EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms S Nawab	**v**	(1) T Systems Ltd
		(2) Mr S Vandenhoudt
		(3) Ms D Theisinger
		(4) Deutsche Telekom

PRELIMINARY HEARING

Heard at: **London Central Employment Tribunal** **On: 10 & 11 December 2018**

Before: **Employment Judge Davidson**

Appearances

For the Claimant: Ms C Palmer, Counsel
For the Respondent: Mr J Dawson, Counsel

RESERVED JUDGMENT

Issues

1. The issues for the tribunal as set down by Employment Judge Burns at a case management hearing on 11 September 2018 were as follows:

   1.1. Are R2, R3 and R4 employees or agents of R1 for the purposes of sections 109-110 Equality Act 2010?
   1.2. Are R2 and R3 employees or agents of R4 for the purposes of sections 109-110 Equality Act 2010?
   1.3. Is R1 or R4 otherwise liable for the acts or omissions of R2 or R3 or each other?
   1.4. Should any of the claims be struck out as a consequence of the above.

2. A further issue was identified at the start of the hearing, namely, if another entity is identified as being the correct respondent, should the claimant be permitted to amend her claim to add that entity as a respondent.

Cast List

3. The relevant parties to this claim are as follows:

   3.1. The claimant is Ms S Nawab.

   3.2. R1 is T-Systems Limited, the claimant's employer and part of the Deutsche Telekoms Group of companies.

   3.3. R2 is Serge Vandenhoudt, an employee of T-Systems Belgium (TB), who line managed the claimant while they were both providing services to another group company, T-Systems Nordic TC A/S (TN).

   3.4. R3 is Daniela Theisinger, R2's line manager and managing director of TB.

   3.5. R4 is the ultimate parent company, Deutsche Telekom.

   3.6. T-Systems International GmbH (GmbH) is a subsidiary of R4 and sits above R1, TN and TB in the group structure.

Factual Background

4. The tribunal heard evidence from the claimant on her own behalf and from Jake Attfield on behalf of the respondent. The relevant background facts are as follows:

   4.1. The claimant started working for R1 in November 2010 as a UK-based employee. In June 2015, she was offered a role as Senior Contracts Manager on the KONE account, which was being handled by TN. She was not seconded to TN but her services were provided by R1 to TN under an intra-group Services Agreement which, itself, was made pursuant to an Umbrella agreement across the group companies.

   4.2. The claimant was provided with a letter of confirmation of the move, informing her that she would report to R2 on day to day matters but that R1's HR department would be her reporting line for administrative matters.

   4.3. The claimant alleges that she was subjected to sexual harassment by R2 from October 2015. The issues led to a series of events resulting in the claimant no longer wanting to work on the KONE account and, consequently, being at risk of redundancy in July 2017.

   4.4. The claimant was consulted on her potential redundancy. R2 was not available for the first redundancy consultation but he conducted the second consultation meeting. He liaised with R1's HR department and took advice from them in relation to the correct procedure. All group companies were engaged in attempting to find alternative employment for the claimant. R1 extended her redundancy consultation period at the suggestion of R4. She remains at risk of redundancy but has not been dismissed by R.

   4.5. R1 has an Anti-Harassment and Bullying Procedure which provides that "*any complaint should be made to your Line Manager and/or the HR*

Representative. If the complaint is against your Line Manager, the complaint should be made to his or her line manager and/or the HR representative."

4.6. There is a group-wide Code of Conduct requiring those working in the various group companies to observe local obligations and to respect local culture. The Code incorporates a Whistleblowing policy.

4.7. In 2017, the claimant reported R2's conduct to Mina Owen (HR in R1), R3 and (on advice from R3) to Georg Pepping of R1. The claimant states that no action was taken and she therefore raised her concerns to R4's compliance team, alleging that there had been a breach of R4's Code of Conduct.

4.8. This was investigated by R4's compliance team but the claimant was not informed of the outcome because the complaint was treated as being made under the whistleblowing procedure. The claimant was dissatisfied with the outcome of her complaint and she requested a meeting with R3 on the basis that she was R2's line manager. The claimant attended a formal grievance meeting conducted by the HR team of R1 on 1 February 2018 but has received no outcome.

The Law

5. The relevant law is as follows:

5.1. Sections 109 and 110 of the Equality Act 2010 set out the provisions relating to vicarious liability of employers and principals for the actions of their employees and agents and the liability of the employee or agent.

> **S109. 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.
>
> **S110. Liability of employees and agents**
>
> (1) A person (A) contravenes this section if—
>
> (a) A is an employee or agent,
>
> (b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and
>
> (c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).
>
> (2) It does not matter whether, in any proceedings, the employer is found not to have contravened this Act by virtue of section 109(4).

