mf

EMPLOYMENT TRIBUNALS

Claimant: **Ms N Gregg**

Respondents: **1. London Borough of Redbridge**
2. Aqua Bubble Ltd
3. Mr S Wanless

Heard at: **East London Hearing Centre** **On: 2 February & (in chambers) 6 February 2017**

Before: **Employment Judge Jones (sitting alone)**

Representation

Claimant: **Mr D McCarthy (Advocate)**

1st Respondent: **Ms N Newbegin (Counsel)**
2nd & 3rd Respondents: **Mr J Crozier (Counsel)**

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:-

(1) Mr Wanless was not an employee of the First Respondent. The Tribunal has no jurisdiction to hear a case against the Third Respondent and all complaints against him are struck out.

(2) The Claimant can have no cause of action against the Second Respondent and all complaints against it are struck out.

(3) There are no reasonable prospects of the Claimant succeeding in her remaining complaints of unlawful sex discrimination in relation to the handling of the grievance. That complaint is struck out.

(4) All claims against all three Respondents are struck out.

REASONS

1 The Preliminary was set up to determine the following:-

1.1 Who is the correct Respondent to the proceedings.

1.2 Whether all or part of the claims against all of the Respondents should be dismissed because Mr Wanless was not an employee or agent of the First Respondent, for the purposes of section 109 to 110 of the Equality Act 2010.

1.3 Whether the Claimant's claims against the First, Second or Third Respondents should be struck out on the ground that they have no reasonable prospect of success and/or

1.4 Whether the Claimant should be ordered to pay a deposit as a condition of continuing to advance all or any of her allegations of sex discrimination and harassment against the First, Second or Third Respondents.

2 The Tribunal had two bundles of documents for this Hearing. It was noted that some additional documents were provided by the First Respondent a few days before this Hearing. Having had an opportunity to consider those documents, and as she was legally represented, the Claimant was prepared to proceed with the Hearing.

3 The Tribunal heard from Ms Gregg, Mr Wanless the Third Respondent; and from the First Respondent the Tribunal heard from, Hayley Roberts CCTV and Lifeline Manager within the Enforcement and Community Safety Division of the First Respondent (who had previously been Trading Standards Manager within a Trading Standards Department); Harveil Toor Enforcement Manager within the Community Safety Services of the First Respondent; and Edward Chaplin Trading Standards and Licensing Team Manager within the Trading Standard Service of the First Respondent, (also the Claimant's current line manager).

4 In considering the evidence and facts in this case, the Tribunal applied the following law.

Law

5 By sections 39(2) and 40(1) of the Equality Act (EqA) the Claimant can bring complaints of discrimination and/or harassment against her employer.

6 As the Third Respondent was not her employer, in order for the Claimant to be able to proceed against him in the Employment Tribunal under section 109 EqA the Tribunal will need to decide whether or not he was a colleague and the First Respondent's employee or agent. Looking at the elements of Section 83(2)(a) of EqA where employment for these purposes is defined, the Tribunal would need to be able to conclude firstly, that there was a contract between the First Respondent and the Third Respondent, and secondly, that the contract was a contract of employment, or a contract of apprenticeship or a contract personally to do work.

7 So addressing those points in turn, the Tribunal considered the following law. The first question is whether or not there was a contract between R1 and R3 and if so, what was it and what was the effect of that contract.

8 The First Respondent referred the Tribunal to the case of *James v London Borough of Greenwich* [2008] IRLR 302 (CA). In that case, the Court of Appeal considered the position of an agency worker who had worked for Greenwich Council for a number of years, first as an employee and later as an agency worker. The Court of Appeal held that she was not an employee. Per Mummery LJ at paragraphs 41 and 42:

> "On the implied contract of service approach to the facts found by the ET it was, in my judgment, entitled to conclude that Ms James was not an employee of the council because there was no express or implied contractual relationship between her and the council. Her only express contractual relationship was with the employment agency, as she recognised when she changed agencies rather than employers in order to obtain a higher wage. The council's only express contractual relationship was also with the agency. There were no grounds for treating the express contracts as other than genuine contracts.
>
> The ET was not perverse in holding that it was unnecessary to imply a third contract between Ms James and the council. What Ms James did and what the council did were fully explained in this case by the express contracts into which she and the council had entered with the employment agency. The council provided work to Ms James for several years, but the ET found that it was not under any implied obligation to do so. The mere passage of time did not generate a legal obligation on the part of the council to provide her with work any more than it generated a legal obligation on her to do the work. The provision of work by the council, its payments to the employment agency and the performance of work by Ms James were all explained in this case by their respective express contracts with the employment agency, so that it was not necessary to imply the existence of another contract in order to give business reality to the relationship between the parties."

9 This Tribunal concludes that the starting point is whether it is necessary to imply contractual relationship in order to explain the work undertaken by the worker for the end user.

10 If there is a contract between the putative employer and the putative employee then it will be necessary for the Tribunal to go on to consider the nature of that contract. Then the relevant questions would be whether there are mutuality of obligations and whether there is "a contract personally to do work". That last issue was addressed in the case of *Jivraj v Hashwani* [2011] IRLR 827 (SC). In that case the Supreme Court held that a named arbitrator was not an employee. Lord Clarke stated as follows:

> "…The Court of Justice draws a clear distinction between those who are, in substance, employed and those who are "independent providers of services who are not in a relationship of subordination with a person who receives the services". I see no reason why the same distinction should not be drawn for the

> purposes of the 2003 Regulations between those who are employed and those who are not notionally but genuinely self-employed.
>
> Whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services."

11 In the case of *Halawi v WDFG UK Ltd* [2015] IRLR 50 the Court of Appeal emphasised that: "the key factors are the element of subordination, the receipt of remuneration and the integration into the putative employer's business". The Court also stated that the power of substitution is inconsistent with the personal performance of services.

12 The First Respondent referred in their submissions to the case *Unite the union v Nailard* [2016] IRLR 906 in which the EAT held that two elected officials who carried out full-time activities for the union while also being employed by Heathrow Airport, were not employees of Unite. Per Judge David Richardson, the union rule book was not a contract personally to do work and did not place officers in a position of subordination to the union. The employer, Heathrow Airport continued to pay the officials whilst they were undertaking union duties. The court did go on to decide that they were agents of the union.

