Case Number: 2416497/2019
2401164/2020
2401538/2020
Code V

RESERVED

EMPLOYMENT TRIBUNALS

Claimant: Paula Barrett

Respondent 1: The Governing Body of St Austin's Catholic School
Respondent 2: Liverpool City Council
Respondent 3: School Improvement Liverpool Ltd

Heard at: Liverpool (by CVP) **On: 6 November, 9 & 18 December 2020**

Before: Employment Judge Shotter (sitting alone)

Appearances
For the claimant: Mr A Line, counsel
For the respondent: Mr T Kenward, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The first respondent's application to strike out the claimant's section 26 claim against it on the basis that the first respondent cannot be vicariously liable for the actions of the alleged harasser is adjourned to the liability hearing by consent.

2. The second respondent's application to strike out the claimant's section 26 claim on the ground that it has no reasonable prospect of success succeeds. The claim brought under section 26 of the Equality Act 2010 against the second respondent has no reasonable prospect of success and is dismissed. The second respondent no longer has any interest in these proceedings.

3. The third respondent's application to strike out the claimant's section 26 claim on the ground that it has no reasonable prospect of success fails. The claim brought under section 26 of the Equality Act 2010 against the third respondent has little reasonable prospect of success and the Tribunal shall

RESERVED

make reasonable inquiries into the claimant's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit at a preliminary hearing. The parties will provide dates of availability for a one-hour public preliminary hearing to be followed by a two-hour private case management hearing to include case number 2415381/2020.

4. Case number 2415381/2020 is to be consolidated with this case and all the claims will be heard together.

5. The Claimant's application to amend her claim to include a claim under section 112 of the Equality Act 2010 ('EA 2010') against the Second respondent is refused and dismissed.

6. The Claimant's application to amend her claim to include a claim under section 112 of the Equality Act 2010 ('EA 2010') against the third respondent succeeds and leave is granted to the claimant to amend her claim to include a claim under section 112 of the Equality Act 2010 and the document titled "Particulars of each detriment" dated 17 July 2020 together with the Grounds of Claim will stand as the claimant's section 112 claim against the third respondent.

7. The third respondent's application to strike out the section 112 Equality Act 2010 claim on the basis that it has no reasonable prospect of fails. The claim brought under section 112 of the Equality Act 2010 against the third respondent has little reasonable prospect of success and the Tribunal shall make reasonable inquiries into the claimant's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit at a preliminary hearing.

REASONS

1. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle, the contents of which I have recorded where relevant. The order made is described at the end of these reasons.

2. This is a preliminary hearing to determine the four issues set out in the Case Management Summary dated 15 May 2020 and Orders sent to the parties on 4 June 2020. The issues are paraphrased as follows:

RESERVED

1.1 The First Respondent's application to strike out the Claimant's section 26 claim against it on the basis that the First Respondent cannot be vicariously liable for the actions of the alleged harasser.

1.2 The Respondents' joint application to strike out the Claimant's section 26 claim (taking into account further and better particulars) on the ground that it has no reasonable prospect of success or, in the alternative, that a deposit order be made.

1.3 The Claimant's application to amend her claim to include a claim under section 112 of the Equality Act 2010 ('EA 2010') against the Second and Third Respondent.

1.4 If the Claimant is permitted to pursue her claim under section 112, the Second and Third Respondents' application to strike out the same on the basis that it has no reasonable prospect of success or, in the alternative, that a deposit order be made.

3. The Tribunal has before it an agreed bundle and Skeleton Arguments prepared by Mr Line and Mr Kenward, for which the Tribunal is grateful. In accordance to the case management order made at paragraph 5.1, I determined that each party can refer to and read out any part of their Skeleton Argument when making oral submissions and both the oral and written submissions have been taken into account.

4. There may be a possibility of yet a further claim being brought by the claimant, but this is a matter that need not concerned the Tribunal at this preliminary hearing as the respondents are yet to be served with any other claim. Since this hearing I have access to the Tribunal file and case number 2415381/2020 incorporating a number of claims brought against the first respondent.

5. With the agreement of the parties an investigation was undertaken by the second and third respondent in relation the employer of Katherine Aistrop, Katie Smith and Darren Tyms as Mr Line was unclear whether the first or second respondent employed those individuals. Confirmation from the third respondent was received by me on 20 November 2020 that Katherine Aistrop, Katie Smith and Darren Tyms were employed by School Improvement Liverpool Limited, the third respondent during the relevant period.

6. The background to this matter is succinctly set out in Mr Line's Skeleton at paragraphs 5 and 6 which I do not intend to repeat.

<u>Pleadings</u>

7. The claimant has issued three claims as follows:

RESERVED

Claim number 2416497/2019

7.1 Claim number 2416497/2019 was presented on the 11 December 2019 following ACAS Early Conciliation that took place between 14 to 27 November 2019. The claim was against the first respondent only. The claimant, a teacher employed by the first respondent as was the alleged harasser, was supported by her union during this period, and it is not disputed by Mr Line that she had union support and representation before the solicitors instructed by NASUWT took over sometime after the third claim form had been submitted.

7.2 The three claims forms prepared with union assistance were not drafted by the claimant's present solicitors, had they been today's application may have been a very different one.

7.3 The Grounds of Claim are extensive running to 92 paragraphs plus sub-paragraphs 1.1 to 2.14 in a rambling narrative style that appears to record every matter in the claimant's employment with which she was unhappy without identifying all of the statutory claims pursued in relation to the facts pleaded. It makes the claimant's case difficult to understand in respect of the victimisation complaint. However, the alleged sexual harassment claim is straightforward and easily understood.

