EMPLOYMENT TRIBUNALS

Claimant: X

Respondents: 1. Y1
2. Y2
3. Y3

Heard at: Manchester **On:** 5 February 2020

Before: Employment Judge Tom Ryan

REPRESENTATION:

Claimant: Mr S Pinder, Solicitor
Respondents: Ms S Younis, Consultant (for Respondents 1 and 2)
Mr J Brotherton, Non-practising Solicitor (for Respondent 3)

JUDGMENT

The application by the third respondent that the claim against them should be struck out as having no reasonable prospect of success is refused.

REASONS

1. By a claim presented to the Tribunal on 3 May 2019 the claimant brought against these three respondents of whom the first respondent was his employer at the material times, claims of discrimination on the grounds of sexual orientation and disability. The claimant had the benefit of legal assistance at the time of drafting the claims. The way in which the claims were put in respect of the third respondent, whose position is relevant today, changed over the course of the proceedings, but in essence the allegation the claimant makes against the third respondent is one of victimisation.

2. The claimant is represented before me by Mr Pinder, his solicitor; the first and second respondents by Ms Younis, a consultant, and the third respondent by Mr J Brotherton, a non-practising solicitor. For the purposes of this preliminary hearing, the circumstances of which I shall shortly describe, I have received the following relevant documents:

(1) A copy of an agreed bundle,

(2) The third respondent's skeleton argument;

(3) The witness statement of Mr AM; and

(4) Mr Pinder provided for me a copy of a decision of Employment Judge Horne in this Tribunal that took place in 2018 in the case of **Carradice v Springfield Bus & Coach Company Limited**, which he provided really as illustration of the consequences of the way in which a claimant might plead his case in these circumstances.

3. The application I have to determine was effectively set out in paragraphs 2, 3 and 4 of the third respondent's grounds of resistance at page 68 where they say that the claimant's complaint "seeks to hold R1 and R2 liable for the involvement of R3 that led to R1/R2 dismissing the claimant" and this is claimed as an act of victimisation, and at paragraph 3 they say this:

> "R3 contends that the Tribunal does not have jurisdiction (for the reasons herein) and invites the Tribunal to either (i) dismiss R3 from the proceedings, or alternatively (ii) strike out any claims under Rule 37 ET Rules against R3 for having no reasonable prospects of success."

4. They further said that they contend, as I think R1 and R2 do as well, that the protected act relied upon, and there is only one (as Mr Pinder accepts) in relation to the third respondent, does not fall within the scope of section 27 Equality Act 2010 or alternatively fall within section 27(3).

5. I am not sure I understand the reference to the "scope" of the section, but I certainly understand that the respondents contend that the allegations set out in the alleged protected act are false and alternatively made in bad faith and therefore it does not amount to a protected act. Nothing that I record here is intended to seek to resolve that issue, or any issue as to whether, if the Tribunal has jurisdiction, the actual allegations of victimisation/detriment have any reasonable prospect of success.

6. Although I received the witness statement of Mr AM and there was discussion about whether the allegation should be explored in evidence, in the event the parties agreed to proceed on the basis of arguing the law in relation to the allegation of agency made by the claimant.

7. The respondents all submitted grounds of response resisting the claims. The matter came before Employment Judge Ross for a preliminary hearing for case management on 18 October 2019 and there at paragraph 2 she listed this preliminary hearing, albeit the date was postponed to this hearing, for the determination of whether or not the Tribunal has jurisdiction to hear a claim for victimisation under section 27 of the Equality Act 2010 against R3. R3 submitted that it was not an agent or servant of R1 or R2.

8. The allegations that EJ Ross identified with the assistance of the representatives are the same allegations that the claimant makes today. They are set out at page 105 of the bundle in summary form.