13 In this case, was the Third Respondent an agent for the First Respondent? The Tribunal started its assessment of the possibility of agency with the definition of agency in a section from Bowstead & Reynolds on Agency, provided by Ms Newbegin. The definition it provides is as follows:

> "Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifest assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifest assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.
>
> In respect of the acts to which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties.
>
> There the agent's authority results from a manifestation of assent that he should represent or act for the principal expressly or impliedly made by the principal to the agent himself, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority.
>
> A person may have the same fiduciary relationship with a principal where he acts on behalf of that principal but has no authority to affect the principal's relations with third parties. Because of the fiduciary relationship such a person may also be called an agent."

Bowstead & Reynolds also states the following:

> "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 the 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…… The term "agency" may be used to refer to: the relationship between the principal and the agent; to the function of the agent with respect to the outside world; or to the sum total of all legal relations involving principal, agent and third parties arising in such situations".

14 The Claimant submitted that the definition of agency as set out in Bowstead & Reynolds was too narrow and that the Tribunal should take a broader approach but the Tribunal was not provided with the Claimant's preferred definition of agency. Mr McCarthy did encourage the Tribunal to look at all the facts and coming to its decision, as the Tribunal would do in any event.

15 The question of who constitutes an agent for the purposes of section 109 of the Equality Act 2010 is the same, at least in essence as question of agent for the purposes of common law. This was made clear by the Court of Appeal in *Kemeh v Ministry of Defence* [2014] IRLR 377 which all parties agreed was relevant to this case. This was a Court of Appeal decision. In *Kemeh* the claimant brought race discrimination allegations against his employer, the Ministry of Defence, arising out of alleged racist comments made by an employee of a third party, Sodexo, which provide catering services for the Ministry of Defence and with whom he came into contact while carrying out his duties. The EAT and Court of Appeal both rejected the contention that the Sodexo employee was an agent of the Ministry of Defence.

16 In *Kemeh*, the Court of Appeal held that to establish an agency relationship under the Race Relations Act 1976 the following needed to be considered:-

(a) That the essential feature of an agency relationship is that the agent is authorised to act on behalf of the principal in relation to third parties with the principal's authority

(b) The fact that someone is employed by A would not automatically prevent him from being an agent of B … there would … 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;

(c) proximity is not sufficient to establish an agency relationship;

(d) The discriminator in case of *Kemeh* was acting as an agent (as employee) of her employer only, not of the defendant (who nonetheless exercised some day-to-day control over the discriminator). As per Elias LJ "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."

17 The Court of Appeal considered whether authority should be implied where the contract worker is integrated into the employer's own workforce or whether the fact that some direction over her activities were exercised by the MoD staff or that she is subject to the employer's delegated authority which suggested that she was or could fit into the definition of agent. Those arguments were rejected and Elias LJ who stated that the fact she is subject to the employer's delegated authority would suggest that she could not sensibly also be said to have been authorised to act on his behalf.

18 In paragraph 48 Elias LJ reflected on what he described as the 'lacuna' in the law that this opens up. He commented that because of the application of different sets of rules relating to contract workers and employees, the appellant in this case fell in a gap in statutory protection. He state however that even if he had no remedy; that was not a legitimate reason for distorting the language of the legislation to provide one as it was up to Parliament to consider the lacuna and remedy it.

19 In the case of *Yearwood v Commissioner of Police* [2004] ICR 1668 the EAT referred to the definition of agency in *Bowstead & Reynolds* quoted above and held that the common law concept of agency is the one that applies when construing the term "agent" for the purposes of discrimination legislation.

20 The Claimant submitted that the Tribunal should consider the definitions set out in the *Tower Boot* case. This point was considered in *Kemeh* and Lord Justice Elias stated that he did not consider that *Tower Boot* provides any further assistance in seeking to determine the proper meaning of section 32(2). The particular features which enable the court to adopt a non-technical approach in that case were not present in the case of *Kemeh* and are not present in this case. *Jones* was also a case in which the issue was of vicarious liability and not of agency. (*Jones v Tower Boot Co Ltd* [1997] IRLR 168 CA.)

21 The First Respondent referred to the case of *DJ Hall v Xerox UK Ltd* (unreported UKEAT/0061/14). In that case, Langstaff P applied the principle set out in *Kemeh* and noted that the definition of agency in Bowstead & Reynolds on Agency required there to be a fiduciary relationship between agent and principal. The Court held that an insurer was merely a commercial provider of services and not an agent. The case also confirmed that the concept of agency in section 109 of the Equality Act requires an individual to have stepped into the principal's shoes in its engagement with third parties.

22 *Harvey* confirms that the employee as agent need not be a fellow employee of the complainant. It refers to the case of *Commissioner of Police of the Metropolis v Weeks* [2012] EqLR 209 in which a complaint by a civilian employee within the Metropolitan Police who was line managed by an officer of the City of London Police was considered by the Tribunal. He carried out her annual appraisals, determined her flexible work request and generally made decisions about her employment. The EAT upheld the Employment Tribunal's decision that the manager was an agent of the Commissioner of Police even though he was also an officer of a different police force. He would however have been employed by that other police force in addition to having managerial supervisory authority over the civilian employee.

23 The Claimant submitted that the conjoined Supreme Court cases of *Cox v Ministry of Justice* [2016] UK SC 10 and *Mohamud v WM Morrisons Supermarkets plc* [2016] UK SC 11 may provide some guidance to the Tribunal on this matter. However, those cases concerned vicarious liability and not agency. They also did not discuss section 109 of the EqA.

24 The Claimant submitted the Respondents are relying on too narrow definition of agency and that the Third Respondent had been sufficiently integrated into the organisation and also that the First Respondent regarded him as an agent.

