ms Jacobs' conduct; or alternatively had been contending that Ms Jacobs was the Third Respondent's employee or worker. Those contentions were withdrawn on pages 7 and 9 of the Claimant's 18 pages of submissions dated 19 March 2021 [348] [350].

15. The withdrawal of the Claimant's case against the Third Respondent on the basis that the Third Respondent was Ms Jacobs' employer was noted in the Preliminary Hearing record (at paragraph 7) [384].

*(c) Liability as principal for actions of Ms Jacobs as agent*

16. Section 109(2) of the Equality Act 2010 is worded as follows:

> Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

17. At the same point the Claimant accepted that the Third Respondent was not Ms Jacobs' employer, the Claimant also withdrew her claim based on principal and agent under Section 109(2). This was made in clear in paragraphs 38, 44 and 46 of the Claimant's 18 pages of submissions dated 19 March 2021 [349-350].

18. Following the Preliminary Hearing before Judge Reid, the Claimant sought to revive her Section 109 claim against the Third Respondent based on principal/agent in her submission dated 28 May 2021 [392]. This was in a document purporting to set out the basis of the Claimant's case against the Third Respondent as directed by Employment Judge Reid at paragraph 23 of her Case Management Order.

19. Rule 51 of the Employment Tribunal Rules 2013 is in the following terms:

> "Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order."

20. In *Khan v Heyward and Middleton Primary Care Trust* [2007] ICR 24, the Court of Appeal made it clear that once a claim has been withdrawn, the Tribunal has no power to set aside the withdrawal so as to reactivate the same claim (see in particular paragraph 74). Therefore, the claim against the Third Respondent based on it being liable as principal for the actions of its agent Ms Jacobs cannot be reactivated.

21. In any event, no sufficient factual basis has been alleged to raise an arguable case that Ms Jacobs was acting as the Third Respondent's agent when line managing the Claimant in their work for the First Respondent. In *Ministry of Defence v Kemeh* [2014] ICR 625, CA, Elias LJ said this at paragraph 43:

> "I would respectfully agree that the fact that someone is employed by A would not automatically prevent him from being an agent of B, and I would not discount the possibility that the two relationships can co-exist even in relation to the same transaction. But in my judgment there would, particularly in the latter case, need to be very cogent evidence to show that the duties which an employee was obliged to do as the employee of A were also being performed as an agent of B. It is in general difficult to see why B would either want or need to enter into the agency relationship. That is so whichever concept of agency is employed. There is a complete lack of such cogent evidence here." (emphasis added)

22. At the relevant time, Ms Jacobs was employed by the Fourth Respondent and working under the direction of the First Respondent – such that the First Respondent is vicariously liable for her actions. Having been introduced to the First Respondent by the Third Respondent, there is no evidential material advanced by the Claimant for arguing that Ms Jacobs was also acting as agent for the Third Respondent. It is insufficient in law for the Claimant to assert (as she appears to do at [392]) that because she was an Agency worker supplied by the Third

Respondent she was thereafter the agent of that entity at all times within the meaning of Section 110(2).

23. Therefore, notwithstanding the exceptional nature of the strike out jurisdiction in discrimination cases, I would have struck out this claim as disclosing no reasonable even if it had not been withdrawn.

*(d) Liability for instructing, causing or inducing the First Respondent to discriminate against the Claimant in the termination of the placement*

24. The Claimant speculates that the Third Respondent is liable under Section 111 Equality Act 2010, namely that the Third Respondent instructed, caused or induced the First Respondent to discriminate against the Claimant in the termination of her placement. This contention is inherently implausible. It amounts to saying that the Third Respondent was the real decision maker, deciding which personnel the First Respondent needed and when. There is no evidence whatsoever advanced by the Claimant to support this, beyond the mere assertion that the Third Respondent was the prime mover behind this decision. No motive for such close involvement in the Claimant's termination has been identified.

25. To frame the Claimant's case against the Third Respondent in this way now is inconsistent with the way that the Claimant has previously explained its case against the Third Respondent. In particular it is inconsistent with her reasoning set out in the 65-page document (starting at [75]) dated 1 January 2021, which includes a detailed explanation with supporting evidence for her opposition to the Third Respondent being removed from the proceedings:

    a. She does not allege that the Third Respondent took part in the decision to dismiss her, whether directly or indirectly;

    b. Nor despite copious citation of email correspondence, does the Claimant identify a particular document which she will point to in support of her claim;

    c. Rather, in contrast to this aspect of her claim, at paragraph (k) [98] the Claimant alleges that the Third Respondent "failed and/or omitted to remove me from the situation … in failing to act, they have permitted and/or allowed Alexandra Jacobs to discriminate against me directly and/or indirectly and/or harass me for a protracted length of time and which then led to the series of acts and/or final act of my termination. Sellick is therefore Negligent and failed in its duty of care";

    d. Further, at paragraph (l), the Claimant alleges that "Sellick knew or ought to have known Alexandra Jacobs … and/or the Council's intent to terminate my contract prior to and/or at the date of termination. Nonetheless Sellick failed and/or omitted to intervene and/or protect my position despite their clear knowledge";

