Neutral Citation Number: [2024] EAT 154

Case No: EA-2023-001193-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26 September 2024

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

MS SAMEENA BASHIR

Appellant

- and –

(1) THE LONDON BOROUGH OF BARKING & DAGENHAM
(2) THREE ANGEL HEALTH CARE LTD
(3) MR ARZUMAND SABIK
(4) MR GODWIN IBEAWUCHI

Respondents

- -
- -

The Appellant appeared in person
David Green (instructed by The London Borough of Barking & Dagenham - Legal Services) for the **1st Respondent**
Craig Johnson, (Employment Consultant) for **2nd and 3rd Respondents**
The 4th Respondent appeared in person

Hearing date: 10 September 2024

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JUDGMENT

SUMMARY

Practice and Procedure, Sex Discrimination, Agency Worker

The Employment Tribunal erred in law in striking out Equality Act and Agency Worker Regulation complaints.

HIS HONOUR JUDGE JAMES TAYLER:

1. This is an appeal against a judgment of Employment Judge R S Drake, after a Preliminary Hearing on 4 July 2023, dismissing the claimant's complaints. The judgment was dated 6 July 2023.

The Complaints

2. The Claimant submitted a claim to the Employment Tribunal that was received on 6 August 2022. In the claim form the Claimant described the types of complaints that she was seeking to bring:

> THE CLAIM
>
> **The Agency Workers Regulations** (AWR)
>
> The Claimant has the right that once she has worked on the same assignment at the same hiring organisation for 12 weeks, the '12-week minimum qualifying period' under the law and Regulation 5, she will **have the right to equal pay as direct teaching employees of the hiring agency**. In the case of the Claimant the hiring agency was the local authority at Barking and Dagenham and her pay entitlement would be based upon Teacher's Pay and Conditions.
>
> **From the start of her employment, the Claimant had the right to a minimum of 5.6 weeks' holiday entitlement**. The Claimant also had this right after the '12-week minimum qualifying period'.
>
> Discrimination
>
> From the start of her employment, the Claimant had protection against discrimination based upon her race. The hirer was also responsible for the actions of all those whom they had employed and third parties who discriminated against the Claimant.
>
> Bullying, Harassment & Victimisation
>
> At all times during her employment, the hirer was responsible for protecting the Claimant against all forms of bullying and had a duty to take action against such conduct when it was reported to them.
>
> Harassment is unlawful under the Equality Act 2010. The hirer had a responsibility to protect the Claimant against all acts of sexual harassment once such acts were reported to them.
>
> Under the Equality Act, the Claimant had the right not to be treated badly because she had done a "protected act"; or it was believed that she had done or was about to do a "protected act". The Claimant was also protected from Victimisation after she had raised serious concerns about health and safety.
>
> Automatic Unfair Dismissal/Protected Disclosures After having made a number of qualifying disclosures, the Claimant was protected by law from unfair treatment, including dismissal.