25 Mr McCarthy submitted that the possession of a warrant card and signing the DPA notices as well as his possession of a desk and access to the Respondent's intranet showed that he was somehow an agent of the First Respondent. He also wrote London Borough of Redbridge's name and address as part of his signing off address of the emails he sent while working there. Mr Wanless made a Data Protection Act request on headed notepaper. A reference is made to paragraph 13.1 of the OMOU.

26 The First Respondent submitted that Mr Wanless was not its employee and that there was no contract between it and Wanless. It was submitted that Mr Wanless was a TRS resource placed with the First Respondent as a result of Kenyon Block Consultants having a contract with the Second Respondent which placed Mr Wanless with Tri-Region Scambusters (TRS). TRS would be invoiced on a weekly basis and Kenyon Block would pay Mr Wanless through Aqua Bubble, the Second Respondent.

27 The First Respondent submitted that it was not necessary to imply any contract between the First and Third Respondent - whether of employment or for the performance of services - in order to explain the reality of his secondment. Therefore no contract can be implied. There was no financial obligation on the First Respondent in connection with Mr Wanless's services as it did not pay for his services. Therefore, even if there was a suggestion of a contract it would be invalid for lack of consideration. Also, even if the Tribunal considered whether there was a contract between Mr Wanless and the First Respondent in connection with a particular piece of work such as his work on Operation Ranger; it would still not amount to a contract of employment, contract of apprenticeship or a contract personally to do work. This is so because he did not receive remuneration/consideration from the First Respondent for that piece of work, his line management was still with TRS through Mr Ian Wright for his work on that project, he was not contractually required to subject himself to the First Respondent's disciplinary or grievance procedures, he did not have stipulated hours or days and he worked on the First Respondent's as well as other Council's projects; and TRS could have removed him at any time and replaced him with another TRS officer.

28 The First Respondent also submitted that Mr Wanless was not its agent. There was no fiduciary relationship between it and Mr Wanless and he did not have authority to enter into contracts with third parties on its behalf. He was not acting on behalf of the First Respondent when he interacted with the Claimant. He may have provided some services to third parties i.e. interviewing witnesses and victims on behalf of Redbridge but that did not make him an agent. In contrast in the case of *Weeks* referred to above, the Respondent stated that if he had used his warrant card when

dealing with third parties he would not have been doing it in the capacity of agent for the First Respondent but rather from statutory authority. In any event, there can be no suggestion that he was exercising such powers in dealings with the Claimant especially as he was subject to her operation, direction and control since she was the senior officer on the Operation.

29 In relation to Mr Wanless, Mr Crozier submitted that Mr Wanless was simply a contractor, who had not been engaged to provide services to the First Respondent as an employee but as an officer of TRS provided free of charge to assist with bespoke and defined investigated operations as a Trading Standards Officers.

30 It was acknowledged that Mr Wanless had contractual relationships with Aqua Bubble, Kenyon Block and TRS (Tri-Region Scambusters). Mr Wanless was not a party to the Organisation Memorandum of Understanding (OMU) between the First Respondent and TRS although he is a signatory to it. That agreement expressly governed the relationship between TRS and the First Respondent only.

31 Mr Crozier submitted that the Tribunal should look closely at the OMOU as it would confirm that Mr Wanless was not an employee or a worker or an agent of the First Respondent. He submitted that Mr Wanless was not integrated into the Respondents' operation or sufficiently subordinated to the First Respondent's operations to be considered an employee within the meaning of the EqA. Also that there was no contract of employment or remuneration provided between Mr Wanless and the First Respondent. He submitted that Mr Wanless was in a similar position to the alleged discriminator in the case of *Kemeh*. Also, that Mr Wanless had not been granted any delegated statutory or legal powers by the First Respondent and had not been granted authority to determine its legal relations with third parties. He submitted also that the fact of day-to-day direction and control that may have been exercised over him in relation to a particular project was insufficient to establish an agency relationship but that in any event, there was no evidence from which to conclude that it exercised everyday control outside the ambit of the particular task or investigation Mr Wanless had to do as a seconded contractor. His overall submission was that Mr Wanless worked under the direction and control of TRS and reported to TRS. He was placed by TRS with the First Respondent along with other councils and could be removed or reallocated at TRS's discretion. In those circumstances it was submitted that it was difficult to see how he could be acting under TRS's direction and also at the same time be the First Respondent's agent.

32 In relation to the Second Respondent the following submissions were made: Mr Crozier, submitted that Aqua Bubble would only be liable in these proceedings if their relationship with the First Respondent were such that they were its agents or Mr Wanless was its employee. This is because the Claimant has no freestanding cause of action against either the Second or Third Respondent which operates independently of sections 39 and 40 of the EqA.

33 Mr McCarthy made no submissions in relation to Aqua Bubble.

34 It is noted that when the First Respondent submitted its ET3 response to the claim it applied to the Tribunal to join Aqua Bubble, Mr Wanless and Tri Region Scambusters and Trading Standards South East Ltd (TRS) and (TSSEL) as

Respondents to these proceedings. The Tribunal did so at a preliminary hearing. The Respondent has since revised its position. At this Hearing, the First Respondent's position was that Aqua Bubble should not continue to be a Respondent to these proceedings because it had no relationship with the Claimant and could not be a proper Respondent. Mr Crozier submitted that the EqA did not grant any route by which it could be liable to the Claimant as it was neither the employee nor the agent of the First Respondent and therefore could not have no liability to her under sections 39 or 40 of the Equality Act.

35 Aqua Bubble was Mr Wanless's employer for tax purposes. Aqua Bubble had no contract and no relationship whatsoever with the First Respondent. Aqua Bubble had not supplied Mr Wanless to the First Respondent. It was submitted that Aqua Bubble could not be a proper Respondent to proceedings as the Claimant has no cause of action against it in the Employment Tribunal.

36 The First Respondent also made the following submissions in support of its submission that the Claimant's claims in relation to the handling of her grievance have no reasonable prospects of success. The Claimant claimed that the Respondent's actions/failures in handling her grievance were acts of direct discrimination. In her ET1 grounds of complaint she refers to "unlawful sex discrimination". It is likely that this is a reference to direct discrimination under section 13 of the Equality Act.