26. The Claimant attempts to explain why the Third Respondent is liable under Section 111 Equality Act 2010 in the document dated 2 March 2021 which starts at [238]. The potential basis for liability is introduced at paragraph 14 [251] and further explained from paragraph 25 onwards [261]. At [266], the Claimant contends that because the Third Respondent knew of the difficulties in her working relationship with Alexandra Jacobs, they must have acted together with the First Respondent to cause and/or induce and/instruct the termination of the Claimant's placement. None of the documents to which the Claimant refers support such an evidential leap.

27. Under the Order made by Judge Reid on 1 April 2021, disclosure was due to take place by 1 September 2021. I was not directed to any further documents arising from disclosure from which the Claimant will argue or infer that the First Respondent instructed, caused or induced the First Respondent to discriminate against the Claimant in the termination of her placement.

28. Therefore, I consider that this is one of those "clearest cases" identified in the legal authorities referred to above where it would be appropriate to strike out this basis for potential liability on the part of the Third Respondent on the ground that it has no reasonable prospect of success.

*(e)* *Liability of employment service provider in the provision of its service*

29. The Claimant alleges that the Third Respondent is liable to the Claimant for providing its services in a discriminatory way. The Claimant explained why this was added at paragraphs 50 and 51 of the document dated 19 March 2021 [355] "At paragraph 7 of the 3rd Respondent's proposed amended grounds of resistance, they avers and contends that they would fall within sections 55 and 56 of the Equality Act 2010. As it relates to this assertion, the Tribunal will need to make a decision regarding this point, and as such I cannot either accept or deny this assertion. However, as a result of their submission at paragraph 7 … I submit that in addition and/or alternatively, it is contended that the 3rd Respondent would be liable under s55(2)(d) and 55(5)(d) of the Equality Act 2010". It is therefore a responsive allegation made in response to the contents of the Third Respondent's proposed amended Response, rather than an allegation initiated by the Claimant.

30. So far as is material, section 55 of the Equality Act 2010 is worded as follows:

> (1) A person (an "employment service-provider") concerned with the provision of an employment service must not discriminate against a person—
>
> (a) in the arrangements the service-provider makes for selecting persons to whom to provide, or to whom to offer to provide, the service;
>
> (b) as to the terms on which the service-provider offers to provide the service to the person;
>
> (c) by not offering to provide the service to the person.
>
> (2) An employment service-provider (A) must not, in relation to the provision of an employment service, discriminate against a person (B)—

(a) as to the terms on which A provides the service to B;

(b) by not providing the service to B;

(c) by terminating the provision of the service to B;

(d) by subjecting B to any other detriment.

…

(5) An employment service-provider (A) must not, in relation to the provision of an employment service, victimise a person (B)—

(a) as to the terms on which A provides the service to B;

(b) by not providing the service to B;

(c) by terminating the provision of the service to B;

(d) by subjecting B to any other detriment.

31. The focus of this statutory section is on actions taken by the service-provider *in the provision of its service*. This is clear from the statutory definition of "the provision of an employment service" in Section 56 Equality Act 2010. This is wholly different from the way in which a worker supplied by an employment service provider carries out their day-to-day duties under the authority of the end user – here the First Respondent. As correctly stated by the Third Respondent in its Response [336 para 69(c)], the Claimant's claim relates to matters within the Legal Team at the First Respondent and not to the provision of recruitment services carried out by the Third Respondent. There is no allegation advanced and explained of a discriminatory provision of employment services by the Third Respondent – either in the original claim or in the lengthy document starting at [75] explaining the basis for holding the Third Respondent liable.

32. Therefore, this complaint is another instance of a "clearest case" where it is appropriate to strike out the complaint out as having no reasonable prospect of success.

*(f)* *Liability under Section 41 Equality Act 2010*

33. The Claimant seeks to argue that the Third Respondent was liable under Section 41 Equality Act 2010. So far as is relevant, this section is worded as follows:

**Contract workers**

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

(a) as to the terms on which the principal allows the worker to do the work;

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

(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

(d) by subjecting the worker to any other detriment.