9. So far as R3 is concerned, the claimant relies for a protected act only on paragraph 15(3): "the letter of grievance of 13 February 2019". As to the detriments that he alleges at paragraph 15(3) (b) and (c) as against R3 they are stated to be:

> "The application of the disciplinary process in 2019 including the different stages of that procedure; (this applies to R3 - appeal only)", and
>
> "The failure to investigate or engage with the claimant's grievance of 13 February 2019 (this allegation includes R3)".

10. In fact the two are co-extensive because the claimant did not attend the disciplinary hearing. He lodged an appeal and he lodged a grievance and the appeal and the grievance were both dealt with by the same process.

11. At the outset of the hearing I had a discussion with the parties about the issues as I have indicated them to be and I drew their attention to the decision of the Court of Appeal in **Kemeh v The Ministry of Defence [2014] EWCA Civ 91** which appeared to me to bear upon the task I had to undertake.

The (putative) facts

12. For the purposes of this decision I do not make any findings of fact but recite what I understand them to be as providing the relevant context.

13. The claimant was subjected by his employers to disciplinary proceedings because of some irregularity that was said to have occurred contrary to proper practices and procedure in the conduct of R1's funeral business. The claimant I believe did not attend a disciplinary hearing. He was dismissed in his absence and as I have indicated he appealed.

14. R1 engaged the services of R3. There is an agreement set out at pages 166 and following which indicates at section 4 the nature of the services. In particular in this case a consultant from R3, Mr AM, was engaged to investigate, in a general sense, at the grievance/appeal stage the claimant's contentions. In those terms R1 is referred to as the "customer" and R3 as the "provider".

15. The terms of R3's engagement indicate that the consultant is to conduct the process on an impartial basis and the recommendation is to be based on an objective assessment of the evidence. The recommendation is one which R1 could, but would not be bound to, follow.

16. There was at section 13 of the terms a section that dealt with liability of R3. Whilst there were limits on the scope of liability, by clause 13(3) it provided that:

> "Nothing in this agreement will exclude or limit the liability of either the Customer or the Provider in respect of:
>
> … any other matter which cannot be excluded or limited under applicable law.

17. For the purposes of determining this issue I consider that is wide enough to encompass acts of unlawful discrimination, for what is what is alleged by the claimant against Mr AM and through him, R3.

18. The scope of the meeting that Mr AM was to hold with the claimant was identified in a letter from R1 to the claimant of 1 March 2019 set out at pages 137-138. It was common ground that it was drafted by R3 and signed by the Managing Director of R1. It says:

> "The consultant will not be able to give you a decision at the close of the hearing, however they will provide recommendations as soon as they have completed any investigation deliberations and upon receipt of their report we will write to you with an outcome."

19. Mr AM had a meeting with the claimant and wrote two reports (pages 147-153 in respect of the appeal and 156-159 in respect of the grievance hearing). It is common ground that the reports resulted in recommendations that the decision to dismiss be upheld and the grievance should be dismissed.

20. It is clear that part of the grievance concerned the way in which R1 had gone about dismissing him and secondly it contained a series of allegations of discrimination which are, in these proceedings at least, said to be on the basis of R1's perception of his sexual orientation. The discriminatory conduct was alleged to have been that of R2.

21. At paragraph 16 of the Grievance report, under the heading "FINDINGS" Mr AM said: "… I make the following findings in relation to the allegations." It does not seem to be in dispute that it would be necessary for somebody in his position to make findings in order to justify a recommendation.

22. Mr AM said he would consider each group of allegations as provided by the claimant. He dealt first with the allegations of sexual harassment. He recited a number of factors in paragraph 17.

23. In paragraph 18 he said, "In light of the above factors I do not uphold these allegations as I cannot accept the Managing Director would have acted in this manner and it is much more likely than not that the claimant is intending to cause disruption and mischief due to his employment being terminated."

24. Then regarding an allegation of psychological bullying by R1 he said, "it seemed more likely than not that [the claimant] is [sic] aggrieved when asked to undertake duties and undertaking those duties in a way requested by [R2]." He stated, "… I do not uphold these allegations."