37 The Respondent submitted that in the ET1 claim there is no reference to any specific unfavourable treatment. The Respondent submitted that in fact, that the Claimant's grievance was replied to promptly, properly investigated and upheld. Ms Newbegin submitted that it was not part of the Claimant's allegations that she was treated less favourably in the handling of the grievance than a male comparator whether hypothetical or otherwise. The Claimant's grievance claims it was submitted are minor procedural complaints about how her successful grievance was handled rather than it was handled in a discriminatory fashion. In her evidence today, the Claimant stated that she would have wished to be able to choose the person who conducted the investigation and the minute taker and to have seen a copy of the report much earlier than she did. In the Respondent's submission, this is not a complaint of less favourable treatment but of unhappiness about the way the grievance was handled. There was nothing in what the Claimant has said today or in her ET1 that links her complaints to her gender. The Respondent's primary submission was that the complaints around the Claimant's grievance had no reasonable prospect of success and should be struck out. In her written submissions, Ms Newbegin also stated that if the Tribunal did not accept that submission, it ought to decide in the alternative, that the Claimant should be required to pay a deposit before being allowed to continue to pursue them, pursuant to Rule 39 of the Employment Tribunals Rules.

38 Mr McCarthy also submitted that the Tribunal should not strike out the grievance of the Claimant at this point as it was early in the proceedings and that it will be a very serious and draconian act to strike out the Claimant's complaint at this early stage of the proceedings. He cited the Claimant's complaints that Mr Wanless took over her work and was not removed from the First Respondent's workplace as soon as it was decided that her grievance was successful. He referred to the allegation that he undermined her and noted that it would be premature to determine that there was no prospect of success at this point in relation to these elements of the claim and that they would need to be properly made out once the claim was part of the process.

39 Rule 37 of the Employment Tribunals Rules of Procedure 2013 states that at any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out al or part of a claim or response on any of the following grounds:- the ground relied on by the First Respondent in relation to the Claimant's complaint of sex discrimination in relation to the handling of her grievance; was (a) it is scandalous or vexatious or has no reasonable prospect of success. A claim cannot be struck out on this ground unless the party in question has had a reasonable opportunity to make representations in writing or in person at a hearing.

40 In addressing the First Respondent's application the Tribunal was aware that there is two stage test to be applied. (*HM Prison Services v Dolby* [2003] IRLR 694). The tribunal must firstly decide whether one of the specified grounds for striking out has been established, and if it has, then secondly, the tribunal has to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid. If the tribunal does not consider both limbs of the test then it will be making an error of law.

41 Ms Newbegin did not make submissions in relation to the First Respondent's reasonable steps defence and reserved her right to make those should these applications fails and the case continue.

42 From the evidence, the Tribunal made the following findings of fact. The Tribunal has been mindful that this was a preliminary hearing and has endeavoured to only make findings on the matters that concern the preliminary matters on which it has heard evidence.

Findings of fact

43 The Claimant was employed by the First Respondent from 2001 as an enforcement officer within Trading Standards. The Claimant continues to be employed by the First Respondent but has been absent from work due to ill-health since December 2015. The Claimant's work involves investigating complex consumer criminal complaints. This involves liaising closely with the police and other organisations.

44 In or around March 2015 Sean Wanless was assigned to assist the Claimant on a complex investigation. Both the Claimant and Mr Wanless were certain that Mr Wanless was a TRS (Tri-Regional Scambusters) investigator. The Claimant did not believe that Mr Wanless was employed by the First Respondent and Mr Wanless was clear that his employer was Aqua Bubble trading as Crystal Umbrella in that they provided payroll services for him.

45 Aqua Bubble is an umbrella company providing PAYE tax services to Mr Wanless as a Trading Standards Consultant. Although Mr Wanless was under a contract of employment with Aqua Bubble he did not provide services to Aqua Bubble or via Aqua Bubble to others. Mr Wanless was engaged by Kenyon Block, a recruitment consultancy to provide services to Tri-Region Scambusters (TRS). TRS is a scambusters team operated as part of national trading standards which provides operational support to "partners" (including local trading standards) focused on "leading

investigations into trading standards offences". TRS is made up of trading standards operatives from different regions including Trading Standards South East Ltd (TSSEL).

46 TRS provided Mr Wanless's services to the First Respondent under the Operational Memorandum of Understanding and information sharing (OMOU). The OMOU was in the bundle of documents. It stated that the agreement was made between the First Respondent's Trading Standards and TRS/TSSEL. In the OMOU the "seconded contractor" was defined as the contract investigator sourced by the TRS and seconded by TRS in support of the London Borough of Redbridge Trading Standards Department in accordance with this agreement. The agreement stated that its purpose was to facilitate the placing of a seconded contractor by TRS with LB Redbridge Council Trading Standards. It stated that:

> "This agreement is intended to govern the status of the seconded contractor in relation to operational management, information, intelligence and discipline."

47 TRS was to source a seconded contractor from a suitable agency and that person would be provided to Redbridge to work within the Trading Standard Service for the purposes of supporting the TRS referral request submitted by the First Respondent on 30 January 2015. The agreement stated that the First Respondent would engage the seconded contractor as a temporary Trading Standards Officer within the Trading Standards Service for the duration of the secondment arrangement and shall grant the seconded contractor sufficient delegated powers to carry out the role envisaged in the TRS referral submission. The seconded contractor would be provided with equipment and office facilities as are normally provided within the service to other members of staff including telephony, access information technology, internet access etc.

48 All the costs associated with the provision of those items would be met by London Borough of Redbridge Trading Standards. The agreement stated that whilst seconded to Redbridge Trading Standards, the seconded contractor would be under the operational control of an appropriate and designated lead trading standards officer within LB Redbridge trading standards for the purpose of case management. However, the seconded contractor would only be employed on the tasks/work stated within the TRS referral submission. TRS reserved the right to redeploy the seconded contractor in support of other regional TRS enforcement tasks as long as the First Respondent's Trading Standards was notified about this in advance. Also, Trading Standards was to notify TRS/TSSEL if they have no ongoing work in relation to the specific case project outlines in the TRS referral submission for an extended period of time.

