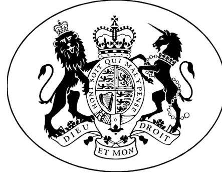

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Dr S Saigar	**v**	(1) NHS England
		(2) NHS Trust Development Authority/ Monitoring operating as NHS Improvement
		(3) Hunter Healthcare Resourcing Ltd

PRELIMINARY HEARING

Heard at: **London Central Employment Tribunal** **On: 3 January 2018**

Before: **Employment Judge Wade**

Appearances
For the Claimant: Mr R Powell (Counsel)
For the First Respondent: Ms H Davies (Counsel)
For the Second Respondent: Mr D Bayne (Counsel)
For the Third Respondent: Ms K Parker (Counsel)

JUDGMENT

1. The claims against the first and second respondents in paragraphs 27, 29 and 30(b) of the Particulars of Claim are struck out as having no reasonable prospect of success.

2. The claim under Equality Act section 109 against the second respondent in paragraph 30(a) is not struck out and no deposit order is made.

3. The claims against the first and second respondents under Equality Act section 110 are struck out.

REASONS

1. No evidence was taken but submissions were made. The claimant did not attend.

The claims

2. The claimant applied for a role as Regional Chief Nurse with the first and second respondents in June 2016. Her application was rejected and she claims that this was unlawful and brings:

(a) A claim under the public interest disclosure provisions of the Employment Rights Act 1996, section 47B, which the respondents say misconceived because there is no jurisdiction.

(b) A victimisation claim under section 27 of the Equality Act. It is conceded that her previous tribunal claims were protected disclosures.

3.1 The allegations against the first and second respondents are put in three ways:

(a) The respondents decided to reject the application and, see paragraphs 27 (protected disclosure) and 29 (victimisation) of the Particulars of Claim, termed the "direct claim".
(b) The decision was made by the third respondent, the recruitment agency Hunter Healthcare Resourcing Limited acting as agent for the first and second respondents, see paragraph 30(a) of the Particulars of Claim, termed the "agency claim" made under section 109 of the Equality Act.
(c) The respondents instructed or induced the third respondent to victimise the claimant, see paragraph 30(b), termed the "instruct/induce claim". This claim refers to section 111.

3.2 Paragraph 30(a) recites a claim under section 110 but there is no logic for that and whilst it was not formally withdrawn Mr Powell very wisely did not argue it as, if at all, it relates to the third respondent. I have struck it out and do not refer to it below.

The applications

4. The first respondent concedes that the third respondent was acting as its agent and so it seeks to strike out only the direct claim and the instruct/ induce, paragraph 30 (b) claim.

5. The second respondent seeks to strike out all three matters in paragraph 3.1, arguing in relation to the agency point that there is no reasonable prospect of the claimant establishing that the third respondent was the agent of the second.

6. The third respondent does not seek any strike out any claim but agrees that it was not acting as the second respondent's agent and that it made the decision not to progress the claimant's application without any input from the first or second respondent.

7. There is another alleged detriment, which is a freestanding claim set out in paragraph 28 of the particulars of claim, relating to comments by the first respondent's human resources director, Mrs H Burgess. No application is made to strike that out.

The direct and instruct/ induce claims

8. The direct claim and the instruct/induce claim go together in that the key question is what are the claimant's prospects in establishing that the first and second respondents knew of and were involved in rejecting her application. She says that this is a matter for the full tribunal as there is a dispute of fact which must be tried.

9. The respondents say that whilst they understand why the claimant made this assertion in her Particulars of Claim, the evidence which has now emerged points in one direction only. That is that there was no involvement on the part of the first and second respondents until after the claimant was told by the third respondent that her claim was not going to be progressed and they did not even know she had applied.

10. The respondents say that whilst there may be some possibility that, despite all the evidence, the claimant could sew doubt in the mind of the tribunal sufficient to shift the burden of proof, she must face up to the fact that the odds are overwhelmingly against her.

11. In brief, what happened was that when she was rejected the claimant was told by the recruitment consultant, Mr Simpson, that it was the panel's decision, the panel consisting of appointees from the first two respondent organisations. In fact, all of the decisions had been made by him alone up to that point and, as stated in the witness statements exchanged in October 2017, the panel was not even aware of the application. He had only told the claimant differently because he did not want to look unprofessional. All of the respondents' witnesses say the same and as Ms Davies says in her submissions "for the tribunal to make a finding that there was a decision by the panel, it must find that five senior NHS managers across two organisations all lack credibility."