25. In respect of events that occurred on 7 and 10 February 2019 concerning requests made of the claimant by R2 to which the claimant appears to have taken exception, according to Mr AM, he recorded: "None of these requests by [R2] seem onerous and outside his remit of that of [the claimant's] job description yet he takes exception to them." Again he said, "In light of the above I do not uphold these allegations".

26. Finally in respect of the main allegation which led, it is said by the R1, to the claimant's dismissal, Mr AM referred to a witness statement of a minister Reverend B regarding the allegations that were said to be the misconduct. He recorded that, "In response to the witness statement of Reverend [B] [the claimant] stated she was a liar. It is my view that it is [the claimant] who is, at best, being fanciful with the truth having been dismissed from his employment".

27. At paragraphs 24 and 25 he set out his recommendations as follows:

> "On the basis of the above findings it is my recommendation that the issues raised by [the claimant] in his grievance are dismissed in their entirety. He should be informed that he has the right to appeal these findings if he believes he has grounds to do so.
>
> It should be noted it is a matter for [R1] whether or not they choose to follow the recommendations contained in this Report."

28. The first respondent did follow the recommendations and these proceedings were commenced by the claimant.

Submissions

29. R3's principal argument, because of course the burden is upon them to persuade me in relation to rule 37, whilst it referred in some degree on the facts of the case was that that R3 operated as an independent external consultant and was therefore not vicariously liable for the conduct of R1 and R2 in dismissing. As to dismissal I do not think the claimant suggests R3 is liable for that.

30. Subject to one matter I will come to in a moment, these points were repeated by Mr Brotherton in argument. Ms Younis for R1 and R2 made no additional submissions.

31. At paragraph 4 of the skeleton argument R3's case was expressed as:

> "The extent of R3's involvement was to provide a recommendation to R1 having undertaken a grievance and disciplinary appeal hearing. The recommendation could either be accepted or rejected by R1. The legal liability decision to dismiss was R1's alone…"

32. I should say that at the early stage of this hearing Mr Pinder for the claimant clarified the way in which he put the allegations that I have already recited as they were recorded by EJ Ross. He identified for me four matters, but in reality two matters he agreed were the nub of his case and if the claimant did not succeed on those he could not succeed on the others. It seems to me they are particularly germane to the argument and the matters I have to decide.

33. Mr Pinder submitted that the claimant's case was this:

a. that the actions of effectively R3 go beyond the role of an adviser because the matters (that is the positions of R1 and R2) were taken forward in a way which was personal, by which he means that Mr AM was making findings, forming opinions or judgments which led to the

recommendation, and by that Mr Pinder was referring to the fact that Mr AM purported to accept the account of R2 rather than that of the claimant, for example;

b. Mr AM received information from R2 but did not share that with the claimant, and I do not think there is any dispute factually that after the meeting with the claimant Mr AM (as I understand it to be the case) did make further enquiries of R2 before communicating his conclusions to R1 by way of a recommendation, and Mr Pinder's complaint was that it was an act of victimisation first of all to (as it were) take them forward personally, as he put it but in the way I have described it, and secondly not to share R2's comments with the claimant or invite his comments on it before making his recommendation.

34. The extra matter that Mr Brotherton for R3 relied on was part of the Judgment of the Court of Appeal in the case of **Kemeh**. I am going to deal with it and recite it in due course when I deal with the case of **Kemeh**, but it is the central part of the paragraph which appears at paragraph 40, one sentence particularly on which Mr Brotherton relied so I will quote it now, although I may repeat it. Elias LJ said in the context of that paragraph:

> "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."

35. Having put the matter in that way, Mr Brotherton's submissions was simply this: that having regard to sections 109 and 110 of the Equality Act 2010 there was no reasonable prospect of success of a Tribunal finding that on the facts of this case R3 was acting as agent for R1.