7.4 The claimant's claim for sexual harassment brought under section 26 of the Equality Act 2010 (the "EqA") relates to a singular alleged incident when a school governor who formed part of the first respondent "stared" at her in a "lecherous manner" and sat "uncomfortably close" on a night out marking a colleague's retirement on the 19 July 2019. The claimant also alleges that the school governor said to a male colleague "What are your thoughts? Because mine have been naughty all night long" with no mention of the claimant's name. The claimant assumed the reference was to her.

7.5 At paragraph 83 the claimant pleads "the claimant believes that Mrs Hickey (the deputy head teacher who dealt with the matter) originally had her best interests at heart, but once Ms Alstrop became involved, Mrs Hickey's attitude towards the claimant changed. Kathryn Alstrop was the HR advisor employed by the third responded.

7.6 At paragraph 90 reference was made to Darren Tyms being appointed to conduct the independent investigation under the Dignity at Work procedure and the claimant's union representative "Mr Fenton has objected to this appointment and notified School Improvement Liverpool that he considers such an appointment of a non-independent investigator to be another act of victimisation…."

The response

RESERVED

7.7 The first respondent denied the allegations in their entirety. Whilst the section 26 EqA complaint is clear and the claimant reporting the alleged sexual harassment is the protected act relied upon, the section 27 victimisation claim is not. The claimant refers to the first respondent failing to deal with the grievance and suffering a detriment when she "misled" about the Dignity at Work process and that human resources ("HR") employed by the third respondent attempted to undermine the claimant's complaint of harassment.

7.8 It is notable that the majority of the first complaint filed deals with the aftermath after the claimant had complained about the behaviour of the school governor to the headmistress. From paragraph 10 onwards the claimant sets out in great detail the process which the first respondent followed, the people involved including Kathryn Alstrop, Kate Smith and latterly Darren Tyms when she raised a grievance and grievance appeal as opposed to a complaint under the respondent's Dignity at Work Policy. The claimant now maintains she should have been advised by the first respondent to raise a complaint under the Dignity at Work Policy and failure to support her in this way was an act of victimisation. The claimant was seeking the removal of the school governor ("the governor") from the first respondent and attended various stages of the grievance procedure with her union representative, including a stage 3 appeal when the panel agreed to re-open the issue under the Dignity at Work procedure. Darren Tyms was to have been the independent investigator had the claimant not objected.

7.9 Darren Tyms was a HR officer described by the claimant as "another SEAT HR advisor." The claimant wished to agree the new advisor and the respondent's appointment of Darren Tyms with whom she did not agree, gave rise to an allegation that his appointment was an act of victimisation.

7.10 In the grounds of complaint, the claimant described Ms Aistrop "from Liverpool SEAT HR" and there was no suggestion Cathryn Aistrop was an employee of the second respondent. At paragraph 89 reference was made to "another SEAT HR advisor, given what happened involving Ms Alstrop", the claimant's union representative argued that an investigation by Darren Tyms "would be inappropriate".

7.11 The Tribunal took the view that on a common sense reading of the claim form Katherine Aistrop, Katie Smith and Darren Tyms were employed by School Improvement Liverpool Limited, the third respondent, and the claimant was aware of this at the time. As indicated above their employment status has since been confirmed. It is notable that no specific complaint was made against Katie Smith in the claimant's pleadings or the further information she provided.

<u>Claim number 2401164/2010</u>

RESERVED

8. Claim number 2401164/2010 was presented to the Tribunal on the 13 February 2020 against the second respondent only, following early ACAS conciliation that took place between 20 December 2019 and 16 January 2020. The claim is identical to the one pleaded against the first respondent and on the face of the pleading Mr Kenward submitted that there appeared to be no legal basis for a cause of action against the second respondent. The Tribunal agreed given the fact that there was no suggestion the named HR advisors/officers Katherine Aistrop, Katie Smith and Darren Tyms the claimant now relies as a basis of her section 112 EqA complaint were employed by the second respondent, and it appears from the claimant's own pleadings HR support was provided by School Improvement Liverpool Limited, who was yet to be brought in as third respondent.

9. I concluded with reference to the claims of harassment and victimisation brought against the second respondent, there was no suggestion the second respondent was (a) vicariously liable for the alleged actions of the governor in question and (b) employed the HR officers named. There is no express or implied suggestion that a section 112 claim was being brought against the second respondent in respect of its dealings with the first respondent or the named governor against whom the alleged sex discrimination complaint had been made. The claims brought against the second respondent are confused in law, and the claimant with the assistance of the union appears to have used a scattergun approach to this litigation, and she failed wholescale to set out clearly which of the facts recorded in the lengthy grounds of complaint gave rise to acts of alleged discrimination.

10. The Grounds of Resistance clarified matters, despite the fact it was also in narrative style. The second respondent asserted it was not interchangeable with the first respondent and denied the actions of the first respondent could be treated in law as the actions of the actions of the second respondent and vice versa. It pleaded the second claim was misconceived and I agreed with this analysis concluding all claims brought against the second respondent will be struck out on the grounds that they had no reasonable prospect of success.

Claim number 1401538/2020 against third respondent

11. On the 27 February 2020, approximately 2.5 months after issuing the first claim against the first respondent, the claimant presented claim number 1401538/2020 against third respondent following ACAS early conciliation that took place between 16 to 28 January 2020.