12. Whilst there is documentary evidence that the panel was engaged in discussing candidates at an early stage, there is no evidence in the documents that they had been involved at all between the time the claimant applied and her application was rejected. The documentary evidence, also now fully disclosed, shows Mr Simpson reporting to the panel that he had been through a sift process and making recommendations to which he received no feedback.

13. The claimant had the benefit of reading witness statements (or at least she should have done by now and her representative definitely has) and inspecting all the disclosure, but no concessions were made. The respondents argue that hanging onto these claims in the hope that, to use a hackneyed phrase, "something might turn up" is not reasonable and that the low prospects are very clear.

14. I have decided to strike these claims out. I agree that there is no reasonable prospect of success because:

(a) The evidence, which the claimant has seen and had time to digest points in one direction only.

(b) Whilst the claimant says that there is a factual disagreement, the evidence is so clearly against her it is not inappropriate to make a strike order see the guidance in *Ezsias.*

(c) Taking the claimant's case at its highest, as I should, all she can do is assert that the panel rejected her rather than Mr Simpson of the third respondent. She has no way of knowing what actually happened independently from the witness and the documentary evidence. She was of course not involved because this was a recruitment exercise and she was one of many external candidates.

(d) The burden on the respondents in having to produce senior witnesses to refute a claim with low prospects would be unreasonable. Contrast this with the fact that the claims against the third respondent will proceed to a hearing in their entirety. The claimant will be able to establish whether the third respondent unlawfully deprived her of the chance to be appointed to the role she applied for. In terms of liability, and indeed remedy, she is not disadvantaged. All the respondents accept that the question of Mr Simpson's conscious or unconscious motives must be explored at the full hearing which is due to start imminently.

(e) The claimant has some evidence, for example in relation to the recruitment policies which may or may not have been correctly applied from which she says inferences should be drawn. She will not be prevented in running these arguments in relation to the decision maker, the third respondent.

(f) Given the concession by the first respondent that the third respondent was its agent and the fact that I have not struck out that claim against the second respondent, see below, the claimant also has an agency claim against the first and second respondents. This will complement her claim against the third respondent.

The section 109 agency claim

15. I have indeed decided not to strike out the agency claim. Whilst the recruitment was originally intended to be by the first respondent only, this was amended. Agency documentation was originally drawn up and agreed between the first respondent and the third respondent. After a couple of months, the position changed and the recruitment proceeded on a joint basis with the second respondent, with the aim of making a joint appointment.

16. I am asked to conclude that there is no reasonable prospect that the third respondent became the recruitment agency of the second as well as the first respondent. I have seen documentation showing that the original contract was with the first respondent only, but that is not surprising given that the first respondent was the only proposed employer at that point. I have then seen later correspondence, involving the third respondent, showing that the parties agreed to amend the job description to present it with the logo of both organisations on it. This could well signify a joint instruction by the first two respondents.

17. I note that the first two respondents both left the third respondent with a considerable amount of responsibility which is why they have successfully argued that the decision was the third respondent's alone. This points to the label "recruitment

agent" being appropriate and consistent with the *Garnac Grain* decision which somewhat Delphicly says:

> *A relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it…. The consent must, however, have been given by each of them, either expressly or by implication from their words and conduct. Primarily one looks to what they said and did at the time of the alleged creation of the agency…"*

The appropriate time must have been approximately April 2016 when the second respondent became involved and not the start of the exercise.

18. Whilst I know that the first respondent paid the third respondent's fee, I could not say that there is no reasonable prospect that the third respondent could have sued the respondents jointly if it had not been paid. I also cannot say that there is little reasonable prospect of success and I do think that this is a question better determined by the full panel once all the facts have been established chronologically, so no deposit order is made.

19. My main misgiving is that I am aware that in paragraphs 2 and 3 of the particulars of claim the claimant identified a distinction between the first respondent, who she said was the third respondent's principal, and the second which she said was only "a party to" the selection process. However, at paragraphs 30 (a) she alleges that both respondents were principals and I have given her the benefit of the doubt regarding this ambiguity in the face of the other points.

Employment Judge Wade on 3 January 2018