49 The agreement confirmed that the seconded contractor would not be employed by or paid by the First Respondent's Trading Standards and that they should not incur any liabilities in respect of salary or claims by the seconded contractor in relation to the secondment position in support of the TRS referral submission. The money to pay the seconded contractor would come from Central Government and therefore the seconded contractor would be a free resource for the First Respondent's Trading Standards.

50 The OMOU stated that while the seconded contractor was not contractually bound by them they were to make themselves aware of and adhere to the standards set out in the council's policies such as the Equalities Act 2010, the harassment and bullying policy, the local government code of conduct, the disciplinary policy and a policy governing the use of LB Redbridge's IT Services.

51 The First Respondent's Trading Standards was to be responsible for the normal management and operational functions of the seconded contractor only whilst they are placed with London Borough of Redbridge trading standards. TRS and the First Respondent's Trading Standards had a right without liability and without cause to terminate the secondment arrangements and thereby the placement of the seconded contractor at any time by notice in writing having immediate effect. The contractor therefore had no right to notice of the ending of his placement and also no right to any of the procedures. The seconded contractor was bound by the Data Protection Act duties of the Redbridge's trading standards services in terms of ensuring that personal details of consumers, traders and any other third parties recorded in case files or on data basis are kept confidential at all times and that the information is only shared in accordance with this agreement as is disposed of securely. There were similar OMOUs for the other work that Mr Wanless did for the Respondent on other particular projects but they were all in similar terms to this one. I find it likely that the other OMOUs all confirmed that he reported to TRS and that he was a seconded contractor sourced by that organisation and placed within the London Borough of Redbridge Trading Standards as a seconded contractor.

52 Mr Wanless was placed with the Respondent because the Claimant was undertaking a major criminal investigation and the First Respondent's Trading Standards considered that it needed assistance in doing this piece of work. This was called Operation Ranger.

53 The Tribunal saw the document which the Claimant signed which was a request for national support for consumer enforcement action. The request was as follows:

> "The assistance of a TREC funded officer is requested (namely Sean Wanless) to assist an investigation into letting and mortgage deposits fraud. Tasks needing completion include intel gathering, obtaining and executing warrants, statements/VPS taking and PACE interviewing."

That request was signed by the Claimant on 10 December 2014. The form also confirmed that the case was anticipated to be complex as the suspects were using aliases. The Claimant was to be the officer in charge.

54 The OMOU in relation to Operation Ranger was signed by the Claimant's line manager at the time, Harveil Toor as Head of Service and the Claimant as nominated Case Lead Officer. Carl Robinson signed on behalf of Tri-Region Scambuster project and Mr Wanless signed as the TRS investigator. Both Mr Wanless and Mr Robinson signed on behalf of TRS/TSSEL. TRS was to cover the overall prosecution cost, officer's salaries, disbursements of all additional expert witness, forensic cost, legal cost or other costs as agreed by TRS Governance Group in support of the investigation.

55 Mr Wanless worked quite closely with the Claimant when working on Operation Ranger. They were engaged in collecting statements, interviewing members of the public and preparing a case for prosecution against the alleged fraudsters.

56 During his time at Redbridge, Mr Wanless was issued with a warrant card. The Respondent has been unable to find any authorised delegated authority giving him a warrant card in its records. He had a security swipe card so that he had ease of access to and from office buildings.

57 Ms Harveil Toor confirmed that he worked on Operation Munich from October 2013. He did not work with the Claimant as part of that operation and had an office based in a different part of the Respondent. The arrangements for his work on that operation was similar to that of Operation Ranger in that the First Respondent did not pay him a salary or cover the cost of any invoices from him. Again he was placed there as a TRS operative. Mr Wanless would make any arrangements with regard to holiday or sick leave direct with TRS. He was also responsible for organising his time. On Operation Munich he worked with George Moraitis who was a Trading Standards Enforcement Officer employed by the First Respondent.

58 During the time that Mr Wanless worked on Operation Munich, Ms Toor was aware that he operated under the direction of Ian Wright, Manager and Lead for TRS. Mr Toor had no line management responsibilities for him and did not carry out any appraisals, approve any leave or conduct any return to work interviews following any periods of absence that he might have had. The First Respondent did not set any days on which he had to work.

59 The Claimant gave evidence that she believed that Mr Wanless took over running of Operation Munich at the time that Mr Moraitis left and that he had an office based in the same building which the Claimant worked although she did not work on Operation Munich. Operation Munich progressed to the stage where in February 2014 search warrants were obtained and executed by the Metropolitan Police on the premises under investigation.

60 Subsequent to that, solicitors representing the suspects in that Operation applied for a judicial review of the application for and the issue of the search warrants. As a result, Operation Munich was held in abeyance to allow the judicial review process to be completed.

61 Once Operation Munich was suspended, the First Respondent submitted a further bid to TRS for additional resourcing on Operation Cosgrove which was a wide-reaching investigation into organised group of rogue traders targeting elderly and vulnerable residents by charging exorbitant amounts of money for work that was overpriced, unnecessary and poorly carried out. The bid was successful and TRS redirected Mr Wanless to assist the First Respondent on Operation Cosgrove. The lead officer for Operation Cosgrove was Senior Trading Standards Officer, Adrian Simpson. Mr Wanless was not the lead officer on this project or on Operations Munich or Ranger. His role during Operation Cosgrove was to assist in gathering evidence and collating statements for potential criminal prosecution.

62 Mr Wanless never carried out any of his activities on his own but was usually accompanied either by the police or by the Claimant or the other lead officers when attending private property as part of any of the Operations.

63 While working at the First Respondent, Mr Wanless was usually hot-desking. He attended the office on a few days a week and the Claimant confirmed in her evidence that he did not attend team meetings although he always wanted to be included in social events.