12. It is now common ground between the parties that the third respondent had entered into a service level agreement to provide HR services to the first respondent. The third respondent is a separate legal entity who employed Kathryn Alstrop, Kate Smith and latterly Darren Tyms, although this was brought into question today by Mr Line who could not be sure whether the second or third respondent employed the named HR officers, despite the claimant's indication that it did as set out within her pleadings. I took the view

this uncertainty only serves to underline the deficiencies within the claimant's pleadings, as she has not thought her claims through to the legal position of the individual respondent's and how it factors into claims of harassment by an individual within the first respondent (described by the claimant as a volunteer) and the harassment she alleged occurred on the basis that the service level agreement between the third and second respondent provided HR services in relation to the first respondent's handling of the claimant's grievance complaint.

13. In the original claim form at paragraphs 83 referred to above and in the following pleaded paragraphs there is veiledly implied suggestion that a section 112 claim was being brought against the third respondent in respect of its dealings with the first respondent. At paragraph 2.5 the claimant pleaded "The employer initially implicitly agreed with the claimant that she had been sexually harassed in July by Mr McCarthy, but once Liverpool SEAT became involved, they attempted to undermine the claimant's issue." At paragraph 2.10 "The involvement of HR in her issue improperly influenced the investigation into her grievance… and paragraph 2.11 "the advice given by HR went beyond what was permissible in terms of advice and it was intended to persuade the claimant that her issue was "low level" by definition and to influence her decision making as to how her issue should be dealt with." At paragraph 2.13 reference made to a "improper and poorly managed process."

14. In the Grounds of Response at paragraphs 32 and 33, the claimant's claim that the claimant's alleged victimisation by the first respondent "through being improperly influenced" by Ms Alstrop of the third respondent was denied. In paragraph 33 the third respondent pleaded "it is denied that my involvement on the part of Ms Ainstrop improperly influenced any consideration given to the matter…"

Further and Better Particulars

15. The claimant's further and better particulars run to 19-pages and appear to include many new matters which was not in accordance with the case management order agreed and sent to the parties on the 4 June 2019.

Withdrawal of harassment claims

16. At the preliminary hearing held on the 15 May 2020 the claimant withdrew the harassment complaints against the second and third respondent, however the victimisation claims remained live. The fact that she brought claims under section 26 of the EqA against the second and third respondent is indicative of the unsatisfactory nature of her pleadings.

Agreement reached with the parties

17. After some discussion a number of matters were agreed at the outset of this preliminary hearing as set out below:

RESERVED

17.1 The claimant has issued three claims that are almost identical with little substantive difference between them.

17.2 The claimant has issued a fourth set of proceedings alleging discrimination and unlawful deduction of wages regarding entitlement to sick pay as the claimant is presently absent from work sick. Proceedings were served only recently and the ET3 is due to be filed by 2 December 2020. There appear to be a number of issues concerning the new claim which I need not concern myself with at this application and may be an issue to be resolved in the future. It was agreed that the fourth set of proceedings will be consolidated with the three claims before the Tribunal today, and at the next preliminary hearing the telephone case management hearing will deal with orders leading to a final hearing for all four claims.

18. Accordingly, with agreement of parties at the hearing I ordered that all four claims appear to give rise to common or related issues of fact and law and they should be considered together. I have now had sight of case number 2415381/2020 which will be considered and joined to the existing three claims and discussed at a private preliminary case management hearing to take place via CVP. It appears from the Tribunal file that the ET3 was filed by the 2 December 2020.

<u>NASUWT correspondence to the Tribunal</u>

19. On the 18 December 2020 I viewed all four files relating to the claimant's claims and noted the following:

19.1 NASUWT wrote an undated letter to the Tribunal attached to an email sent 17 March 2020 in which the following reference was made "during the course of her complaining internally…the school aided by advice from School Improvement…is claimed to have subjected the claimant to victimisation by reason of her having raised the issue as to sexual harassment." The matter was raised not in connection with the possibility of a section 112 EqA claim and application to amend, but as a basis of an argument that the second and third respondent had a "clear relationship of ownership and control…the extent that they are one and the same legal entity for the purpose of these proceedings," which I found to be completely misconceived in fact and in law. Mr Kenward submitted that the claimant did not make an application to amend to expressly include a claim brought under section 112 EqA. In contrast, Mr Lines submitted that the undated letter could be interpreted as an application to amend. Giving the letter, its ordinary common sense meaning I agreed with Mr Kenward, concluding the application to amend was first made orally at the preliminary hearing held on 15 May 2020.

19.2 Under lead file 2416497/2019 the claimant's union representative in an email sent on 17 June 2020 attaching the further and better particulars made reference to "detriment relied upon as an act of victimisation by the

school…and in the course of assisting that school by the 'knowing help' (under s112…) of School Improvement Liverpool Ltd." Reference was also made to further alleged acts of victimisation since the lodging of the claim forms described as "an ongoing course of conduct by both respondents." An application to amend was not made but threatened "if no settlement of these matters are forthcoming."

19.3 Reference to the additional claims set out by the claimant in the further information was made by Mr Lines and I took the view that any claims pleaded after the 27 February 2020 were not before me, and as no application to amend had been made I did not consider the claimant's further information which included any new complaints not previously pleaded.

Law – strike out/deposit order

20. The relevant law has been set out in the Skeleton Arguments, particularly that prepared by Mr Line as set out below.

Test for strike out

21. The procedural basis is rule 37:

"37. — (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

22. The test for strike out involves two stages. First, the Tribunal must be satisfied that one of the specified grounds is established. Second, the Tribunal must then (as an exercise of discretion) decide whether to strike out: Hasan v Tesco Stores Ltd UKEAT/0098/16.