36. The claimant's submissions are that without seeking to challenge the legal basis on which the Court of Appeal reached its decision, as Mr Pinder said, he was not that brave but he submitted that factually there were circumstances here that took this case outwith the scope of **Kemeh**. It is probably appropriate for the purposes of this just to describe the two cases alongside.

37. The claim of direct discrimination in **Kemeh** was this: Mr Kemeh was a private soldier deployed to the Falkland Islands and for those purposes it was accepted he was to be treated as an employee of the Ministry of Defence for the purposes of making a complaint of discrimination, which he did on return to the United Kingdom after his service. The MoD contracted with Serco who in turn contracted with another facilities provider, Sodexo, to provide caterers to assist the NCOs in the Mess at the premises in the Falkland Islands where Mr Kemeh and others were being provided with food as part of their service. Sodexo employed a butcher, a Miss Ausher, and she made a racially offensive comment which it was common ground amounted to direct discrimination against Mr Kemeh. So for the purpose of the analysis which again in those days was looking at the earlier legislation, it was being suggested by Mr Kemeh at least that Ms Ausher was an agent for the Ministry of Defence. It is right to notice that Sodexo was not party to

those proceedings. The equivalent relationships within this case are of course R1 who contracted with R3 for the purposes I have described. R3 employed Mr AM who it is alleged discriminated by way of victimisation against the claimant in these proceedings, and that is the chain in each case.

38. The Court of Appeal, it is common ground, did not seem to think there was any significance in the intervening party to the chain, Serco (as far as Sodexo was concerned), and it is of course the case that in the case of **Kemeh** the employer of Ms Ausher (Sodexo) was not a party to the case and there was no claim against Sodexo as such.

39. Mr Pinder submitted that R3 was authorised to act for R1 in the conduct of this investigation. There was a closeness in the relationship, namely there was a contact between R3 and R1. They were acting for the employer by reaching findings on the way to making the recommendation. He submitted that they were standing in the shoes of the employer for those purposes, carrying out this function for the employer, and, as regards the claimant, R3 was held out to him as standing for the employer in respect of this aspect of a relationship between the employer and the employee.

40. Mr Pinder in submissions described the claim as complex. He drew my attention to various paragraphs in the judgment of the Court of Appeal in **Kemeh**, and he described the role of Mr AM as closer to the principal than the agent. Essentially he submitted that the nature of the work that Mr AM was required to do and the fact that he was doing it directly, that is although employed by R3 (R3 would be providing his services directly), for the purposes of actually taking steps which would affect the legal position as between the claimant and R1. In support of that he relied upon a number of paragraphs in the judgment of **Kemeh** to which I will refer below.

41. In effect factually Mr Pinder was submitting that this case has distinguishing features because of the nature of the task upon which Mr AM was engaged, such that it would be open to this Tribunal to conclude legitimately that on the facts of the case R3 was acting as agent for R1 within the meaning of the term as set out in the relevant statutory provision, in the conduct of the grievance/appeal investigation, and therefore could be liable under the relevant provisions of the Equality Act 2010.

42. The relevant provisions are of course sections 109 and 110. In material part they provide as follows:

> Section 109
>
> "(1) Anything done by a person (a) in the course of A's employment must be treated as also done by the employer."

The argument there would be that Mr AM was working in the course of his employment with R3.

> "(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.

(4) In proceedings against A's employer B in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A from doing that thing or things of that description."

Section 110

"(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)."

43. The rest of those two sections are not relevant.

44. In the event it was agreed between the parties that this came down to the proper analysis of what the status was or how one must construe the word "agent" in section 110(a) and 109(2).

45. The Tribunal's task at this particular point is not to make a final determination of any of these points of law. What I have conclude, in order to release R3 from the proceedings, is that the claim against them on the grounds that the claimant has no reasonable prospect of success in establishing that they are an agent for the purposes of the claim. If I do not reach that conclusion it is possible that at a final hearing the tribunal having heard evidence and considered further argument may decide that the claimant has not established that R3 as defined in the section.

