



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr T Bright

**Respondent:** Jonathan McAllister

**Heard at:** Leeds

**On:** 17 December 2018

**Before:** Employment Judge Jones

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Not in attendance

# JUDGMENT

The complaint of age discrimination by way of harassment is struck out on the grounds it has no reasonable prospects of success.

# REASONS

1. By a claim form dated 13 April 2018 the claimant brought a claim that he had been discriminated against in the form of harassment in respect of a remark made by the respondent which he heard in a Skype conference meeting on 17 December 2017. The claimant alleged that the respondent was an employee of the Gambling Commission, which is also his employer. He also presented a complaint against the Gambling Commission on 27 April 2018 in respect of the same matter.

2. The complaint against the Gambling Commission has been withdrawn and dismissed. In its response the Gambling Commission stated that it was not liable for the actions of Mr McAllister as he had been supplied by an employment agency and had been engaged, at the material time, as an agency worker. Pursuant to an order of the Tribunal, the employment agency provided the address of the respondent.

3. The claimant withdrew his claim against the Gambling Commission on the basis he could not establish that the respondent was an employee of theirs. He had been advised that he could not bring a claim in such circumstances as the respondent was not an agent of the Gambling Commission (see **Kemeh v Ministry**

of Defence [2014] IRLR 377) nor an employee, both of which were necessary pre-conditions to attach liability to the Gambling Commission.

4. The claimant has no freestanding claim which he can pursue as against Mr McAllister, the alleged perpetrator of the act of harassment. In the circumstances, as there is no cause of action which can be pursued against the respondent, the claim has no reasonable prospects of success and must be struck out.

5. Section 120 of the Equality Act 2010 ("EqA") provides jurisdiction to an Employment Tribunal to determine a complaint relating to a contravention of work in Part 5. Part 5 provides for those against whom claims for infringements of the prohibited conduct provisions, contained in Chapter 2 of Part 2 of the EqA, may be brought. The most common examples are employees and agents under section 39. The liability of employers and principals for the actions of their employees and agents is governed by section 109 of the EqA. A statutory defence is available to employers for acts of their employees in certain prescribed circumstances, see section 109(4). The employee or agent who was alleged to have perpetrated the act may individually be liable under section 110 of the EqA and can be made or remain a separate party under that provision. However, the right to bring a claim against such an individual is available only if the claim arises against the employer or principal in the first instance.

6. None of these provisions assist the claimant to bring a claim against the respondent. Ironically, the respondent would have been likely to have benefited from the protection of section 41 of the EqA, as a contract worker, as against the unlawful actions of the Gambling Commission and its employees, but the same protection does not arise in favour of the claimant for the acts of an individual who is working as a temporary agency worker for the Commission.

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Employment Judge D N Jones

Date 18 December 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

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