64 Mr Wanless sent emails as part of his work with the Respondent. The Tribunal had a sample email in the bundle of documents dated 4 February 2016. In that email, Mr Wanless signed off as "Sean Wanless TRS Investigator, Trading Standard Service, London Borough of Redbridge, 10th Floor, Lynton House, 255-259 High Road, Ilford, Essex IG1 1NY". He gave a telephone number which was a landline to Lynton House and gave an email address of sean.wanless@redbridge.gov.uk. He gave a twitter address of @redbridgelive and facebook and website addresses for Redbridge.

65 Another email in the bundle dated 3 March 2016 had the same signing off information. The Claimant confirmed that Mr Wanless signed letters to banks and other financial institutions requesting information under the Data Protection Act. On those occasions, he would write on Redbridge headed paper to say that he is a TRS Trading Standards Officer attached to Redbridge and would explain who he was investigating, what information was being sought and ask for it in an evidential format. He would then sign that letter as a TRS Scambuster Investigator attached to the London Borough of Redbridge.

66 Although Mr Wanless had a warrant card, all witnesses confirmed that he had never used it during his time on Operations Cosgrove, Munich or at Ranger. The warrant card stated that it expired on 31 December 2016. The warrant card clearly stated that it was the property of the London Borough of Redbridge and gave the public protection office a place to return it to if it was found. It identified Mr Wanless as a Trading Standards Officer and stated the following:

> "The above mentioned officer has been authorised on behalf of the London Borough of Redbridge in the exercise of the powers conferred by virtue of the legislation in the attached list."

It stated that it was authorised by Cathy McCann, Chief Community Safety Officer. It then listed a number of acts of Parliament under which Mr Wanless had authority to act by virtue of the warrant card. It was curious that Mr Wanless had a warrant card. Mr Toor, Mr Chaplin and Ms Taylor HR all confirmed that there was no record in the Respondent's records of anyone signing delegated authority to issue Mr Wanless with a warrant card. The Respondent has an internal procedure that would require a functional unit manager to have sight of the application form and to sign to give the trading standards officer delegated authority. Once the card is printed the delegated authority is cross-checked and referenced. This process is necessary because if an enforcement officer is in court giving evidence the signed delegated authority would be requested and would need to be shown to the court. It is clear that Mr Wanless never gave evidence in court in this way because the lack of delegated authority would have been discovered at that time.

67 Mr Wanless confirmed that he never used the warrant card as all of the operations he had been involved with usually required the police to issue search warrants which would be used to enter premises. His evidence was that he would be part of the team that would go into premises under those search warrants and his name would be on the warrant along with all the other officers concerned. In those situations he would not need to show his warrant card which meant that he never used it during his time at the Respondent.

68 On 9 December, the Claimant spoke to Mr Chaplin her line manager to inform him that she was going to raise a formal complaint that she had been sexually harassed at work by Mr Wanless. There is a dispute between the parties as to Mr Chaplin's reaction but the Claimant did submit a formal grievance on 13 December about Mr Wanless's conduct under the First Respondent's Dignity at Work procedure which she sent to Mr Chaplin. The Claimant has been off sick since December 2015.

69 On 18 December Mr Chaplin wrote to the Claimant acknowledging her complaint and informing her that he had appointed Wendy Golding as the investigating officer to address it. The Claimant was unhappy about that appointment and asks that someone else should be appointed as she considered that Ms Golding knew both herself and Mr Wanless and she had concerns about confidentiality. The Claimant was invited to an investigation meeting on 26 January.

70 On 17 December 2015 TRS was informed of the Claimant's complaint and that Mr Wanless was under investigation. They were also advised that it may be the case that at some stage he would not be permitted to attend the council's offices in Redbridge.

71 On 11 March the asked to see Ms Golding's report. The investigation report was in the bundle of documents and was dated 26 February 2016. As part of the report the investigator concluded that although it was not possible to find corroborating evidence in relation to each complaint she found that there was strong evidence to support each specific allegation. She essentially upheld the Claimant's grievance. The recommendations included a recommendation that if Mr Wanless had been an employee of the First Respondent, she would have recommended that the disciplinary procedure should be initiated due to the potentially serious nature of elements of the Claimant's complaint against him. Instead, the investigator recommended that consideration should be given to ending the secondment and any future working of Mr Wanless at Redbridge.

72 Mark Benbow, Community Safety, Transformation and Enforcement Lead wrote to the Claimant on 4 March to let her know that the report concluded that she had been a victim of sexual harassment by Mr Wanless. He wrote to her formally setting out the results of the investigation on 15 March although the copy of the investigation report was not enclosed. A slight correction was made to that letter in a further letter dated 22 April in which the Respondent confirmed that although not all of the complaints were corroborated it was the conclusion that it was likely that all the incidents did occur. Her grievance was still upheld.

73 Solicitors then entered into correspondence with the Respondent on behalf of the Claimant querying the results of the investigation and raising issues of confidentiality that the Claimant had with the process that the Respondent set up.

74 Mr Chaplin confirmed that by this time, the Claimant and Mr Wanless in Operation Ranger had got to the stage where criminal charges had been laid against two defendants who had been bailed to return to court in March 2016. The First Respondent needed further work to be done on the case to ensure that the prosecution did not fail. Having invested lots of resources into the case up until that time they needed someone to get the case ready for court. Mr Chaplin decided that Mr Wanless should continue working for the Respondent to finish that piece of work. Mr Wanless had a significant amount of knowledge in relation to the case in particular, the evidence, the witnesses, the defendants etc and it was felt that the most efficient way to bring the matter to court was to ask him, through Mr Ian Wright, to finish the work on the matter. The Respondent made that request of Ian Wright Mr Wanless' manager at TRS. Mr Wright agreed that Mr Wanless could remain on Operation Ranger until it completed. Mr Ian Tucker took over supervision of the case and was the lead on the Operation. Mr Wanless never became the lead on the Operation. Mr Tucker was the officer in charge.

75 Mr Chaplin confirmed that he had initially suggested that Mr Wanless should be made officer in charge because the amount of work and the significant knowledge that he had about the case but Mr Wright at TRS refused and reminded the First Respondent that Mr Wanless was simply a resource for the Respondent and it was the Respondent's case and it was therefore necessary for the First Respondent to keep control of it.

