Appeal No. UKEAT/0058/13/RN
UKEAT/0059/13/RN
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EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 17 June 2013

Before

HIS HONOUR JUDGE McMULLEN QC

(SITTING ALONE)

MR C G ORFORD APPELLANT

S THREE STAFFING UK LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	No appearance or representation by or on behalf of the Appellant
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE – Amendment

The Employment Judge wrongly refused to allow the Claimant to join as a Respondent the end user in a triangular agency relationship when that Respondent was said to be an undisclosed principal. **Equality Act 2010** ss.109-110 applicable. The EAT allowed the amendment and remitted the case to the Employment Judge for further directions.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about the refusal of Employment Judge Garside sitting in Newcastle to allow the Claimant to join into proceedings Sevcon Ltd who is the end user of services provided by an employment agency S Three Staffing UK Ltd. I will refer to the parties as the Claimant, S Three and Sevcon.

2. This is a hearing. S Three did not intend to attend or be represented as they said in writing. Sevcon was aware of the hearing, albeit late in the day, and were advised of their right to attend but have not appeared, as their representative solicitor says out of no disrespect to the Appeal Tribunal.

Introduction

3. This is an appeal by the Claimant against three orders; on appeal they are known as EAT/0058/13, 0059 and 0060, the net effect of which was to preclude the Claimant in his claim against S Three from bringing in the end user, Sevcon. The reasons given by Employment Judge Garside were these:

> **"8. I did not give reasons at the telephone case management discussion for the refusal to join Sevcon as a second respondent. There is no requirement to do so and is not particularly appropriate at a telephone case management discussion. The reason that I refuse the application is, having the ET1, the ET3 and the correspondence, it was clear that the claimant had been registered with the respondent for some time. He was sent an email by the respondent on 24 May 2012 giving details of the vacancy at Sevcon. The respondent notified 740 other potential candidates at the same time. The claimant applied for the vacancy by attaching his CV to an email but provided no other information. The respondent was required by Sevcon to provide two candidates only and who its specifications. The respondent sent details of two candidates. Sevcon did not reject the claimant's application. It never received any documentation concerning him.**
>
> **9. The claimant has been unable to identify a reason why Sevcon should be joined as a second respondent other than it was the Principal in respect of s.109 and 100 of the Equality Act 2010 and potentially liable for its agent's alleged wrong-doing. Taking into account the overriding interest and the fact that the case was listed for one day, and was to be listed very shortly, it appeared to me that to exercise my discretion in favour of the claimant's application was inappropriate. Nothing would be achieved by joining Sevcon as a second respondent other than to involve them in unnecessary costs, it already having instructed solicitors to respond to the application. Having read the ET1 and the ET3 I formed a view of the strength**

> **of the claimant's claim. If he was successful in his claim the respondent clearly had sufficient financial resources to be able to satisfy any award made. Therefore, I declined to join Sevcon as a second respondent."**

4. The Claimant has submitted a very detailed skeleton argument analysing those reasons of the Employment Judge. He makes a powerful case and I will allow his appeal.

5. First I consider that the purpose of sections 109 and 110 of the **Equality Act** is precisely to deal with the present situation. Sevcon was until late in the day an undisclosed principal and sections 109 and 110 fix liability upon a principal for the acts of its agent, here S Three. The Judge did not consider the balancing exercise for an amendment if this were to be conducted under **Selkent** principles except simply that the hearing was listed.

6. The Judge did not consider precisely the time point which was to be identified arising out of the late disclosure of the identified principal, Sevcon. The fact that there was a hearing listed is a factor but is not substantial in this case given the nature of the allegations made by the Claimant.

7. The Employment Judge appears to have made decisions on the basis of the 'pleadings' and without considering whatever evidence there might be. The Judge did not consider the allegation of discrimination which points towards the matter being dealt with as a matter of evidence and substance and not being disposed of except in the most cases by way of a summary procedure.

8. The Claimant sought to rely on new evidence about material which has not been made available. The Claimant contends that the application for joinder was not dealt with in the

correct way. The test is not what is appropriate but what justice requires. The Claimant is to make a case about the concealment by S Three of the undisclosed principal, Sevcon.

9. In my judgment, all the material, bearing in mind the criteria in **Selkent** and **Cocking v Sandhurst** pointed towards the granting of the Claimant's application to join Sevcon to the proceedings. Triangular proceedings where an employment agency is involved are the norm so that a Claimant can weigh his case against the agency and the end user and a specific gateway is made by the **Equality Act** for that.

10. In my judgment the Judge erred in the factors which he considered and in failing to stand back and look at what was required by a Claimant alleging discrimination in the circumstances of this case.

11. What is to be done? I do not have any argument from Sevcon or S Three but I do have the Claimant's argument that as a matter of practicality this matter should be decided by the EAT rather than send it back. I note from **Buckland** [2010] ICR 908 CA the comment that ping-pong between the ET and the EAT should be avoided if at all possible.

12. I have such material as is available; I am not making a final determination disposing the case, indeed we are at an early stage. I am simply giving an opportunity for the Claimant to bring his case against S Three and against Sevcon and for this case to go ahead. In my judgment the overriding objective requires Sevcon to be joined. No more material is necessary for me to make that decision. The application by the Claimant for me to do so is unopposed and so I will restore this case to Employment Judge Garside or any other Employment Judge for further directions with Sevcon now as the Second Respondent.