The arrangements under which the Claimant provided services

3. In its response, the 1st Respondent set out the arrangement under which the Claimant provided her services:

> 1. This response is entered on behalf of the 1st Respondent, the Education Health Care Team, a department within the London Borough of Barking and Dagenham.
>
> 2. The 2nd, 3rd and 4th Respondents are separately represented, and this response is not being entered on their behalf.
>
> 3. **The 1st Respondent, the Education Health Care Team (EHCT) within the London Borough of Barking and Dagenham**, **is responsible for coordination of statutory education, health and care needs assessments** for children and young people 0-25 years old, and maintaining and reviewing education, health and care (EHC) plans issued following completion. The Local Authority is responsible for providing children with Special Educational needs both Social Care and an access to an Education.
>
> 4. **The 2nd Respondent, Three Angel Healthcare Ltd, is a private limited company, they provide a Domiciliary Service**, which offers Person centred Quality support to a wide client group, from ages 5+. The service they provided to the Council is that they provided carers for Child A.
>
> 5. **The 3rd and 4th Respondents are employees of the Three Angel Care** (the 2nd Respondent).
>
> 6. **The Local Authority has a duty to provide Child A with both social work support, and an access to an Education**.
>
> 7. **Child A, is a child with Special Educational Needs who attended a Day Centre called Lilliputs**. **The 1st Respondent commissioned the 2nd Respondent, Three Angel Care to provide Carers to care for Child A at the Day Centre. The 3rd and 4th Respondents are the Carers that cared for Child A.**
>
> 8. **To support Child A's Educational needs, the 1st Respondent requested a Tutor (via an Agency) to work with Child A, at Lilliputs Day Centre. The Agency was Remedy Education, the Remedy Recruitment Group and the 1st Respondent was the hirer.** In the absence of further information, the 1st Respondent understands that the Claimants Employer was EPayMe, the Third Party Employer chosen by the Claimant for her work through Remedy Recruitment Group. The Claimant was paid through EPayMe and they processed all her payroll.
>
> 9. **Child A's support was as follows. The care function was provided by Three Angel Care and the carers, and the Educational function was provided by the Tutor, (the Claimant) who all worked closely together at the Lilliputs Day Centre, to support Child A.**
>
> 10. The Claimant's Employer has not been named as a Respondent and will have

> liability to the Claimant as her Employer. The 1st Respondent was the hirer. The Claimant worked as a Tutor for Child A, at Lilliputs Day Centre, supplied by the Remedy Education Agency. **The 1st Respondent will request a Preliminary Hearing to consider whether the Claimants Employer should be named as a Respondent.** [emphasis added]

4. Thus, it was the 1st Respondent's case that:

   4.1. the 1st Respondent is a Local Authority

   4.2. the 1st Respondent had a statutory obligation to provide education and care for Child A

   4.3. the 1st Respondent discharged its responsibility to provide education by contracting with an agency, "Remedy", who provided the Claimant to carry out the educational services, and was paid through a payroll company

   4.4. the 1st Respondent discharged its responsibility to provide care by contracting with another agency, the 2nd Respondent, "Three Angel Health Care", who provided the 3rd and 4th Respondents to carry out the care services

Identifying the issues and fixing a Preliminary Hearing

5. All respondents denied the claimant's complaints on jurisdictional grounds, including contending that they were submitted out of time.

6. A Preliminary Hearing took place before Employment Judge J S Burns on 6 February 2023. Employment Judge Burns described the issues as follows:

> **Agency Workers Regulations 2010 Regulation 5 against R1 as a hirer**.
>
> **Direct Race discrimination** - section 13 EA 2010 (against R1 and R2)
>
> Claimant describes her race as Pakistani.
>
> **Z The alleged less favourable treatment is that when she complained about R4 to R1/R2 they dismissed her complaints and sided with R4 because R4 and Child A were both from Nigerian backgrounds**
>
> **Sexual Harassment** - section 26 EA 2010 (against all Respondents)
>
> **The alleged unwanted conduct was**
>
> - continual remarks by R4 about Child A having an erection

- unwanted comments by R4 about C's appearance
- R4 asking C out and embarrassing her
- R4 pretending that he was going to lock her in a kitchen
- R3 taking R4's part and laughing and supporting him in his harassment of C

Victimisation - section 27 EA 2010 - against R1/R2 only

C claims she made a protected act by complaining about R4's sexual harassment whereupon she suffered the detriment of being dismissed

Automatic Unfair dismissal section 103A ERA 1996 - R1/R2 only

C claims she made several protected disclosures - raising health and safety matters - for example being stabbed in eye and complaining about being moved to another part of the venue - and that her agency Remedy Education raised several H and S issues on her behalf also, which PDs were the cause or principal cause of her dismissal by R1/R2. [emphasis added]