23. The Respondent only pursues the *"no reasonable prospects of success"* limb of rule 37(1)(a). When considering the application for strike out I had in mind strike out on this ground will generally be inappropriate in the following situations:

RESERVED

a. Where there are central facts in dispute, because the Tribunal is not in a position to conduct a mini-trial when determining strike out: Ezsias v North Glamorgan NHS Trust [2007] IRLR 603, paragraph 29. In the context of discrimination claims, regard must also be had to the reverse burden of proof: A v B [2010] EWCA Civ 1378, paragraph 61. Furthermore, even where primary facts are not in dispute, special care must be taken because of the inferences which might be drawn from them.

b. Discrimination claims should only be susceptible to strike out in the very clearest of circumstances. In Anyanwu v South Bank Students Union [2001] IRLR 305 at paragraph 24 it was held: "For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

24. The approach to be taken was summarised in Mechkarov v Citibank NA UKEAT/0041/16 at paragraph 14: "*(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."*

Test for deposit order

25. The procedural basis is rule 39:

"39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
(3) The Tribunal's reasons for making the deposit order shall be provided with the order."

26. It was noted in *Van Rensburg v Royal Borough of Kingston-Upon-Thames* UKEAT/0095/07/MAA that the test under rule 39 is less rigorous compared to rule 37(1)(a), but that *"needless to say,* [the Tribunal] *must have a proper basis*

for doubting the likelihood of the party being able to establish the facts essential to the claim or response." It was noted in *Hemdan v Ishmail* [2017] IRLR 228 at paragraph 11 that the purpose of rule 39 *"is emphatically not … to make it difficult to access justice or to effect a strike out through the back door"*.

Section 112 EqA

27. Section 112 is concerned with aiding contraventions
28. *"(1) A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111 (a basic contravention).*
(2) It is not a contravention of subsection (1) if—
(a) A relies on a statement by B that the act for which the help is given does not contravene this Act, and
(b) it is reasonable for A to do so."

29. In Anyanwu v Southbank Students Union [2001] IRLR 305 at paragraph 5 it was held by the House of Lords: "The expression 'aids' in s.33(1) is a familiar word in everyday use and it bears no technical or special meaning in this context. A person aids another if he helps or assists him. He does so whether his help is substantial and productive or whether it is not, provided the help is not so insignificant as to be negligible. While any gloss on the clear statutory language is better avoided, the subsection points towards a relationship of cooperation or collaboration; it does not matter who instigates or initiates the relationship." Although section 112(1) does not use the term 'aids' the title to the section is "aiding contraventions" and the term "help" which is used in the text has a broadly synonymous meaning.

Conclusion: applying the law to the facts

The first agreed issue

31 With reference to the first issue set out above, namely, the first respondent's application to strike out the claimant's section 26 claim against it on the basis that the first respondent cannot be vicariously liable for the actions of the alleged harasser, it was agreed that this was not suitable for a preliminary hearing where no evidence is being heard and it is a matter that can only be resolved after the Tribunal has heard all of the evidence in the case. Accordingly, with agreement I ordered that vicarious liability of the first respondent for the alleged sexual harassment of the claimant by a governor was an issue to be decided at the liability hearing. Vicarious liability will be included in the list of issues to be agreed by the parties before the next telephone case management discussion, and the parties will come prepared to

deal with this point at the final hearing, including calling relevant witnesses to give evidence.

The second agreed issue

32 With reference to the second agreed issue, namely, the first and second respondents' joint application to strike out the claimant's section 26 claim (taking into account further and better particulars) on the ground that it has no reasonable prospect of success or, in the alternative, that a deposit order be made, I have dealt with the respondents on an individual basis.

The second respondent

33 Turning to the second respondent I agree with Mr Kenward that the claim of victimisation brought against the second respondent was misconceived in law and the Grounds of Claim disclose no cause of action against the second respondent who was not the employer of the three individual HR officers who supported and advised the first respondent during the investigation into the claimant's complaint of sexual harassment. The only link between the second and third respondent is the service level agreement to provide HR services to the first respondent which is not a legal basis for treating the first respondent as responsible in law for the actions of the first and/or third respondent.

34 It follows that the complaint of victimisation brought against the second respondent is misconceived in law as no cause of action is disclosed and the claim struck out on the basis that it has no reasonable prospect of success. The Tribunal's decision in this regard is reinforced by the fact that the claimant, in her further and better , does not refer to any detriments caused directly the second respondent as submitted by Mr Kenward

The third respondent

35 Turning to the third respondent, the Tribunal accepted Mr Kenward's submission that absent any claim being brought under section 112 of the EqA, the claimant has not identified a basis for the third respondent, as a non-employer of the claimant, to be liable for any victimisation of her in the course of her employment, where the appropriate party is her employer.

36 In the further and better particulars, the claimant refers to the detriments she was caused by Ms Hickey, the head teacher, who was employed by the first respondent and the complaints relating to the third respondent largely concern the way Kathryn Alstrop led various meetings e.g. informing the claimant that the alleged harasser would not be asked to remove himself from the Governing Body "because the outcome had to be proportionate to the incident" and what the claimant had asked for was "disproportionate." The claimant alleges Kathryn Alstrop minimised the harassment, informing her taking witness evidence was "futile" thus allegedly attempting to undermine the integrity/compromise the investigation. The informal stage outcome letter was prepared by Kathryn

RESERVED

Alstrop with the headteacher's name typed on it. The claimant's complaint in respect of the outcome letter is unclear, as she concedes it was sent to Ms Hickey, and presumably it was drafted for her approval and in sending it to the claimant Ms Hickley adopted it as her own. Under the heading "Who?" the majority of the claimant's complaints are against Ms Hickley, and a very small number against Kathryn Alstrop which were largely in connection with process i.e. the of minutes she prepared and refusing the claimant to leave the names of her witnesses in her statement.