…

> (5) A "principal" is a person who makes work available for an individual who is—
>
> (a) employed by another person, and
>
> (b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).
>
> (6) "Contract work" is work such as is mentioned in subsection (5).
>
> (7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

34. In accordance with the definitions in this section, and on the pleaded facts of the present case:

    a. Both the Claimant and Ms Jacobs are the "contract worker" (in accordance with sub-section (7));
    b. The First Respondent is the "principal" to whom the Claimant and Ms Jacobs have been supplied, making the work available to Ms Jacobs and the Claimant as contract worker (in accordance with sub-section (5));

35. Given this statutory wording, there is no basis in law for the Tribunal to find that the Third Respondent was also acting as principal under Section 41 Equality Act 2010. Such a conclusion would extend the potential liability of the Third Respondent beyond the specific scope set out in Section 55 for employment service providers.

36. Therefore, this final alleged basis for the Third Respondent's liability does not turn on disputed oral evidence, but on statutory construction. The Claimant's construction is not reasonably arguable. Therefore, the Claimant has no reasonable prospect of success, and this complaint should also be struck out.

37. My conclusion is that all complaints advanced against the Third Respondent should be struck out under Rule 37 as complaints which have no reasonable prospect of success.

***Liability of the Fourth Respondent***

38. Throughout the period covered by the Claimant's allegations, Ms Jacobs was employed by the Fourth Respondent, even though she was working at the First Respondent council. In those circumstances, Section 109(1) Equality Act 2010 applies:

> "Anything done by a person (A) in the course of A's employment must be treated as also done by the employer."

39. The effect of this Section, without more, is that the Fourth Respondent is liable for any discrimination on the part of Ms Jacobs. Section 109(4) provides a limited statutory defence, namely "In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a

defence for B to show that B took all reasonable steps to prevent A from doing that thin or from doing anything of that description".

40. In its ET3, the Fourth Respondent does not specifically rely on this statutory defence. All that is said is that it was not aware of the allegations contained in the Claimant's claim until 30 July 2020, after the date on which the contract had terminated. It states that it did not exercise any supervision, direction or control over the Claimant. That does not amount to a basis for finding that the statutory defence is very likely to be established; such that the Fourth Respondent is very unlikely to be liable for any proven discrimination on the part of Ms Jacobs.

41. In its Skeleton Argument, the Fourth Respondent seeks to argue that in accepting liability for any discrimination on the part of the Second Respondent, the First Respondent "effectively released the Fourth Respondent from responsibility that it would otherwise have had for R2s acts and omissions under Section 109(1) EA 2010" (paragraph 13). This proposition is said to be derived from *Duck v Mayeu* [1892] 2 QB 511 (CA). Self-evidently, given its vintage, this case is not an authority as to the implications of a concession as to vicarious liability from one potentially liable party on the liability of a different party under the Equality Act 2010.

42. I am not persuaded that the decision to continue the case against the Fourth Respondent, being a case that has a proper legal basis, is an unreasonable one. It is legally irrelevant that the award of compensation will not be higher as a result of the continued participation of the Fourth Respondent.

43. In those circumstances, the claim must remain against the Fourth Respondent. There is no basis for striking it out on the basis that it is a claim with no reasonable prospect of success or of making a deposit order on the basis that there is little reasonable prospect of success.

44. The alternative basis on which the Claimant seeks to make the Fourth Respondent liable is under Section 109(2) Equality Act 2010, on the basis that the Fourth Respondent is responsible for the actions of the Third Respondent as its agent. No facts are alleged to support such a contention, beyond the Third Respondent's status as an employment agency and the Fourth Respondent's status as the Claimant's employer. As I have found that the claim against the Third Respondent should be struck out as having no reasonable prospect of success, this particular basis of complaint against the Fourth Respondent should also be struck out. It assumes that there is liability on the part of the Third Respondent.

***Application for an anonymity order under Rule 50***

45. So far as the application made under Rule 50 is concerned, this application has already been considered and determined by Employment Judge Reid at the Preliminary Hearing held on 7 April 2021. Judge Reid was not persuaded it would be appropriate to make an anonymisation order in relation to the Second Respondent's name, for the Reasons given at paragraphs 13 to 22 of the

Preliminary Hearing record [385-386]. There are no new circumstances that makes it appropriate to revisit the conclusion reached by Judge Reid.

***Conclusion***

46. The parties that remain part of these proceedings should co-operate to ensure that there is an agreed List of Issues in a final form that enables the Tribunal Panel conducting the Final Hearing to fully understand each of the issues to be decided. If this cannot be achieved, then the parties are to refer the matter back to Employment Judge Gardiner as a matter of urgency. If any further directions are sought then an application should also be made on the papers to Employment Judge Gardiner.

**Employment Judge Gardiner**

**31 December 2021**