46. That takes me then to the decision in **Kemeh**. References in that case are to section 32 of the 1976 Race Relations Act and it is common ground that section 32(1) finds its counterpart in sections 109(1) and (3) of the Equality Act 2010, and section 32(2) in sections 109(2) and (3) of the Equality Act 2010.

47. The ET had considered that Ms Ausher was an agent for the MoD. The ET had noted that the MoD had not authorised or encouraged the act but went on in paragraphs 34, 35 and 36 of its judgment (as set out at paragraph 15 of the Court of Appeal's judgment) to set out the basis of its conclusion. In the CA that was later described by Elias LJ in paragraph 16 as a "very broad analysis". He says:

"It seems to rest on the premises that if a contractor is carrying out functions for the benefit of an employer which that employer would otherwise need to

> do for himself, then he can be said to be acting on the employer's behalf thereby creating an agency relationship."

48. The MoD had appealed the decision of the ET to the Employment Appeal Tribunal (HH Judge Peter Clark). At that point it was appreciated there were a number of cases and the case of **Yearwood v Metropolitan Police Commissioner [2004] ICR 1656** was described as the leading authority.

49. Mr Kemeh sought to argue that even adopting the common law concept of agency, which appears to be the effect of **Yearwood,** it would have been open to the ET to find an agency relationship and accordingly the case should be remitted. The EAT rejected that submission. The basis of the analysis was that there was simply no evidence that either Sodexo or Ms Ausher were agents of the MoD. She was acting as an employee of Sodexo not an agent of the MoD. The appeal was allowed, the decision of the ET set aside, and the parties made their way to the Court of Appeal.

50. Ms Romney QC for Mr Kemeh argued his case relying on the case of **Jones v Tower Boot [1997] IRLR 168** in the Court of Appeal which had, it was said, "eschewed a technical legal approach in favour of a purposive approach when applying section 32(1)". She submitted the Court of Appeal should do the same applying section 32(2). Section 32(1) related to employees and section 32(2) to agents.

51. The argument of Mr Kemeh was described in this way (paragraph 27),

> "Ms Romney suggested the following would constitute a satisfactory definition of the agency relationship in a case such as this. It is a relationship, other than an employment relationship, where the agent is (1) subject to a degree of direction from the principal; (2) where there is a degree of integration with the principal's employees; and (3) where there is a degree of proximity between the agent and principal. On this analysis, the concept would include those regularly working with the principal's employees, but it would exclude contractors who are engaged to carry out a specific task, such as electricians or plumbers called to deal with a particular emergency."

52. The Court of Appeal described that at paragraph 28 as far removed from **Yearwood** but Ms Romney had submitted that the EAT had adopted the wrong test and the court may well have adopted a different analysis if **Tower Boot** had been drawn to its attention.

53. As to the decision of the Employment Appeal Tribunal in **Kemeh** itself at paragraph 32 there is set out a long quotation from the decision of the Employment Appeal Tribunal, His Honour Judge Peter Clark, at paragraphs 36 and 37. Because it is necessary for me to express a view on those, I quote them as follows beginning with a quotation from **Bowstead v Reynolds** at 1003:

> "36. … 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 yet 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 act.
>
> 37. The justification for the agent's power is a unilateral manifestation by the principal of his or her willingness to have their legal position changed by the actions of an agent. The result of this manifestation is that the agent has the power to affect the principal's legal relations."

54. In its discussion of the issue the Court of Appeal quoted Peter Gibson LJ in the case of **Bedfordshire Police v Liversidge** about purposive constructive. Of that at paragraph 36 Lord Justice Elias said this:

> "I readily accept that a broader rather than a narrower meaning should be adopted where two constructions are equally plausible and the broader meaning better achieves the statutory purpose. As he said, that was the approach of the court in the **Tower Boot** case. But I do not consider that **Tower Boot** provides any further assistance in seeking to determine the proper meaning of section 32. The particular features which enabled the court to adopt a non-technical approach in that case are not present here. Moreover, **Tower Boot** was concerned with the question for what acts the employer should be liable whereas here the issue is for whose acts the employer should be liable."