37 There is no reference to any alleged acts of victimisation by Kate Smith.

38 With reference to Darren Tyms his name is set out in the column headed "Who" but there is no reference to the EqA. The complaint appears to be that Darren Tyms insisted on the claimant responding to a deadline to answer questions when her GP in a report confirmed the claimant's mental health vulnerability in attending meetings. This was not pleaded in the claimant's original Grounds of Complaint in which Darren Tyms was referenced as the HR investigator the claimant could not agree to as recorded above

39 It appears to me, from the claimant's own pleadings and the further and better particulars she has provided that the first respondent is, as submitted by Mr Kenward, the obvious party vicariously liable for alleged acts of harassment and victimisation during the course of the claimant's employment with it. I agree with Mr Kenward that the claimant criticises Kathryn Alstrop and latterly Darren Tyms in their capacity as independent HR officers unconnected to the first respondent, the claimant or the alleged harasser, for their handling of her complaint, and without more, their actions are unlikely to amount to victimisation for which the third respondent can be found vicariously liable.

40 Mr Kenward submitted at paragraph 40 in his Skeleton Argument that in paragraph 2 of the Grounds of Claim under the sub-heading of "The Claim" confirmed that the Claimant is complaining that her treatment since her complaint of alleged sex harassment amounted to victimisation contrary to Equality Act 2020 section 27 in the various respects set out in sub-paragraphs 2.3 to 2.14. These sub-paragraphs simply set out various criticisms of the handling of the Claimant's complaint. However, such criticisms do not, without more, amount to victimisation and I agree with Mr Kenward's analysis.

41 Mr Kenward contended that the claimant has not identified any basis for establishing she was subjected to the detriments alleged "because" she had done the protected act, and her claims "simply" amounts to dealing with the issue of causation on a "but for" basis, which was misconceived. I agreed the correct test in victimisation cases was as set down by Mr Kenward in his Skeleton Argument. Reference was made to the House of Lords decision in Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 HL. A Chief Constable refused to give a reference because the Claimant had brought Tribunal proceedings. However, the House of Lords suggested that the causative test required the Tribunal to identify "*the real reason, the core reason,*

the causa causans, the motive, for the treatment" of which complaint is made (paragraph 77). The real reason in that case was that the provision of a reference might compromise the Chief Constable's handling of the case being brought against the Police Force and that was a legitimate reason for refusing to accede to the request. I took the view the claimant would have an uphill struggle identifying the motive for preparing inadequate records of a meeting or insisting on answers to questions was causally linked to the very complaint that was being investigated given the HR officers in question had not connection with the alleged perpetrator and were not employees of the first respondent where the alleged perpetrator was a volunteer governor.

42 Mr Kenward also referred me to the EAT decision in A v the Chief Constable of West Midlands Police [2015] UKEAT/0313/14/JOJ, EAT, a police officer appealed against a Tribunal's decision to dismiss her claim that she was sexually harassed by a superior officer and victimised by the Police Force when she complained. It was suggested that the Force had victimised her by narrowing the scope of the enquiry so as not to include sexual harassment. It was also alleged that there was victimisation by failing to make specific findings on two of the allegations. Langstaff J suggested that a failure to investigate a complaint is not in itself victimisation.

"*The context is this. The right to complain of victimisation is designed to protect those who genuinely make complaints. They may not be made in bad faith. The act has to relate to a protected characteristic once such an act is done. The effect of the section is, as it were, to place complainants in a protective bubble. They may not be penalised. The response of the person to whom the complaint is made may not be such as to treat the person adversely. Though the wording of section 27 suggests that "subjecting to a detriment" may be by positive act, Miss Banton submits, and I accept, that it may also arise by an omission to act. But omissions to act must be carefully scrutinised in this regard. The purpose of the victimisation provision is protective. It is not intended to confer a privilege upon the person within the hypothetical bubble I have postulated, for instance by enabling them to require a particular outcome of a grievance or, where there has been a complaint, a particular speed with which that particular complaint will be resolved. It cannot in itself create a duty to act nor an expectation of action where that does not otherwise exist*" (paragraph 20).

43 Mr Line submitted that the claimant had raised a protected act when she raised a grievance on 25 July and the main question for the trial will be the issue of causation, with inferences to be drawn from primary facts and the burden of proof applied. He argued that the claimant's case was a "classic example" the Tribunal needed to hear evidence on, and referred it to a number of cases including *Derbyshire v St Helen's MBC* [2007] IRLR 540, paragraph 37, submitting it was arguable that the Claimant will establish that the way in which her grievance was handled amounted to a detriment.