7. Employment Judge Burns fixed a Preliminary Hearing:

> 1. There will be an Open Preliminary Hearing starting at 10am on 4/7/2023 for one day by CVP **to consider whether the claims against the Respondents or any of them should be struck out under Rule 37** on the grounds that they are **outside the jurisdiction of the Tribunal** or o**therwise have no reasonable prospect of success** and/or whether a Deposit Order or Orders should be made under Rule 39. The jurisdictional issues **may entail consideration whether** (i) **R1 was a hirer** of the Claimant for purposes of the Agency Workers Regulations 2010 (ii) **whether the Claimant was an employee of R1 or R2** for purposes of the section 103A ERA 1996 claim (iii) whether for purposes of the Equality Act 2010 claims, **C was employed by R1 or R2 under section 83 EA 2010**; whether **R1 or R2 were the agent or principal of the other Respondents under section 109**; and **whether R3 and or R4 were employees or agents of R1 and or R2 under section 110**. [emphasis added]

8. On the face of it the direction was for a Preliminary Hearing to consider strike out of the complaints and/or making a deposit order. For some reason it appears to have been thought that the claimant was asserting that she was an employee of either the 1st Respondent or 2nd Respondent, whereas it seems clear that she asserted that she was an agency worker hired by the 1st Respondent.

The Judgment

9. Employment Judge Drake's judgement was in the following terms:

> 1. **The claims under the Equality Act 2010 ("EqA") in respect of events before 1 March 2022 are out of time and the Tribunal finds they were not presented within such further period of time as is just and equitable. Therefore, they are dismissed**.
>
> 2. **The claim in respect of an event occurring on 2 March 2022 (allegedly**

> **committed by R4 alone) is potentially in time**, but it is **separate and distinct from preceding events, and therefore it is not found to be part of a course of conduct capable of being aggregated with the preceding complaints**. Moreover, **when seen alone it is struck out under Rule 37 as having no reasonable prospect of success**.
>
> 3. **The claim of automatically unfair dismissal under Section 103A** of the Employment Rights Act 1996 as amended ("ERA"), being a detriment the Claimant asserts was because the Claimant had made what she alleges was a protected disclosure as defined by Sections 43A to 43C ERA, **is also out of time** and the Claimant has not shown for the purposes of Section 111 ERA that it was not reasonably practicable to present her claim in time nor that she presented it within a time the Tribunal can find reasonable. **It is therefore struck out and dismissed**.

10. The judgment suggests that the time point in respect most of the **Equality Act 2010** ("EQA") complaints may have been determined as a matter of substance, the **EQA** complaint in respect an event on 2 March 2022 was struck out as having no reasonable prospects of success and that the **Employment Rights Act 1996** ("**ERA**") was struck out because of the time point.

11. The conclusion in the written reasons suggests that all complaints were, in fact, struck out:

> 20. Accordingly, I conclude that –
>
> 20.1 The claims as against R1 and R2 **must be struck out as having no reasonable prospect of success**.
>
> 20.2 The claims as against all Respondents **must be struck out as out of time and in my judgment, they have no reasonable prospect of success**.

12. A time point may be determined as a matter of substance as a preliminary issue or be struck out on the basis that there is no reasonable prospect of the complaint being within time. These are different things: see **E v X, L, ZL v X, Z, E** UKEAT/0079/20/RN. When fixing the Preliminary Hearing Employment Judge Burns stated it was to determine an application for the claims to be struck out pursuant to Rule 37 of the **Employment Tribunal Rules 2013** ("**ETR**") which permit a claim to be struck out because it has no reasonable prospects of success. A preliminary issue would be determined pursuant to Rule 53 **ETR** as a matter of substance.

13. The approach Employment Judge Drake adopted to the analysis of evidence also suggests that he was considering strike out:

> 8.4 I emphasise that my conclusions are based upon my reading of the Claimant's ET1 Grounds of Complaint specifically and not on any forensic or similar testing

> of the merits of any substantive issues' evidence as such, as I do not have power to do so

The Agency Worker Complaint

14. The judgment did not specifically refer to the agency worker complaint in analysing the complaints, but dismissed all complaints. The claimant brought a complaint pursuant to Regulation 5 of the **Agency Workers Regulations 2010** ("**AWR**") which entitles an agency worker after 12 weeks to the same basic working and employment conditions as a direct employee relating to pay; the duration of working time; night work; rest periods; rest breaks; and annual leave.

