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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102262/2020

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Preliminary Hearing Held in Chambers on 27 April 2021

Employment Judge - A Strain

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Dr Claire McGonagle

**Claimant
Represented by
Ms S Shields
Solicitor**

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Argyll and Bute Integration Joint Board

**First Respondent
Represented by
Mr R Davies
Solicitor**

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Highland Health Board

**Second Respondent
Represented by
Mr R Davies
Solicitor**

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Dr Colin Barrett

**Third Respondent
Represented by
Mr R Davies
Solicitor**

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Ms Jane Williams

**Fourth Respondent
Represented by
Mr R Davies
Solicitor**

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Ms Jane Lawrence-Wynch

**Fifth Respondent
Represented by
Ms S Mair
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the allegations under the NHS Recruitment Regulations as described in the further and better particulars of the claim form part of her claim of vicarious liability against the Second Respondent
5 and do not constitute new individual claims under the Regulations against the Third to Fifth Respondents.

Background

1. The Claimant was represented by Ms Shiels, Solicitor. The First to Fourth
10 Respondents were represented by Mr Davies, Solicitor. The Fifth Respondent was represented by Ms Mair, Solicitor.
2. This was a Preliminary Hearing to determine the following issues:
 - 15 a. Whether the NHS Recruitment Regulations allegations against the Third to Fifth Respondents, as described in the further and better particulars of the claim, form part of the claim; and
 - b. If so, whether those claims, in so far as brought against the Third to Fifth Respondents as individuals, have no reasonable prospects of
20 success, on the basis that it is asserted by the Third to Fifth Respondents that the Regulations do not provide for the personal liability of workers.
3. The Parties had lodged Written Submissions in advance of the Preliminary Hearing:

Submissions

The Third to Fifth Respondents' Position

- 5 20. The Tribunal considered the Written Submissions lodged by the agents representing the Third to Fifth Respondents (**Respondents**). They objected to the allegations made under the **Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2018 (Regulations)** forming part of the claim against the Respondents on the
- 10 basis that they had not been included in the original claim and had only sought to have been introduced in the further and better particulars lodged by the Claimant. These were new claims which could only be introduced by amendment.
- 15 21. Furthermore, the Respondents position was that the Regulations did not create personal liability for individual workers – only for NHS Employers. Section 49B of the **Employment Rights Act 1996 (ERA 1996)** under which the Regulations were created makes reference to NHS Employers. It makes no reference to personal liability of workers. Sections 49B (6) and (7) prescribe what can be an NHS Employer. The Regulations
- 20 themselves repeat the language of section 49B.
22. Regulation 4 (1) gives an applicant a right of complaint to an Employment Tribunal against an NHS Employer. Regulation 6 covers potential remedies an Employment Tribunal may award and only makes reference to orders or recommendations against an NHS Employer.
- 25 23. The Regulations prohibit certain NHS Employers from discriminating against job applicants because it appears to the employer that the applicant has made certain disclosure of information.
24. In respect of the Third and Fourth Respondents it is asserted that the claims under the Regulations are contained within 7)(a) Further and
- 30 better particulars of claim (1-10) on pages 9-10. The Claimant seeks to

argue that the Third and Fourth Respondents discriminated against the Claimant after the Claimant made protected disclosures contrary to Regulation 3 and section 49B of ERA 1996 in that the Claimant's applications for shifts were refused. In respect of the Third Respondent it is also asserted that he treated the Claimant less favourably.

25. In respect of the Fifth Respondent it is asserted that the Claimant describes the Fifth Respondent as an "agent" of an NHS Employer. In the further and better particulars the Claimant on page 8 asserts that the Fifth Respondent discriminated against the Claimant for making protected disclosures contrary to Regulation 9 (3) and section 49 B of ERA 1996. The Fifth Respondent refused the Claimant's applications for shifts. If an agent of the NHS Employer discriminates against an applicant then it is the NHS Employer who is treated as responsible, not the individual or agent. Any remedy is against the NHS Employer.

26. The Claimant was not an "applicant" in terms of the Regulations in the factual circumstances claimed. The Claimant therefore has no reasonable prospect of success against the Respondents in relation to the Regulations.

27. In respect of the Respondents the Regulations do not provide for the personal liability of individuals (workers and/or agents) and that only the Second Respondent (as NHS Employer) could be liable to pay compensation under Regulation 6 (b). As such, the claims under the Regulations against the Respondents had no reasonable prospects of success.

The Claimant's Position

28. The Claimant's position was that no claim under the Regulations had been brought against the Respondents as individuals. The Respondents were properly named as Respondents in relation to claims of detriment under section 47B of ERA 1996. It was only the Second Respondent that could be liable for any discrimination. This liability was extended by

Regulation 9 which provided that discrimination by a worker of an NHS Employer is to be treated as discrimination by the NHS Employer where the discriminatory conduct occurs during the course of that worker's employment. The extended definition of worker in section 43K of ERA 1996 applies.

29. An NHS Employer could also be liable for discrimination by an agent where the discriminatory conduct occurs with the authority of the NHS Employer (Regulation 9 (3)).

30. The Claimant's Paper Apart to her ET1 at the final paragraph entitled "Discrimination" asserts that in applying for shifts the Claimant was an "applicant" in terms of section 49B of ERA 1996 and the Regulations. She was discriminated against by the First and Second Respondents because she had made a protected disclosure. The First and Second Respondents were vicariously liable in terms of Regulation 9 for discriminatory conduct by the Third, Fourth and Fifth Respondents.

31. The Claimant agrees that the Regulations do not provide for the personal liability of individuals and that only the Second Respondent could be liable to pay compensation under Regulation 6 (b). The Second Respondent could be liable for any discriminatory conduct of its workers or agents.

32. The Respondents are named in relation to the separate claim for detriment (including dismissal) under section 47 B because they may be personally liable for a remedy.

Decision and Reasons

33. It is accepted by all Parties that the Regulations do not provide for the personal liability of individuals such as the Third to Fifth Respondents. The Claimant in her ET1 gives fair notice that the claim she asserts under Regulation 9 is against the Second Respondent on the basis of vicarious liability for the discriminatory conduct of the Third to Fifth Respondents.

34. The information contained within the further and better particulars does not constitute the introduction of “new claims” under the Regulations against the Third to Fifth Respondents as individuals. The Claimant provides further information with regard to the vicarious liability claim made against the Second Respondent under the Regulations which was asserted in her ET1.

35. As no claims are brought against the Third to Fifth Respondents as individuals under the Regulations the second issue becomes irrelevant.

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Employment Judge: Alan Strain
Date of Judgment: 27 April 2021
Entered in register: 11 May 2021
and copied to parties

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