44 Mr Line essentially agreed with Mr Kenward that the question of causation focusses on the respondents' state of mind (conscious or subconscious) and

the reason for the treatment: *Greater Manchester Police v Bailey* [2017] EWCA Civ 425, paragraph 12. Mr Line referred to *Deer v Oxford University* [2015] IRLR 481 at paragraphs 26-28, the concepts of detriment and less favourable treatment are distinct, but *"… there will be very few, if any, cases where less favourable treatment will be meted out and yet it will not result in a detriment… there is no concept of less favourable treatment as such in this formulation of the wrong. However, if a tribunal finds that the reason for particular conduct adverse to an employee is victimisation, there is implicit in that conclusion a finding that but for having taken the protected act, the employee would have been treated more favourably.*" Mr Line submitted it will be necessary for the claimant to have the opportunity to challenge the respondents' account under cross examination; and the Tribunal will need to take a view in light of the evidence heard. At this stage it cannot be assumed that there is no causative connection and evidence needs to be heard about this. The Claimant's position is, therefore, an arguable one. Reference was made to *Deer* at paragraph 48 Elias LJ held:

"… if the appellant were able to establish that she had been treated less favourably in the way in which the procedures were applied, and the reason was that she was being victimised for having lodged a sex discrimination claim, she would have a legitimate sense of injustice which would in principle sound in damages. The fact that the outcome of the procedure would not have changed will be relevant to any assessment of any compensation, but it does not of itself defeat the substantive victimisation discrimination claim."

45 Mr Line submitted that as the victimisation claim relates to the handling of the grievance which can only be determined following the consideration of live evidence. For the same reasons he argued, it would be inappropriate to impose a deposit order. The Tribunal had concerns with the claimant's claim over the handling of her grievance given the decision makers were not Kathryn Alstrop or Darren Tyms but the deputy and/or headmistress, and it is her motivation the Tribunal will be considering in respect of any causal connection between the protected act and the decisions taken leading to the appeal when the first respondent agreed to re-open and investigate the claimant's complaint about sexual harassment under the Dignity at Work Procedure.

46 I was initially minded to strike out the complaint of victimisation as having no reasonable prospects of success, however, taking into account Mr Line's submissions the allegations made against Kathryn Alstrop and Darren Tyms are fact sensitive and require a Tribunal to consider whether there is any causal link with the protected act i.e. the claimant's allegation of sex discrimination and detriments if proven, taking into account the mental processes and "core reason" for the treatment alleged, it would be draconian to strike out the claim of victimisation against the third respondent on this basis alone.

47 The claimant's claims of victimisation brought against the third respondent are weak, and I took the view they had little reasonable little reasonable prospect of

success when the cause of action as pleaded, appears to be against the first respondent who, if the claimant succeeds, will be vicariously liable for the actions of the deputy/headteacher and not the HR representatives advising the first respondent who are employed by the third respondent. The amount of the deposit to be ordered is to be ascertained at an open preliminary hearing when the claimant will provide oral evidence under oath as to her means, which will be followed by a close case management hearing to deal with new claim number 2405381/2020 lodged on the 29 September 2020 against the first respondent only following ACAS Early Conciliation that took place between the 14 and 27 November 2019.

Application to amend to include a claim under section 112 of the EqA.

48 Mr Kenward submitted there was no formal application made by the claimant to amend, and the case management order assumed one would have been made no later than the 17 July 2019 and the claimant is 4-months out of time, a significant non-compliance. Mr Kenward is correct in his analysis. The claimant's trade union representative attended the preliminary hearing held on the 15 May 2020 and the Case Management Summary sent to the parties on 4 June 2020 records the claimant's claims and at 13(iii) a claim of "Aiding Contraventions under section 112…made against the second and third respondents only…amendment to the claimant's claims would be needed to permit this to be pursued." At paragraph (4) reference was made to the preliminary hearing considering the following applications "to the extent that the applying party continues to pursue the application as at the date of the preliminary hearing. At paragraph 4 (iv) the claimant's application to amend was set out as recorded above.

49 It is clear from the Tribunal file that (a) the claimant had not made a written application to amend reflecting her intention to pursue a section 112 claim, and (b) the application was made orally without notice to the respondent and without providing a draft amended Grounds of Complaint, for which the claimant can be criticised given the slapdash manner in which her claims have been approached, setting aside the defects in the pleadings, has led to confusion and a great deal of time being spent by the parties and Tribunal in unravelling her claims with reference to the Equality Act 2010.

50 At the preliminary hearing the claimant was ordered to provide further information including "full details of any claim the claimant intends to pursue within the scope of section 112 including full details of any act or omission alleged to amount to "knowing help." The claimant was ordered to provide this information giving the specifics set out at paragraphs 1.2.3 to 1.2.9 and 1.3. The claimant provided minimal information in a document referred to as "Particulars of each detriment relied upon as an act of victimisation…and in the course of assisting [the first respondent] by the "knowing help" under section 112 EqA.

RESERVED

51 The Tribunal was referred to the House of Lords decision in Anyanwu at paragraph 5referred to above: "The expression 'aids' in s.33(1) is a familiar word in everyday use and it bears no technical or special meaning in this context…the subsection points towards a relationship of cooperation or collaboration…the title to the section is 'aiding contraventions' and the term "help" which is used in the text has a broadly synonymous meaning."

52 Keeping the guidance received from the House of Lords in mind, I reminded myself of the claimant's original grounds of complaint, albeit duplicated, against the third respondent. At paragraph 2.5 the claimant pleaded "The employer initially implicitly agreed with the claimant that she had been sexually harassed in July by Mr McCarthy, but once Liverpool SEAT became involved, they attempted to undermine the claimant's issue." At paragraph 2.10 "The involvement of HR in her issue improperly influenced the investigation into her grievance… and paragraph 2.11 "the advice given by HR went beyond what was permissible in terms of advice and it was intended to persuade the claimant that her issue was "low level" by definition and to influence her decision making as to how her issue should be dealt with." At paragraph 2.13 reference made to a "improper and poorly managed process." At paragraph 83 the claimant pleads "the claimant believes that Mrs Hickey originally had her best interests at heart, but once Ms Aistrop became involved, Mrs Hickey's attitude towards the claimant changed. At paragraph 90 reference was made to Darren Tyms being appointed to conduct the independent investigation under the Dignity at Work procedure and the claimant's union representative "Mr Fenton has objected to this appointment and notified School Improvement Liverpool that he considers such an appointment of a non-independent investigator to be another act of victimisation…."