15. Regulation 18(4) **AWR** provides the time limit:

> (4) Subject to paragraph (5), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning— (a) in the case of an alleged infringement of a right conferred by regulation 5, 12 or 17(2)[…]2, with the date of the infringement, detriment or breach to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the infringement, detriment or breach, the last of them;

16. The last payment to the claimant was made on 13 March 2021. The 1st Respondent accepted that the complaints under the **AWR** are within time as the last alleged infringement was within time.

The Employment Rights Act Complaint

17. The Employment Tribunal incorrectly referred to a claim of automatic unfair dismissal on the ground that the claimant made protected disclosures. The 1st Respondent accepts that the correct analysis was that the claimant was an agency worker for the purposes of section 43K **ERA**. The time limit for such a claim is "three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them" or "within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months". The time limit is, in effect, the same as would apply were the claim for unfair dismissal. Accordingly, the mischaracterisation of the complaint is not of significance in respect of the **ERA** time point.

18. The grounds of appeal do not challenge the dismissal of the **ERA** complaint as out of time. It

appears from the judgment that the claimant did not assert an arguable basis for an extension of time on the basis that it was not reasonably practicable to submit the **ERA** claim within the primary three month time limit. Accordingly, the dismissal of the **ERA** complaint remains in force.

Equality Act Complaints

19. The Claimant relied on a last act being an email sent by the 4th Respondent. There is a suggestion in the grounds of appeal that she and the 4th Respondent were employees of the 1st Respondent. That contention is unarguable. As Mr Green noted it is, however, arguable that both the Claimant and the 4th Respondent were agency workers of 1st Respondent for the purposes of section 41 **ERA**, but that does not provide a basis for the claimant to rely on an act allegedly done by the 4th Respondent in a claim against the 1st Respondent unless the 4th Respondent was an agent of the 1st Respondent pursuant to the provisions of section 109 **EQA**, which provide:

> 109 Liability of employers and principals
>
> (1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
>
> (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
>
> (3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

20. The Claimant challenges the approach of the Employment Tribunal to the agency issue by ground 3 of the grounds of appeal.

21. The Employment Tribunal directed itself as follows:

> 12.8 With regard to the question of whether R1 and R2 were liable as principals for the actions of R3 and R4, I noted the Court of Appeal decision in *Kemeh v Ministry of Defence* [2014] EWCA Civ 91 as explained by Mr Pacey. I note the detailed examination of the common law of Agency when applied in Employment contexts. Para 32 was specifically referred to me which reviews the law of Agency as quoted from the leading legal academic work "Bowstead & Reynolds on Agency" which I will not repeat here but which I paraphrase for ease of reference as saying that (though their Lordships and the EAT before them were referring to a Section in the relevant statute law at the time but which is now reproduced without change in Section 109 EqA) the definition of "anything done by an agent for a principal, with the authority of the principal" does not extend to parties as between whom the accepted common law defined relationship of "Agency" does not exist. I deal with this in paragraph 13.3 below.