55. It was common ground before me that this case concerns also for whose acts the employer should be liable, or in this case whether the acts of R3 can be imputed to the principal, R1.

56. Having considered the various points that arise from trying to work out precisely what a general concept of agency is, at paragraph 40 to which I have already referred and at paragraph 41 are set out the essential reasoning of the Court of Appeal:

> "40. But ultimately it is not necessary for the purposes of appeal to resolve that question. Whatever the precise scope of the legal concept of agency, and whatever difficulties there may be applying it in marginal cases, I am satisfied that no question of agency arises in this case. 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. (That is not, of course, to say that employees can never be agents, they might well be depending upon the obligations cast upon them, such as where a senior manager is authorised to contract with third parties. He will be an employee but will also act as an agent when exercising the authority to deal with third parties.)
>
> 41. In my judgment, Miss Ausher's contract with Sodexo is the source of any authority she has to make decisions relating to the butcher's department in the Mess. It may be, as Ms Romney asserts, that ultimately the MoD would have the right to veto her presence, at least for good reason. But that limited

> degree of control comes nowhere near constituting authorisation by the MoD to allow Ms Ausher to act on its behalf with respect to third parties."

57. The Court of Appeal then went on to consider whether a man can be a servant of A and the agent of B in performimg the same piece of work. In the judgment of Moore-Bick LJ in **MAN Nutzfahrzeuge AG v Ernst & Young [2005]** he had expressed the view that could in principle be the case. Elias LJ said,

> "I would respectfully agree that the fact that someone is employed by A would not automatically prevent him from being an agent of B, and I would not discount the possibility that the two relationships can co-exist even in relation to the same transaction. But in my judgment there would, particularly in the latter case, 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. It is in general difficult to see why B would either want or need to enter into the agency relationship. That is so whichever concept of agency is employed."

58. At paragraph 44 he dealt with the alternative formulation put forward on Mr Kemeh's behalf by Ms Romney QC. He said this:

> "In my judgment, therefore, the argument of Ms Romney is unsustainable. Indeed, unlike the appellants in *Yearwood*, who at least asserted a concept of agency which recognised the need for the agent to be authorised to act on behalf of the principal, she relies upon the concept of an agency relationship involving three criteria or characteristics which does not focus on the concept of authority as such at all. In my view, these criteria fail to reflect the statutory language. Her concept has the merit of sustaining her case, but I see no conceivable warrant in the language of the section for adopting it. Ms Ausher may be said in a general sense to be working for the benefit of the MoD, but she is in not acting on its behalf. She is not, as it were, standing in the shoes of the MoD in relation to independent third parties."

59. For those reasons Mr Kemeh's appeal was dismissed.

60. Mr Pinder relies upon the last sentence at paragraph 44 as an important distinguishing feature. Whilst he says it was right for the Court of Appeal to say that Ms Ausher could be said in a general sense to be working for the benefit of the MoD but not acting on its behalf, he submits here that Mr AM and R3 are in fact standing in the shoes of R1 in relation to the claimant who is independent of the contract between R1 and R3 and by its actions or omissions R3 can affect the legal position of not only R1 but the claimant as well.

61. Put in that way, I have to say that whilst I cannot positively say that in my judgment the claimant will succeed in showing that R3 acted as agent for R1 in this case within the construction of section 109 and section 110, I am not persuaded (not without some hesitation) that Mr Pinder's argument on this point has no reasonable prospect of success.

62. In those circumstances the application to strike out the claim against R3 or to remove them from the proceedings at this stage fails.

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Employment Judge Tom Ryan

Date: 4 June 2020

REASONS SENT TO THE PARTIES ON

10 August 2020

FOR THE TRIBUNAL OFFICE

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