53 In the Grounds of Response at paragraphs 32 and 33, the claimant's claim that the claimant's alleged victimisation by the first respondent "through being improperly influenced" by Ms Alstrop of the third respondent was denied. In paragraph 33 the third respondent pleaded "it is denied that my involvement on the part of Ms Ainstrop improperly influenced any consideration given to the matter…" I took the view that the words "improperly influenced" could embrace a section 112 claim which is concerned with aiding contraventions i.e. helps or assists.

54 In the claimant's further information under the heading "Who?" the first reference to Ms Aistrop was on 3 September 2019 when she allegedly described the investigation and said "whatever approach C took, the outcome would be exactly the same, that being…[the governor] would remain on the Governing Body…Ms Aistrop said to me that what I requested was disproportionate to the incident…sexual harassment is on a spectrum and as this was low level I wouldn't be getting my requested outcome…her opinion not policy but quoted as the later and C believed it to be such." The claimant also alleged Ms Aistrop had said on the same date "these days asking someone for their phone number on a night out is classed as sexual harassment." The

RESERVED

claimant also alleged that the burden of taking statements was placed on her because she was not told "interviews were automatically part of the process."

55 I found it difficult to understand how Ms Aistrop had, on the claimant's own account when she expressed an opinion and/or not made the interview process clear, aided contravention of the Equality Act, and even if the claimant's case was taken at its highest, this allegation little reasonable prospect of success under a section 112 claim.

56 The claimant also alleged in the further information that Ms Aistrop had "wanted to redact the names of my witnesses from my statement to 'contain' the situation" and would not allow the claimant to name her witnesses in the statement. This is similar to the earlier pleading in the Grounds of Complaint and I have difficulty understanding how this act aided contravention under section 112. The same point applies to the inaccurate minutes taken by Ms Ainstrop on the 26 September 2019 an allegation not elaborated by the claimant who failed to specify how the alleged inaccuracies aided contravention under section 112 despite the clear case management order made that she set out her complaint in this regard in considerable detail, which she appears to have disregarded.

57 Turning to the claims against Mr Tyms set out in the further information the claimant refers to the following;

57.1 On 18 June 2020 Mr Tyms emailed the claimant to commence the Dignity at Work investigation when the GP's letter of 3.2.2020 stated the claimant could not attend any workplace related meetings.

57.2 On the 26 June 2020 Mr Tyms sent the claimant an email with a deadline for her to answer questions after correspondence from the trade union representative outlining reasons why the claimant was unable to engage with his requests.

57.3 the 7 July 2020 Mr Tyms gave the claimant a "final deadline" to answer questions, when the claimant's GP letter of 1 July 2020 confirmed the claimant was vulnerable due to her mental health and should not attend meetings which the claimant alleges was ignored by Mr Tyms because he had sent her the deadline date for a response.

58 As in the case against Ms Ainstrop I have difficulty understanding how the alleged actions of Mr Tyms aided contravention under section 112. The claimant appealed and as a result her complaint of sexual harassment was to be investigated under the dignity at work procedure, Mr Tyms was gathering information from the claimant who was represented by her union at the time, when the claimant was absent from work. The claimant is criticising Mr Tyms for what are essentially procedural matters and there appears to be no connection with how he was dealing with the investigation and the claimant's allegations of victimisation against the first respondent.

RESERVED

59 Mr Line accepted some level of criticism could be levelled at the claimant as she had not produced a document that dealt with the section 112 claim which was parasitic on the primary claim brought under section 27 of the EqA. Mr Line submitted that the claimant provided the draft amendment in her further and better she prepared without legal assistance as a litigant in person, and the application is expressly before the Tribunal today the respondent having been put on notice at the preliminary hearing when the claimant's union representative referred to section 112 claim and the purpose of this preliminary hearing was to consider it and decide whether leave should be granted. The first point to note from my reading of the Tribunal's file was the claimant at the time was not a litigant in person but represented by her union who were on record and send the further information to the Tribunal.

60 Mr Line argued that a section 112 complaint was in the third respondent's contemplation evidenced by paragraph 33 of the Response. The claimant's case was that the claimant was victimised by the first respondent, the second respondent influenced that victimisation and the claimant's further and better particulars made a bare reference to section 112, which is essentially a relabelling exercise with no prejudice to the respondent, who had already anticipated it as the matters pleaded supported a section 112 claim, for example, the references to Ms Alstrop, "HR employed by the third respondent" and a pleaded case of influence. The Tribunal was referred to paragraphs 83, 88 to 90 which Mr Line argued, pleaded the facts on which a section 112 claim could be established.

61 In short, Mr Line argued that the claimant's pleading, which can be cross-referenced to apply to all respondents, references the improper involvement of HR. I took the view, on the pleadings and further information provided by the claimant the only HR advisors that could be involved were Kathryn Alstrop and Darren Tyms. Mr Line further submitted that the respondent can file an amended response, applying the balance of hardship test.