22. The analysis of the Employment Tribunal at paragraph 13.3 to 13.5 was:

> 13.3 The one matter of complaint occurring later than 1 March (i.e. on 2 March 2022) was an alleged act of harassment by R4; It was not an act which the Claimant says was perpetrated directly by R1 or R2, **but she asserts that they were vicariously liable for it under Section 110 and by virtue of the hirer relationship and the effect of Regulation 14 AWR; This requires consideration of AWR and I conclude as follows**:-
>
> 13.3.1 In the pleadings the most the Claimant says of R1 (P18 – para 5) is that it was the end user of her services, that it was the ultimate source of R3 and R4's pay and that and it was thus a hirer; I can see why she says so and I agree;
>
> 13.3.2 The Claimant assumes from this however that this shows she had rights under AWR as against R1, which is an argument I can understand but those rights are limited as indicated above in para 11 i.e., as to terms and conditions enjoyed as if she were an employee, not as to the fixing of vicarious liability. Liability for the acts of others is limited to acts of breach of provision of employment terms; It is not expressly extended to create vicarious liability under Regulation 14. This latter limits liability fixed upon a hirer to matters for which it is actually, not assumed to be, responsible - from which I infer that what is meant is "direct" not "indirect" or "vicarious responsibility"; If the hand of direct control of R3 and/or R4 is with R2, then it cannot be said R1 is "responsible"; the fact that the indirect source of payment of R3 and R4 is ultimately R1, does not in law make R1 "responsible" for the acts of R3 and R4 – to do so would stretch the bounds of the existing common law concept of vicarious liability, and such degree of stretch is not specifically provided for in AWR itself; The Regs would have said so if that was what the statutory draftsman and Parliament intended;
>
> 13.3.3 **The Claimant serially pleads the existence of an intervening party between R1 and her** – (inter alia by way of example P18 paras 6, 7, and 8 refer); **She does not plead a direct relationship with R1 as employer save as hirer under AWR but I see and conclude that she misinterprets the extent of liability she assumes exists**;
>
> 13.3.4 **The Claimant serially pleads that not R1` but R2 engaged R3 and R4** – (inter alia by way of example again P18 para 5, P20 para 17, P21 paras 21 and 24 refer); She does not plead any relationship whatsoever between her and R2 such as to confer any rights accruing to her against them;
>
> 13.4 Thus, **I cannot find that on her pleading in the Grounds of Complaint the Claimant is arguing a triable cause of action against R1 in respect of the actions of R2, and especially R3 and R4, as in respect of the limited terms of Reg 14 AWR**, R1 does not have sufficient privity of relationship with R3 and/or R4 so as to be responsible for their actions: **Similarly, I do not see how from her pleading the Claimant can argue that R2 is vicariously liable if it were not the employer of R3 and R4. Section 109 EqA specifically fixes liability on a party such as R2 if the party committing an actionable act were doing so "in the course of employment".** Thus, the Tribunal does not have jurisdiction to hear the claims founded on AWR against R1, nor founded on Section 109 EqA in respect of both R1 and R2. This conclusion deals with the first question posed by EJ Burns referred

> to in paragraph 6.1 above;
>
> 13.5 **On the basis of the Claimant's pleading (P18 para 6) of her Grounds of Claim, she says that she was engaged by a party other than R1 or R2 to work for R1; Thus, by her own pleading (P18 para 5), she says she was not an employee of R1 or R2; Therefore, this addresses EJ Burns' question referred to in paragraph 6.2 above.** [emphasis added]

23. The Employment Tribunal analysed the claim that the 1st Respondent could arguably be liable for an act of harassment done by the 4th Respondent on the basis that there might be liability as a result of the application of the **AWR**. The Employment Tribunal was correct that the **AWR** are not relevant to this issue. The relevant provision was section 109 **EQA**. It is clear that this matter was before the Employment Tribunal because of the reference to **Kemeh**. However, the judgement does not include any analysis of why it was not arguable that the 4th Respondent might have acted as an agent of the 1st Respondent.

24. In **Kemeh** the Court of Appeal considered whether the Ministry of Defence could be liable for the act of an employee of a contractor working in the canteen at an army base who was asserted to have made a racist comment to a soldier. Elais LJ held:

> 39 **Even in the so-called "general concept of agency" advanced in the Yearwood case, it would be necessary to show that a person (the agent) is acting on behalf of another (the principal) and with that principal's authority**. Once it is recognised that the legal concept does not necessarily involve an obligation to affect the legal relations with third parties, I doubt whether the concepts are materially different.
>
> 40 But ultimately it is not necessary for the purposes of appeal to resolve that question. Whatever the precise scope of the legal concept of agency, and whatever difficulties there may be of applying it in marginal cases, I am satisfied that no question of agency arises in this case. **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. (That is not, of course, to say that employees can never be agents; they might well be, depending on the obligations cast on them, such as where a senior manager is authorised to contract with third parties. He will be an employee but will also act as an agent when exercising the authority to deal with third parties.) [emphasis added]

25. The Employment Tribunal did not analyse the tasks performed by the 4th Respondent and the extent to which, if any, the 1st Respondent had provided authority to the 4th Respondent to act on its

behalf. There was a potentially significant difference between this case and **Kemeh** in that the 1st Respondent specifically pleaded that the 2nd Respondent through its employees 3rd and 4th Respondents caried out its statutory duty to provide care for Child A. I consider that the Employment Tribunal erred in law in holding is was not reasonably arguable that the 4th Respondent acted as agent for 1st Respondent. The analysis of this question will require careful factual consideration of the relationships between the 1st Respondent and the 2nd Respondent and their employees the 3rd and 4th Respondents and the extent to which the 1st Respondent has provided authority to 2nd Respondent and it employees to act of behalf of the 1st Respondent.