76 In the First Respondent's letter to the Claimant's solicitors dated 12 May 2016, the First Respondent confirmed that one of the recommendations in the report was that consideration should be given to ending the secondment and any future working of Mr Wanless at the London Borough of Redbridge. The Claimant's solicitors were informed that Mr Wanless was no longer carrying out any work for the council and will not be engaged in any future secondment type arrangements there.

77 In the letter to the Claimant's solicitors the Respondent confirmed that they were not expecting the Claimant to simply return to the workplace and be put back in the same environment as Mr Wanless. It is the Respondent's case that had the Claimant indicated that she was going to return to work from her sick leave, they would have immediately removed Mr Wanless from the organisation.

78 In the letter, Mr Benbow on behalf of the Respondent confirmed that the Claimant raised the issue of confidentiality. Apparently a former employee of the First Respondent called Martin Hickey had made a Facebook post that contained derogatory and distasteful about her and which indicated that he had clear knowledge of the Claimant's grievance. The Claimant's solicitors had alleged in their letter that she considered that Mr Hickey found out about her complaint because the First Respondent had breached confidentiality. The Respondent refuted that allegation. Mr Benbow confirmed that the Claimant's written complaint was not shown to any of the witnesses or to Mr Wanless. It had only been shown the Respondent's employment relations advisor Karen Scott, Mr Benbow himself, and Mr Drake who was Head of

Environmental Health and Consumer Protection. Mr Wanless had been advised of the broad nature of the complaints against him as part of the investigation of the grievance. Mr Benbow suggested that it was likely that Mr Wanless provided the information to Mr Hickey who he confirmed was an ex-employee.

79 The Respondent had a number of policies in the bundle, one of which was its Dignity at Work – Bullying and Harassment Policy and Procedure. The procedure allowed for any issues to be addressed informally but to be taken up in a more formal way if it remained unresolved or if the employee decided that they wanted to and mediation/conciliation was unsuccessful or not considered appropriate.

80 The Investigation Officer, who would usually be appointed by the appropriate Manager, would normally investigate with the assistance of HR, ideally within 15 days from receipt of the complaint. The policy allows for copies of the relevant documents – including any reports to be sent to HR Services. If the complaint is substantiated, the Investigating Officer, together with HR Services would make recommendations to the Manager who referred the case who would then decide on a course of action. That could include reporting the matter to the perpetrator's line manager. Further action could involve disciplinary proceedings at which the evidence used in the grievance investigation could be used.

Judgment

Aqua Bubble

81 In this Tribunal's judgment, the Claimant declined to make any submissions on Aqua Bubble being an appropriate Respondent in these proceedings. Aqua Bubble is Mr Wanless' employer for tax purposes. However, it does not pay him any remuneration. Aqua had no relationship with the Respondent or with the Claimant. They were not party to the OMOU. The Employment Tribunal has no jurisdiction to hear the case against them as there is no part of the EqA that applies. The Claimant cannot pursue Aqua Bubble for Mr Wanless' actions.

82 The Tribunal's judgment is that the complaint against the Second Respondent, Aqua Bubble is struck out as the Tribunal does not have jurisdiction to hear it.

Mr Wanless

83 Under Section 109 EqA the Claimant can pursue an action against Mr Wanless for actions he has done in the course of his employment. The first question is therefore – was he employed by the First Respondent?

84 In this Tribunal's judgment there was no contract between Mr Wanless and the First Respondent. The OMOU was between TRS/TSSEL and the First Respondent. He did not sign the agreement in his own right but as a representative of TRS/TSSEL.

85 Mr Wanless had been associated with the First Respondent from 2013 to 2015/2016. However, from the cited cases the mere passage of time does not change his status. During his time working with the First Respondent, it was clear to all concerned that he was a seconded contractor, seconded by TRPS and placed in the Trading Standards Department to assist the Respondent.

86 Mr Wanless was never the officer in charge of any of the Operations on which he worked. He provided much needed support to the Operations but was never in charge. Whenever the Respondent wanted his resource deployed elsewhere within the Council they had to ask TRS to do so and he was TRS's resource.

87 Mr Wanless was not supervised, controlled or managed by the Respondent. He organised his own time. He organised his own work. The terms on which his services were provided to the Respondent is set out in the OMOU and both TRS and the First Respondent kept to those terms during his time there.

88 There was no fiduciary relationship between Mr Wanless and the First Respondent. In this Tribunal's judgment there was no need to imply any agreement between Mr Wanless and the First Respondent since him working on Operations Munich, Cosgrove and Ranger was explained by the OMOU. It is clear that he was working with the First Respondent to conduct these investigations rather than working for it.

89 The next question for the Tribunal comes from section 109(2) EqA and was whether Mr Wanless was the First Respondent's agent. Applying the definition of agency in Bowstead & Reynolds and the law as stated in *Kemeh*, for Mr Wanless to have been the First Respondent's agent there would need to be fiduciary relationship between them, he would need to have authorisation to act on its behalf so as to affect its relations with third parties; and the duties he was performing were being done as the First Respondent's agent.

90 However, there was no fiduciary relationship between Mr Wanless and the First Respondent. His wages came from the Government and not from the First Respondent. Whereas in *Kemeh* the Ministry of Defence had day-to-day control over the discriminator, in this case, the First Respondent and in particular, the Claimant before she went off sick did not have control over Mr Wanless. They had to go through TRS if they wanted to move him to another Operation and they had to inform TRS that he was being investigated for his conduct towards the Claimant and that it may be asked to remove him in future. It is my judgment that Mr Wanless worked with the First Respondent on these Operations and did not work for it. He was an experienced Trading Standards Officer who was brought in for his expertise and experience and it is unlikely that he took direction or instruction from the Claimant or the other officers in charge of the other Operations.