5.2. At common law, the definition of as a 'unilateral manifestation by the principal of his or her willingness to have their legal position changed by the actions of

an agent' was approved by the Court of Appeal in *Kemeh v MOD* [2014] IRLR 377.

Determination of the Issues

6. I make the following findings:

General

6.1. Each of the companies within R4's group are separate legal entities.

6.2. The claimant was an employee of R1. I find no evidence of an employment relationship between the claimant and R4, or any other group company. It is clear that R1 was regarded as the employing company throughout.

6.3. R2 and R3 were employees of TB; they were not employees of R1. There is no evidence of the elements required to constitute an employment contract between R1 and either R2 or R3. Similarly, there is no evidence of an employment contract between R4 and either R2 or R3.

6.4. I reject the claimant's submission that, due to the close working relationships between group companies, all working with the common aim of benefitting R4, that all group employees are employees of all group companies.

6.5. R4 is not an employee of R1 as it is a corporate entity and cannot be an employee.

Was R2 the agent of R1?

6.6. I find that R2 was the agent of R1. When matters were arranged so that R2 would be R1's line manager, R1 delegated its management of its employee, the claimant, to R2. She remained R1's employee and therefore R2's actions as her manager were carried out on behalf of R1.

6.7. This was a situation which was imposed on the claimant by R1 and I find it a deeply unattractive argument that the claimant should have no remedy for her allegations of discrimination because the alleged perpetrator supposedly had no connection with R1. I find that he must have had some connection with R1 if he was authorised by them to be the day-to-day manager of one of their employees, carrying out the duties which R1 had assigned to her.

6.8. This is supported by the role played by R2 in the redundancy consultation process. He conducted the meetings, as would be expected from a manager. In view of my finding that the claimant was an employee of R1 (and no other company), R2 must have been carrying out this function as agent for R1.

6.9. In both these aspects of his role, R2 had the capacity to affect the legal position of R1 as regards it contract with the claimant. He was a decision

maker – for example in awarding her a bonus and offering her a position – and, although R1 was required to implement his decision (as the claimant's employer), he was the person making decisions in relation to her.

6.10. I do not see any significance in R2 seeking advice from R1's HR. Any manager, wherever they are based and whoever they are employed by, is likely to look for administrative support from HR, as was confirmed by Mr Attfield in evidence.

6.11. I do not consider that the fact that efforts to find alternative employment on redundancy were group-wide is indicative that the claimant is a 'group employee'. I note that there is authority that an employer should look for vacancies across the group on a redundancy (*Vokes Ltd v Bear* [1973] IRLR 363).

Was R3 the agent of R1?

6.12. I find that R3 could potentially have become the agent of R1 when the claimant invoked the Anti-Harassment Procedure if she had been tasked by R1 to deal with it. The procedure was drafted by R1 (or another group entity) and acted as a guide to the claimant in how to pursue a complaint for harassment. The claimant was entitled to read the procedure as giving her an avenue of complaint to R3 as her allegations were about R2, her manager.

6.13. However, I find that the fact she was identified as the person to whom the grievance should be addressed does not mean that she was the agent of R1. If she had investigated the grievance, should would have done so as R1's agent but I find that she was not required to deal with the complaint herself. She was at liberty to delegate the investigation to a more appropriate person. In this case she nominated Georg Pepping.

6.14. It appears that the claimant wanted R3 to 'support her' in her complaint about R2, not necessarily to be the person who investigated it. I find that R3 and R1 were able to nominate another person who would deal with her grievance and that person would be acting on behalf of R1.

6.15. I therefore find that R3 was not the agent of R1. Any failure by R1 to deal with the grievance is a matter for R1 to answer, not R3.

Was R4 the agent of R1?

6.16. I find no evidence that R4 was the agent of R1. They are separate companies within the same group and there were inevitably common interests. However, I find that all group companies were operated as separate legal entities and R4 did not act as R1's agent.

Were R2 and R3 employees or agents of R4?

6.17. I find no evidence that R2 and R3 were employees or agents of R4. They were employed in R4's group companies but these companies are independent legal entities.

Is R1 or R4 otherwise liable for the acts or omissions of R2 or R3 or each other (as regards the claimant's claim)?

6.18. R1 is liable for the acts or omissions of R2 who was acting as R1's agent.

6.19. R1 is not liable for the acts of omissions of R3.

6.20. R4 is not liable for the acts or omissions of R2 and R3 and has no liability towards the claimant.

Consequences of findings

7. As a result of my findings, I make the following orders:

7.1. The claims against R3 and R4 are struck out.

7.2. The claims against R1 and R2 go forward a full merits hearing.

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Employment Judge Davidson

Date: 17 December 2018

JUDGMENT and SUMMARY SENT to the PARTIES ON

18 December 2018

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FOR THE TRIBUNAL OFFICE