Appeal No. UKEAT/0167/13/DM

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 June 2013

**Before**

**HIS HONOUR JUDGE PETER CLARK**

**MR G LEWIS**

**MS P TATLOW**

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MS S HURST — APPELLANT

MR M KELLY — RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

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| For the Appellant | MR GORDON SANKEY<br>(Representative)<br>Stevenage Citizens Advice Bureau<br>Swingate House<br>Danestrete<br>Stevenage<br>SG1 1AF |
| For the Respondent | No appearance or representation by or on behalf of the Respondent. |

**SUMMARY**

**HARASSMENT**

**SEX DISCRIMINATION – Jurisdiction**

Whether Claimant could bring a claim of sexual harassment against a fellow employee whilst not proceeding against their employer.

**Held**: Employment Tribunal was wrong to refuse jurisdiction in these circumstances. **Barlow v Stone** [2012] IRLR 899 (EAT) applied. **Fecitt v NHS Manchester** [2012] IRLR 64 (CA) considered and contrasted.

Appeal allowed. Case remitted for full merits hearing before fresh ET.

**HIS HONOUR JUDGE PETER CLARK**

**Introduction**

1. At all relevant times both the Claimant, Ms Hurst, and the Respondent, Mr Kelly, were employed by PH Jones Ltd (PHJ) at their call centre in Stevenage. The Respondent was the Claimant's line manager.

**The factual background**

2. On 24 September 2010 the Claimant's employment with PHJ ended. She entered into a compromise agreement with PHJ which precluded her from bringing any claim against that employer arising out of her employment and its termination and she received a payment.

3. In October 2010 she lodged the present claim in the Bedford Employment Tribunal against this Respondent, Mr Kelly, only. She alleged sexual harassment by him on two occasions in March and July 2010 at what are said to be work-related functions. By his form ET3 the Respondent denied the allegations.

4. The matter came on for hearing before a full Tribunal on 6 December 2012. The Claimant appeared in person; the Respondent did not attend. He has not taken any part in this appeal. The Tribunal identified a preliminary jurisdictional issue to be determined: could the Claimant bring this claim against a fellow employee only, her former employer not being a party to the proceedings?

5. The Claimant relied upon a skeleton argument prepared by an adviser at her local Citizens Advice Bureau dated February 2011. For the reasons given in the Judgment dated 20 December 2012, the Tribunal decided that they had no jurisdiction to hear the claim because

the former employer, PHJ, was not a party and it was dismissed. Against that Judgment this appeal is brought.

6. The Tribunal was not referred to the Judgment of the EAT, HHJ David Richardson presiding, in **Barlow v Stone** 1 June 2012, since reported at [2012] IRLR 899. In that case the claimant brought a claim of victimisation under **Disability Discrimination Act 1995** against a fellow employee but not their mutual employer. A tribunal dismissed his complaint on the ground that it had no jurisdiction. The EAT allowed the claimant's appeal, holding that it was unnecessary for the claimant to bring a claim against his former employer in order to proceed against a fellow employee alleged to have discriminated against him by way of victimisation in the course of his employment.

7. We respectfully agree with the EAT's approach in **Barlow**. Had that case been made available to the Bedford Tribunal, we are satisfied that the Tribunal would have followed it and reached the opposite conclusion. Our analysis, in line with **Barlow** and the helpful submissions advanced by Mr Sankey on behalf of the Appellant before us, is that by s.41 of the **Sex Discrimination Act 1975**, which applied in this case, the employer is vicariously liable for the tortious acts of its employees vis-à-vis a fellow employee bringing a complaint under the Act, and by s.42(2), the tortfeasor employee is liable as an aider and abetter even if the employer escapes liability by virtue of the statutory defence under s.41(3). We are not excluding, at a full merits hearing a possible defence that the alleged tortfeasor was not acting in the course of his employment so that his employer could not have been vicariously liable for his act.

8. The SDA applies in this case because the acts complained of preceded the coming into force of the **Equality Act 2010**. The particular act complained of is harassment contrary to s.6(2A)(a). The Tribunal, in their conclusions, para. 9, noted the heading to Part 2 of the Act,

"Discrimination by Employers". That does not, in our judgment, prevent s.42(2) from attaching personal liability to the tortfeasor employee as aider and abetter to the employer, who is, or would be subject to the s. 41(3) defence, vicariously liable for his acts.

9. In makes no difference to the analysis in our view that the reason why the employer has not been joined as a Respondent in this case is the existence of a binding compromise agreement which precludes such a claim. That may be relevant to the question of compensation if her claim against this Respondent proceeds. But that is not a matter which strikes at the Tribunal's jurisdiction. Further, unlike the Employment Tribunal, we can see no basis for distinguishing the approach of Mummery LJ in **Yeboah v Crofton** [2002] IRLR 634 in the passage to which the Tribunal was referred and to which they refer in their Reasons.

10. We are fortified in our conclusion by the treatment of the protection under the **ERA** for whistleblowers. In **Fecitt & Ors v NHS Manchester** [2012] IRLR 64 the Court of Appeal held that s.47B of ERA did not protect whistleblowers from acts of victimisation by fellow workers. The protection lay only against the employer. That was the erroneous approach taken by the Employment Tribunal in the present case in relation to liability under the SDA. However, in **Fecitt**, at paragraph 33, Elias LJ drew this distinction:

> **"Here, in contrast to the discrimination legislation where individuals may be personally liable for their acts of victimisation taken against those who pursue discrimination claims, there is no provision making it unlawful for workers to victimise whistleblowers."**

It followed that the Claimant's employer could not be held vicariously liable for the non-tortious acts of the victimisers in **Fecitt**.

11. Parliament has since taken action to amend the law as it was revealed by the Court of Appeal in **Fecitt**. S.19 of the **Enterprise and Regulatory Reform Act 2013** amends s.47B

ERA by inserting, at subsection 1A, a provision rendering fellow employees personally liable for acts of victimisation and, thus, rendering employers vicariously liable for those acts. For completeness, we note that s.110 of the **Equality Act** spells out the personal liability of employees for their discriminatory acts rendered unlawful by the 2010 Act.

12. In these circumstances, we have concluded that this appeal must be allowed. The decision of the Employment Tribunal is set aside. The matter is remitted to a fresh Tribunal to be appointed by the Regional Employment Judge to determine the claim on its merits.