91 Did he have the authority to affect the First Respondent's relations with third parties? As he was in possession of a warrant card it is likely that he did have that power. He could have used it in that way. In reality he never did so. He always attended premises in conjunction with the police and the officer in charge of the particular Operation. He was never the main person in any of those raids or public actions. In his correspondence with various bodies to obtain information as part of investigations, Mr Wanless always identified himself as a TRS Trading Standards Officer working with the First Respondent. The fact that the First Respondent's details are part of the email address together with the Respondent's details does not take the matter any further. He was in the process of conducting investigations to help the First Respondent. The person he was writing to would need to be able to contact him to

give him the information requested and so accurate contact details were necessary. At the same time, he consistently put on correspondence that he was a TRS Scambuster Investigator attached to the Respondent. That was unlikely to lead anyone who received such a communication to believe that he was an agent of the First Respondent. It is likely to indicate that he was an agent of TRS. Applying the law in Kemeh – he would no more be considered an agent of the First Respondent than the Claimant would be when she sent similar letters to banks and other organisations requesting information on suspects.

92 In this Tribunal's judgment, Mr Wanless was not an agent of the First Respondent.

93 Mr Wanless was not the Claimant's employer. He was neither the First Respondent's employee nor its agent. The EqA does not provide the Claimant with any other route by which she can take action against him in the Employment Tribunal for his conduct towards her.

94 In those circumstances, her claim against the Third Respondent cannot proceed and is struck out.

The First Respondent

95 The Claimant continues to be employed by the First Respondent.

96 The complaint she makes against the First Respondent is that it discriminated against her on the grounds of her gender. From her ET1 and her evidence at the Hearing it appears that she is making the following complaints:

96.1 That her complaint was not taken seriously

96.2 That there was delay in addressing her complaint

96.3 Mr Wanless continued to work at the Respondent despite what was said in the First Respondent's letter to her

96.4 She was not allowed to choose the investigator

96.5 She was not given access to the Report until she got the bundle for this Hearing.

It was the Claimant's case that she did not think that a man in her situation would have been treated in this way.

97 It was submitted on the Claimant's behalf that it was too early for the Tribunal to make a decision on the strengths or weakness of the Claimant's complaint about her grievance. However, the Tribunal did have live evidence from the Claimant on this matter. What it did not have was the Respondent's evidence but the Tribunal is aware that the burden would be on the Claimant to show that she was treated less favourably on the grounds of her gender in way in which the Respondent handled the grievance.

98 The Claimant did not point to a man who had his grievance dealt with in less time or who had been provided with a copy of the investigation report. She did not point to any policy of the Respondent which addressed these matters.

99 The grievance was investigated in accordance with the policy referred to above. There was a delay in the report being produced and it was produced outside of the time scales set out in the policy but the Claimant does not suggest in her ET1 or in her evidence to the Tribunal that grievances brought by men are usually dealt with much quicker and within the time scale set out in the policy. The Claimant's grievance was upheld.

100 The Claimant does not suggest that the Respondent would usually allow the complainant to choose the investigator and it would be unusual if it did so. The policy does not allow for that and specifically stated that the Manager to whom the complaint is made will choose the Investigating Officer. The policy also stated that the report would be kept by HR. There was no provision for the Claimant to be given a copy of the report. Even though the Claimant may have wished to see a copy of the report, she has not put forward any fact from which she will ask a Tribunal hearing this allegation to find that the reason why she was not given the right to choose the Investigating Officer, or given a copy of the report or the investigation was delayed; was because of her gender.

101 In relation to the fact that Mr Wanless was not immediately removed from his work with the Respondent, Mr Chaplin explained the balancing act that he had to do between the urgent need to complete the Operation and secure convictions in relation to criminal activity in the borough and the need to provide the Claimant with a safe working environment. It is the First Respondent's position that had the Claimant informed it that she was well enough to return to work Mr Wanless would have been asked to leave. They had already notified TRS in December when she first raised her grievance that he was under investigation and may have to be asked to leave the Council premises.

102 In this Tribunal's judgment the Claimant is unhappy with the grievance process. However, it is highly unlikely that she will be able to establish at a Hearing facts from which the Tribunal can conclude that the reason for the failings that she complains of in the grievance process was her gender. It is highly unlikely that the burden would shift to the Respondent to show a non-discriminatory reason for the delay, Mr Wanless completing his work on Operation Ranger and for the Respondent's decision – in line with its policy – not to let her have the right to choose the investigating officer or to see a copy of the report once produced.

103 The Tribunal considered that the claim of sex discrimination has no reasonable prospects of success. The Claimant was unable to refer to anything – whether in her evidence, in her ET1 or in her submissions – which she would seek to rely on in a full merits hearing to lead the tribunal to infer that the reason for the matters she complains about was her gender.

104 The Tribunal then considered whether it should impose a deposit order as a condition of allowing the complaint to continue. The Tribunal considered that it was likely that the Third Respondent treated the Claimant badly because of her gender but the Tribunal hearing the case would not be looking at that. The complaint is simply that the First Respondent treated her less favourably in the way it dealt with her grievance. From the Claimant's evidence at this Hearing, the ET1, the report and Mr Bowen's letters – it appears that the First Respondent dealt with her grievance appropriately. The Tribunal is aware that it has not heard all the evidence on this matter. But taking the Claimant's case at it highest, even if the Tribunal at a full merits Hearing came to the conclusion that the grievance could have been addressed quicker and the First Respondent should have asked TRS to remove the Third Respondent from its premises immediately, it would still need evidence from which to infer that this occurred because of the Claimant's gender, in order for her to be successful in a sex discrimination complaint. The Claimant did not suggest how that was related to her gender.

105 The Respondent as a public body would incur further costs in defending a sex discrimination complaint that is unlikely to succeed. If the complaint was allowed to proceed the Claimant will have an expectation of success which is unlikely to be met. She would also incur additional costs, stress and time in preparing the case and attending the Tribunal.

106 For all those reasons this Tribunal's judgment is that it is appropriate to use its discretion to dismiss the claim because it has no reasonable prospects of success.

107 It is this Tribunal's decision that the Claimant's complaint that the Respondent treated her less favourably on the grounds of her gender in the way it dealt with her grievance has no reasonable prospects of success. That complaint is struck out.

108 The Claimant has no other claims before the Tribunal.

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Employment Judge Jones

28 March 2017