26. The Employment Tribunal also concluded it was not arguable that the email sent by the 4th Respondent was part of "conduct extending over a period" for the purposes of section 123(3) **EQA**. In the judgment the Employment Tribunal stated:

> 2. The claim in respect of an event occurring on 2 March 2022 (allegedly committed by R4 alone) is potentially in time, but it is separate and distinct from preceding events, and therefore it is not found to be part of a course of conduct capable of being aggregated with the preceding complaints. Moreover, when seen alone it is struck out under Rule 37 as having no reasonable prospect of success.

27. There was no substantive analysis of either the complaint against the 4th Respondent that the Employment Tribunal accepted was potentially in time and the earlier complaints. This is challenged in grounds 1 and 2 of the grounds of appeal. I consider that the Employment Tribunal erred in law in concluding that the email sent by the 4th Respondent on 2 March 2022 could not arguably form part of conduct extending over a period without any such analysis. Furthermore, it does not appear to have been argued that the email of 2 March 2022 could not form part of conduct extending over a period at the hearing before the Employment Judge.

28. Accordingly, I consider that the Employment Tribunal erred in law in concluding that the 1st Respondent could not arguably be liable for the actions of 4th Respondent and that his action could not arguably form part of conduct extending over a period. That potentially put the claim against the 1st Respondent within time.

29. The time issue in respect of the 2nd to 4th Respondents is different. Whereas the claimant

received an ACAS Early Conciliation Certificate for the 1st Respondent on 13 July 2022, the Early Conciliation Certificates for the 2nd to 4th Respondents were issued on 5 July 2022, which would mean that even if the complaint against the 4th Respondent can be part of conduct extending over a period the claim is out of time against them unless it is just and equitable to apply a time limit in excess of three months. In the grounds of appeal, the claimant asserts that:

> I believe it is just and equitable for the Tribunal to accept my claims for Respondents 2, 3, 4 as being in time as the claims against Respondents 2, 3 and 4 are intrinsically entwined with the claim against Respondent 1. Thus was why I had waited for the certificate for Respondent 1 to be issued before submitting my ET1.

30. I consider that the point is well made and that the determination that the **EQA** complaint should be struck out as not arguably being within time in respect of all Respondents should be set aside; because if it is decided that the claim against 1st Respondent is within time that arguably is a matter that the Employment Tribunal should take into account in deciding whether it is just and equitable to apply a time limit in excess of three months to the **EQA** claims against the 2nd to 4th Respondents. I also have considerable concerns that in deciding that there was no reasonable prospect of establishing the claims are within time the Employment Judge referred repeatedly to advice received by the Claimant whereas the Claimant contends that she received no such advice and she did not tell the Employment Judge that she had.

Disposal

31. The strike out of the **EQA** and **AWR** complaints are set aside and the matter is remitted to the Employment Tribunal. The parties should liaise together to consider whether any strike out applications should be pursued and/or whether an application is made to the Employment Tribunal to determine any preliminary issues. The case management on remission will be a matter for the Employment Tribunal. I consider that any such further applications should be determined by a different Employment Tribunal because of the firm views expressed by the Employment Judge and because consideration by the same judge would not result in any significant saving of time or cost. I note that at the hearing of the appeal the 4th Respondent asserted that he may not have been employed by the second respondent directly. It is not clear whether this is a matter that was raised previously.

It will be a matter for the Employment Tribunal to determine whether the matter has been raised previously, and if not, whether it is open to the 4th Respondent to raise it on remission.