62 I accepted Mr Line's argument that on balance that the claimant had presented valid claims against each respondent, albeit I found she had no cause of action against the second respondent for the reasons set out above, The possibility of a section 112 claim relates to the third Respondents' actions in relation to the first respondent. I accepted adding a reference to section 112 is akin to the addition of legal label to existing facts and applying Selkent Bus Co Ltd v Moore [1996] IRLR 661, the balance of hardship favours permitting the amendment, bearing in mind the content of the third Respondent's response.

63 In written and oral submissions Mr Line put forward the claimant's position coherently in direct contrast to the pleadings and further information which are far from coherent in their reference to the section 112 claim. Mr Lines in his skeleton argument attempts to put a gloss on the claimant's pleadings which is just not there. Mr Line submitted that insofar as the involvement of HR advice caused or contributed to any act of victimisation by the first respondent, then it

is relevant for the Tribunal to consider the implications of this by reference to section 112. The Tribunal accepted this did not "drastically" change the nature of the case before the Tribunal and the same facts that will need to be considered.

64 Mr Line offered to submit yet further and better particulars on the part of the claimant, which can be discussed with the parties at the preliminary hearing. I am reluctant to give the claimant yet another opportunity to expand upon her claim bearing in mind she was not a litigant in person at the time, but in receipt of union representation and support. In addition to discussing with the third respondent whether further information is necessary for it to understand the case it needs to meet at the liability hearing, the lodging of an amended response will also be discussed together with case management orders relating to claim number 2415381/2020.

65 In conclusion, the claimant is permitted to pursue her claim under section 112 against the third respondent all claims having been dismissed against the second respondent on the basis that she would suffer the most on the balance of prejudice scales, despite the apparent weaknesses in her claim.

Application to strike out the section 112 EqA claim

66 For the same reasons as set out above in relation to the victimisation claim brought against the third respondent, the application to strike out the same on the basis that it has no reasonable prospect of success is dismissed as I am not in a position to hold a mini-trial and there is a possibility that the comments allegedly made by Kathryn Alstrop and the alleged disregard by Darren Tyms of medical advice and/or the claimant's mental ill health could reverse the burden of proof and adverse inferences may be drawn. These are matters that should proceed to a full liability hearing when the facts can be reached after resolving credibility issues and disputed evidence before judgment is reached on merits.

67 I concluded in the alternative, that a deposit order should be made in relation to the allegations made by the claimant in the pleadings and further information as opposed to Mr Lines' clarification of those claims. The section 112 claim has little reasonable prospect of success. I accept the strength of Mr Kenward's submission that the obvious party liable for any acts of discrimination or victimisation during the course of the claimant's employment would be her employer, namely the Governing Body and she a "significant obstacle in establishing a prima facie case that there was a breach of section 112 through the second respondent when it had not involvement at the time of the alleged harassment, and therefore the alleged contravention which would have had to have been aided would be that of victimisation. Thus, Kathryn Alstrop and the alleged disregard by Darren Tyms of the third respondent must have known that an act or omission on the part of the Governing Body would amount to deliberately subjecting the Claimant to a detriment because of her complaint and, notwithstanding such knowledge, the third respondent decided to assist the Governing Body in achieving such a purpose". I agree with Mr Kenward that

RESERVED

such an argument would have very poor prospects of success and there is no material relied upon by the Claimant which would enable the Tribunal to arrive at the necessary conclusion.

68 In conclusion, the first respondent's application to strike out the claimant's section 26 claim against it on the basis that the first respondent cannot be vicariously liable for the actions of the alleged harasser is adjourned to the liability hearing by consent.

69 The second respondent's application to strike out the claimant's section 26 claim on the ground that it has no reasonable prospect of success succeeds. The claim brought under section 26 of the Equality Act 2010 against the second respondent has no reasonable prospect of success and is dismissed. The second respondent no longer has any interest in these proceedings.

70 The third respondent's application to strike out the claimant's section 26 claim on the ground that it has no reasonable prospect of success fails. The claim brought under section 26 of the Equality Act 2010 against the third respondent has little reasonable prospect of success and the Tribunal shall make reasonable inquiries into the claimant's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit at a preliminary hearing. The parties will provide dates of availability for a one-hour public preliminary hearing to be followed by a one private case management hearing to include case number 2415381/2020.

71 Case number 2415381/2020 is to be consolidated with this case and all the claims will be heard together.

72 The Claimant's application to amend her claim to include a claim under section 112 of the Equality Act 2010 ('EA 2010') against the Second respondent is refused and dismissed.

73 The Claimant's application to amend her claim to include a claim under section 112 of the Equality Act 2010 ('EA 2010') against the third respondent succeeds and leave is granted to the claimant to amend her claim to include a claim under section 112 of the Equality Act 2010 and the document titled "Particulars of each detriment" dated 17 July 2020 together with the Grounds of Claim will stand as the claimant's section 112 claim against the third respondent.

74 The third respondent's application to strike out the section 112 Equality Act 2010 claim on the basis that it has no reasonable prospect of fails. The claim brought under section 112 of the Equality Act 2010 against the third respondent has little reasonable prospect of success and the Tribunal shall make reasonable inquiries into the claimant's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit at a preliminary hearing.

RESERVED

75 Finally, in order to prepare for the open preliminary hearing, the claimant will prepare a written statement of her means together with supporting evidence which she will deliver to the respondent no later than 28-days after this reserved judgment is received. In preparation of the preliminary hearing the parties will be sent an agenda to complete and confirm when providing availability dates whether a three-hour allocation is sufficient failing which the preliminary hearing will be listed for three-hours.

_____

Employment Judge Shotter

18.12.20

Sent to the parties on:

23 December 2020

For the Tribunal: