Neutral Citation Number: [2022] EAT 72

Case Nos: EA-2020-000849-VP
EA-2020-000850-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17 May 2022

Before :

MICHAEL FORD QC, DEPUTY JUDGE OF THE HIGH COURT

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Between :

MR TARIQ SAMI **Appellant**
- and -
MR ABEL AVELLAN **Respondent**

- - - - - - - - - - - - - - - - - - - -

MR TARIQ SAMI **Appellant**
- and -
1) NANOAVIONICS UK LTD 2) NANOAVIONIKA UAB/ t/a NANOAVIONIKA LLC
3) AST & SCIENCE LLC **Respondentds**

- -

Mr J Horan of Counsel for the **Appellant**
Miss M Tutin (instructed by Coyne Partners) for the **Respondents**

Hearing date 5 April 2022

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The Claimant brought proceedings against his former employer, the first respondent, for race discrimination and harassment. He also brought claims against the second respondent, a company which owned all the shares in the first respondent, on the basis that it was an agent of first respondent for the purpose of section 109 of the **Equality Act 2010** ("EqA"), it knowing helped the discrimination for the purpose of section 112 and/or it was liable under section 111 for inducing acts of discrimination. He later brought a claim against the fourth respondent, the chairman of the second respondent, contending he knowingly helped what was alleged to be a discriminatory dismissal. At a preliminary hearing an employment judge ("EJ") ordered the claimant to pay deposits in respect of his claims against the second and fourth respondents. The claimant appealed.

Held (allowing the appeal in part). The test for ordering a deposit order was lower than that for a strike out but there still must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim (**Hemdan v Ishmail** [2007] IRLR 228 applied). The EJ erred in ordering a deposit in relation to the claim that the fourth respondent knowingly helped discrimination within the meaning of section 112 on the basis that (i) the claimant was only employed for a short period and (ii) the dismissal was alleged to be for "poor performance/discriminatory". Neither reason was relevant to the claim having little reasonable prospect of success. As for the claims against the second respondent, the claim based on section 111 EqA, would inevitably fail because the relationship between the first and second respondent was not such that the first respondent was in a position to commit a "basic contravention" of the EqA in relation to the second respondent, so that a necessary precondition of the section was not met: see section 111(7) EqA. The EJ erred, however, in making a deposit order in respect of the other allegations against the second respondent because the claimant advanced facts, some of which were supported by documents, which went beyond "mere assertions" to support his claims based on agency under section 109 and section 112 EqA. In addition, the fact

that the claimant was employed by the first respondent, which the EJ took into account, was not relevant to whether those claims against the second respondent stood little reasonable prospect of success.

Michael Ford QC, Deputy Judge of the High Court

Introduction

1. This appeal is brought by Mr Tariq Sami against a judgment of Employment Judge Bartlett (the "EJ"), sitting alone in the Watford employment tribunal at a hearing via CVP on 25 August 2020. Written reasons were sent to the parties on 16 September 2020. The claim was brought against four respondents. The EJ held, among other matters, that the claims against the Second Respondent, Nanoavionika UAB, and the Fourth Respondent, Mr A Avellan, had little reasonable prospect of success and she ordered the payment of a deposit in the amount of £150 in respect of each claim. The appeal is against those deposit orders and not against other aspects of the judgment.

2. I shall refer to the parties as the Claimant and, collectively, as the Respondents, as they were before the Tribunal.

3. Before me, the Claimant was represented by Mr Horan of counsel and the Respondents to this appeal were represented by Ms Tutin of counsel. I am grateful to both for their submissions.

The Tribunal Decision

4. The Claimant presented his first claim on 27 August 2019. In it he complained of direct and indirect race discrimination and harassment contrary to the **Equality Act 2020** ("EqA"). The claim was brought against the three corporate Respondents set out below:

   (1)The First Respondent, NanoAvionics UK Ltd, is a company incorporated in the UK, who it was said had employed him as Sales Director from 2 January 2019 until his dismissal on 24 May 2019.

   (2) The Second Respondent, the full name of which was given as Nanoavionika UAB T/A Nanoavionika LLC, is a Lithuanian-based company which owns all the shares in the First Respondent.

   |(3) The Third Respondent, AST & Science LLC, is a company registered in Delaware.

5. In a very detailed rider to his claim form the Claimant set out his allegations of discrimination. These included allegations that he was treated less favourably in various ways

because his race was non-Lithuanian, such as being dismissed for failing to achieve targets, being given less support, having his target changed at short notice and being abruptly dismissed. He also claimed he was subject to indirect race discrimination, referring to the application of various provisions, criteria or practices, such as sales targets, which it was said operated to the particular disadvantage of non-Lithuanians. His complaint of harassment relating to race under section 26 EqA is, I was informed at the hearing, no longer being pursued.

6. While his primary claim was against the First Respondent, the Claimant contended in addition, that (i) the Second and/or Third Respondent were also his employers because they were in control of him and were referred to in the contractual documentation (it was said the Second Respondent had in fact signed a contract with him); (ii) both the Second and Third Respondents were potentially liable as agents under section 110 **EqA** and for aiding contraventions of the Act under sections 112 of the **EqA**; and (iii) the Second Respondent was also liable for inducing contraventions of the Act, contrary to section 111 : see paragraphs 259-60 of the rider to the claim form.

7. In the responses from all three Respondents, the claims were denied. The Respondents accepted that the Claimant was employed by the First Respondent but contended he had no contractual relationship with the Second or Third Respondent and was dismissed on 24 May owing to his poor performance.

8. In the grounds of resistance attached to the responses, it was asserted that the Claimant had failed to particularise how the Second or Third Respondents were agents of the First Respondent or had induced or knowingly helped discrimination by the First Respondent, and a request was made for a deposit order in relation to these complaints (paragraphs 9-10). The grounds explained that the Second Respondent was a satellite manufacturer, satellite launch broker and satellite operator, employing approximately 80 scientists and space engineers. It received funding, according to the grounds, from the Third Respondent, which owned the majority of the shares in the Second Respondent. In order to expand its presence in the UK market, the Second Respondent had established the First Respondent in 2018. It is based in the science park at Harwell Campus, Oxfordshire and is a wholly-owned subsidiary of the Second Respondent. It was said that the Claimant was employed by the First Respondent in order to expand its market presence and growth in the UK.

9. As already foreshadowed in his original grounds of complaint, the Claimant subsequently presented a second claim against Mr Abel Avellan, the Fourth Respondent, on 19 September 2019. In it he claimed that the Fourth Respondent, who is the chief executive of the Third Respondent and chairman of the Second Respondent, had aided the acts of race discrimination against the Claimant within the meaning of section 112 **EqA**. In particular, it was alleged that the Fourth Respondent had approved of the discriminatory dismissal of the Claimant and had failed to conduct an appeal sought by the Claimant (see paragraph 17 of the rider to the claim form).

10. In the response served on behalf of the Fourth Respondent the claims were denied. It was stated that it was inherently implausible that the Fourth Respondent, who is also non-Lithuanian, would discriminate against the Claimant and a request was made for a deposit order.

11. The matter was listed for a preliminary hearing ("PH") to consider if the claims against the Second, Third or Fourth Respondents should be struck out or the Claimant should pay a deposit order. There was an agreed list of issues and both parties provided written submissions. The Claimant also presented additional documents the night before the hearing, relevant to the process of his dismissal. I refer to some of these below.

12. The written judgment of the EJ set out the background to the claim and cited rules 37 and 39 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** (the "Rules"), on strike out and deposit orders respectively.

13. After summarising the arguments of the parties, the EJ found that the Claimant's contract of employment was with the First Respondent alone and not with the Second or Third Respondents. She struck out the part of the claim alleging the Claimant was employed by them (paragraph 19), and there is no appeal against that ruling. The EJ turned to consider the whether the Second or Third Respondents could be the agents of the First Respondent or liable for helping discrimination under section 112 **EqA**. She said this:

> "20. Therefore the only issue remaining is whether or not R2 and R3 were in a relationship of agency. Both parties referred me to the judgement of the Employment Appeal Tribunal in Yearwood v Metropolitan Police Commissioner [2004] ICR 1660 [39]. I find that the term 'agent' as used within the statute refers to the common law of

agency and the question is whether R2 and/or R3, as corporate entities, entered into fiduciary duties with the First Respondent in respect of the its relationship with the Claimant. I found Yearwood to be of limited relevance because it is largely concerned with whether or not agency can arise in the very specific circumstances of police officers and their relationships whereas in this case the issue is whether or not there is agency between corporate entities.

21. I find that there is no reasonable prospect of the claimant establishing that R3 acted as the agent of R1 in respect of R1's relationship with the claimant. Very little has been identified which could establish such a relationship except that R3 and R1 are in the same corporate group. I make the same findings in relation to section 112 of the Equality Act 2010. Therefore, the claimant's claims against R3 are struck out.

22. In respect of agency between R2 and R1, I accept that there was a specific power of attorney granting authority to a director of R2 to execute documentation terminating the claimant's employment. I am not satisfied that this is sufficient to establish agency in relation to the alleged discriminatory acts. However when I take into account that there has been some granting of authority, that R2 or R2's management team may exercise some control over R1's actions (particularly due to R1's limited size and resources), I do not find that there are no prospects of the claimant establishing such agency. However I consider that there are little reasonable prospects of the claimant establishing agency because, taking his claim at its highest, the claim against R2 is based on mere assertions and ignores the employment relationship between the claimant and R1. I make the same findings in relation to section 112 of the Equality Act 2010 and I consider that the claimant has little prospects of success in establishing that R2 knowingly aided R1 contravened the Equality Act 2010. Therefore I have decided not to make a strike out order in respect of the claimant's claims against R2 but I make a deposit out order as set out above.

23. I have considered the claimant's evidence about his difficult financial circumstances. Taking that into account, I make an order that the claimant must pay a deposit of £150 in respect of the claims against R2."

14. There is no appeal against the EJ's decision striking out the claim against the Third Respondent. The EJ did not consider the claim that the Second Respondent was liable under section 111.

15. As regards the claim against the Fourth Respondent under section 112, the EJ said the following.

"24. In relation to the claims against R4 I make the following findings:

24.1 The claim against R4 has two elements which are alleged to be a breach of section 112 of the Equality Act 2010:

24.1.1 R4 approving the termination of the claimant's employment (which is alleged to be a discriminatory act).

24.1.2 A failure to carry out an appeal process in respect of the claimant's termination during the period 7 to 22 June 2019.

24.2 I do not find that the claimant's claim against R4 was an abuse of process. Lodging a claim against another party at a later date is not inherently an abusive act. The claimant gave reasons which related to what he was told by ACAS as to the delay;

24.3 I do not find that there are no or little reasonable prospects of success of the claim that, given the intertwined nature of the management teams in the group structure, R4 knew about the termination of the claimant's employment. However, section 112 sets out the following:

'(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.'*

24.4 I find that s112 of the Equality Act 2010 requires that R4, a non-Lithuanian, knowingly helped R1 and/or R2 act in contravention of the Equality Act 2010 and the claimant must establish that R4 cannot benefit from s112(2). I find that there is little reasonable prospects of success of the claimant establishing all of these elements, particularly when the wider circumstances of the claim are considered which is a dispute surrounding a relatively short period of employment and a dismissal which is alleged to be for poor performance/discriminatory. Therefore I make a deposit order in the amount of £150 as set out above."

16. The Claimant did not pay the deposits made in respect of his claims against the Second and Fourth Respondents, with the result that those claims were struck out.

Legal Framework

17. Claims under Part 5 of the **EqA**, relating to the work sphere, are brought under section 39 against the employer. In addition, by section 40 an employee must not harass one of its employees.

18. The Act sets out some careful provisions for the ascription of liability, similar to those in the earlier anti-discrimination legislation. First, under the title "Liability of employers and principals", section 109 states:

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

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal."

The normal operation of these provisions is to deem the acts of a subordinate employee to be attributable to the employer, but liability also extends to agency relationships. So if an agent of an employer discriminates against an employed colleague, that act is attributed to the employer as principal. In addition, the effect of section 110(1) and (2) is to impose personal liability on the employee or agent, even where the employer has a defence under section 109(4) because it took all reasonable steps to prevent the act of discrimination.

19. Section 111 of the Act imposes additional liability for instructing, causing or inducing contraventions, replacing the analogue provisions in the predecessor legislation, such as sections 30-31 of the **Race Relations Act 1976**. That section states:

"111 Instructing, causing or inducing contraventions

(1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6, or 7 or section 108(1) or (2) or 112(1) (a basic contravention).

(2) A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.

(3) A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.

(4) For the purposes of subsection (3), inducement may be direct or indirect.

(5) Proceedings for a contravention of this section may be brought—

(a) by B, if B is subjected to a detriment as a result of A's conduct;

(b) by C, if C is subjected to a detriment as a result of A's conduct;

(c) by the Commission.

(6) For the purposes of subsection (5), it does not matter whether—

(a) the basic contravention occurs;

(b) any other proceedings are, or may be, brought in relation to A's conduct.

(7) This section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B.

(8) A reference in this section to causing or inducing a person to do something includes a reference to attempting to cause or induce the person to do it.

(9) For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating—

(a) in a case within subsection (5)(a), to the Part of this Act which, because of the relationship between A and B, A is in a position to contravene in relation to B;

(b) in a case within subsection (5)(b), to the Part of this Act which, because of the relationship between B and C, B is in a position to contravene in relation to C."

The effect of section 111(7) is to circumscribe the reach of section 111. Unless the relationship between A and B is such that A, the person giving the instruction or causing or inducing the breach, can commit discrimination under the **EqA** in relation to B - for example, A is the employer of B and so potentially liable to B under s.39 **EqA** - the section is not triggered. I return to this point below because it is relevant to the appeal.

20. Liability is also imposed for helping contraventions by section 112 **EqA**, replacing the provisions referring to aiding unlawful acts as were formerly found in, for example, section 42 of the **Sex Discrimination Act 1975**. Section 112 states:

112 Aiding contraventions

(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.

(3) B commits an offence if B knowingly or recklessly makes a statement mentioned in subsection (2)(a) which is false or misleading in a material respect.

(4) A person guilty of an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(5) For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating to the provision of this Act to which the basic contravention relates.

(6) The reference in subsection (1) to a basic contravention does not include a reference to disability discrimination in contravention of Chapter 1 of Part 6 (schools).

The section requires, therefore, both (i) the act of helping and (ii) a mental element of

"knowingly".

21. Guidance on the meaning of section 112 is given by the Code of Practice on Employment issued by the Equality and Human Rights Commission (the "Code") and which tribunals must take into account where it appears relevant: see section 15(4) of the **Equality Act 2006**. The Code says that "help" should be given its ordinary meaning, and in relation to "knowingly" says at [9.28] that:

> "the person giving the help must know at the time they give the help that discrimination, harassment or victimisation is a probable outcome. But the helper does not have to intend this outcome should result from the help."

Under the predecessor legislation, the House of Lords held that "knowingly aids" required more than a simple attitude of helpfulness and co-operation, but declined to be more prescriptive as to the meaning of the concept because, as Lord Bingham emphasised, "the outcome of cases such as this will almost always turn on the facts properly found": see **Hallam v Avery** [2001] ICR 408 at [9]-[10].

22. Rule 39 of the Tribunal Rules deals with deposit orders. Rule 39(1) states:

> "(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."

The threshold for a deposit order, of "little reasonable prospect of success", is lower than the threshold of "no reasonable prospect of success" for a strike out under rule 37(1)(a). If the threshold is crossed, the tribunal has a discretion to order a deposit.

23. Where a tribunal makes a deposit order and the paying party fails to pay the sum ordered, the relevant allegation or argument is struck out: see rule 39(4). If the deposit is paid, and the tribunal later decides against the paying party for "substantially the reasons given in the deposit order", that party is treated as having acted unreasonably for the purpose of a costs order in rule 76 unless the contrary is shown and the deposit is paid to the other parties: see rule 39(5).

24. On the approach to rule 39, Mr Horan referred me to **Sharma v New College Nottingham**,

UKEAT/0287/11/LA in which Wilkie J indicated that a similar approach applied to making deposit orders as applies to strike outs, where it is only in an "exceptional case" that the courts will strike out a claim where the core facts are in dispute, such as where the alleged facts are totally and inexplicably inconsistent with the undisputed contemporaneous documentation: see **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126 per Maurice Kay LJ at[29], cited in **Sharma** at [26]. He argued that unless a case with disputed facts fell into the "exceptional" category, no deposit order could be made.

25. I do not consider, however, that the similarity between strike outs and deposit orders can have the effect of overriding the different wording of the two rules. As much is clear from **Ezsias** itself, in which the Court of Appeal, having held that the claim should not have been struck out, left open the possibility of a deposit order being made: see Maurice Kay LJ at [33]. The lower threshold for making a deposit order than a strike out gives a tribunal greater leeway to make a preliminary assessment of the strength of a case, including of the factual credibility of allegations: see Elias P (as he then was) in **Van Rensburg v Royal Borough of Kensington-Upon-Thames**, UKEAT0096/07/MAA at [26]-[27].

26. Nonetheless, the practical effect of a deposit order on the right of access to justice - probably due more to the costs warning if the case is pursued than to the deposit sum itself - means that there must be a proper basis for making such an order. As it was put by Simler P (as she then was) in **Hemdan v Ishmail** [2017] IRLR 228 at [12] in comparing deposit orders with strike outs:

> "The test, therefore, is less rigorous....but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or defence. The fact that the tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be a proper basis."

Simler P went on to state that, in light of the purpose of a deposit order to save cost, time and anxiety, the assessment of whether a claim has little reasonable prospects must necessarily be summary, adding that if "there is a core factual conflict it should properly be resolved at a full merits hearing where evidence is heard and tested" [13]. Those concluding words are guidance and should not be understood as replacing the wording of rule 39, nor as preventing a tribunal, in an appropriate case, from deciding that a factual allegation has little reasonable prospects of success. But they underline the need for caution before making a deposit order where core facts are in dispute, and the important safeguard of sufficient reasons before

deciding a claim or allegation has little reasonable prospect of success

The Grounds of Appeal

27. Following a preliminary hearing before Jason Coppel QC, sitting as a Deputy High Court Judge, the appeal grounds were amended so as to provide three focused grounds of appeal: see the amended Notice of Appeal dated 10 November 2011. Below I deal with each ground, referring to the numbering used in the revised grounds of appeal.

28. **Ground (2): section 112, Fourth Respondent**. This ground, as revised, is that in ordering the Claimant to pay a deposit in respect of his claim against the Fourth Respondent based on section 112 of the **EqA**, the EJ gave insufficient reasons, based herself on erroneous reasons and/or applied an inappropriately high, and incorrect, standard.

29. It is common ground that a claim based on section 112 is not necessarily parasitic on an existing claim against another respondent. In other words, a claim may be brought on the basis that A helped B to commit a "basic contravention" even though no claim is actually brought against B. Here, the pleaded claim was that the Fourth Respondent aided contraventions by approving of the dismissal of the Claimant or by failing to process his appeal. The matter could be analysed as the Fourth Respondent having helped a discriminatory dismissal within the meaning of section 39 of the EqA, the relevant "basic contravention". Alternatively, to the extent that the dismissal had already taken place and so could not be "helped" after the event (see **May & Baker v Okergo** [2010] IRLR 394 at [34]), the claim could properly be analysed as an allegation that the Fourth Respondent helped an act of discrimination closely connected to a relationship which had ended - namely that the Claimant, as a former employee, was not given the same opportunity to appeal as would have applied to a Lithuanian employee - so that the "basic contravention" would then be a breach of section 108 **EqA**. I consider the rider to the claim brought against the Fourth Respondent, when properly analysed, provided a sufficient basis for either of these two types of claim, both of which potentially engaged section 112.

30. In support of his pleaded claim against the Fourth Respondent, the Claimant provided some supporting documentary evidence to the tribunal. He said he was informed of the decision to dismiss him on 24 May 2019 by Mr Linus Sargautis, the Chief Commercial Officer of the Second Respondent. In what the Claimant said was a hand-written contemporaneous note he

took of the discussion, he recorded Mr Sarguautis as saying that the matter had been discussed with lawyers and "with Abel", a reference to the Fourth Respondent. The same note also referred to "maybe culture" as one of the reasons for his dismissal. Text messages sent on the same day by the Claimant to Chris Ivory, an employee of the Third Respondent, and which were also before the tribunal, provided some further support for that allegation because they referred to the Claimant's having been told that the he had been dismissed on "Abel's authorisation".

31. Miss Tutin also reminded me that a tribunal decision must be read fairly and as a whole, without being hyper-critical of the reasoning, and that reasons for making a deposit order may be short. But she rightly accepted that a tribunal decision to make a deposit order can properly be challenged if the tribunal has failed to consider relevant considerations or took into account irrelevant considerations: see, for example, **Medallion Holidays v Birch** [1985] IRLR 408.

32. At paragraph 24.3 the EJ initially said that she did not consider the claim against the Fourth Respondent stood no or little reasonable prospect of success; but I accept Miss Tutin's submission that, when the decision is read fairly, the EJ was only addressing in this paragraph whether the Fourth Respondent *knew* about the Claimant's dismissal. Here, the EJ accepted the threshold for making a deposit order was not crossed.

33. In that light, the EJ's only reasons for making a deposit order were set out in paragraph 24.4, said to be the "wider circumstances" of the claim, referring specifically to (i) a dispute surrounding a short period of employment and (ii) a dismissal which is alleged to be for "poor performance/discriminatory". For the Fourth Respondent, it is accepted that the only "wider circumstances" were factors (i) and (ii).

34. It is hard to see how either of these two reasons is relevant to strength of the claim for the purpose of the threshold in rule 39. That the dispute concerned a short period of employment is, I consider, neutral. Discrimination can occur in short-term or long-term employment, and the EqA is intended to proscribe discrimination before, during and even after employment, regardless of its length. The short period of employment might support the Claimant's case - that the Respondents wanted quickly to engineer his dismissal because he was non-Lithuanian - or the Respondents' case that he did not perform well enough in his probationary period. But in itself the short period of employment says nothing about the strength or weakness of the

case.

35. Nor does the second reason, that the "dismissal was alleged to be for poor performance/discriminatory", point towards a claim having little reasonable prospect of success. It does no more than recite the issue before the ET at a full hearing, set out by the EJ earlier in paragraph 5 of her judgment. The fact that the dismissal was alleged by the Respondents to be for poor performance is unsurprising because it is a truism that people do not generally admit to discrimination, and the addition of the word "discriminatory" only serves to highlight that the reason why the Claimant was dismissed was in dispute.

36. I accept that tribunal reasons in a context such as this may be terse and should not be read too closely. But the reasons given, I consider, were not relevant to the proper application of the words "little reasonable prospect of success" in rule 39 and provided no proper basis for doubting the Claimant's allegations. In the alternative, the EJ failed to give adequate reasons for her conclusion because no other sufficient reason was given for making a deposit order. The provisions of rule 39(5) reinforce my conclusion. If the deposit had been paid, it is difficult to see how the two reasons given by the EJ could be relevant to deciding the claim against the Fourth Respondent at a full hearing. The reasons would not, therefore, permit a later tribunal properly to assess whether under rule 39(5) the Claimant should be treated as having acted unreasonably for the purpose of a costs order or payment of the deposit to the Fourth Respondent.

37. Miss Tutin sought to uphold the conclusion of the Tribunal based on the EJ's noting earlier in paragraph 24.4 that the Fourth Respondent was a non-Lithuanian. It was inherently implausible, she argues, that the Fourth Respondent would knowingly help others to dismiss the Claimant because he was not Lithuanian. The difficulties with that argument are, first, that it does not correct the two reasons given by the EJ in paragraph 24.4, which are expressly given as the reasons for making the deposit order. Secondly, I consider that reason alone would not be sufficient to provide a proper basis to meet the threshold for a deposit order - especially given there was some documentary evidence, albeit from the Claimant's note, to suggest that "culture" may have been stated to be a reason for the dismissal. Thirdly, once the two "bad" reasons are stripped out, I do not consider the fact the Fourth Respondent is also a non-Lithuanian is a sufficient basis to conclude that the error was immaterial to the result or that I can conclude that a deposit order would inevitably have been made: see **Jafri v Lincoln**

College [2014] ICR 920 at [21]. The question of "knowingly helps" is very much a question based on the primary facts found by the tribunal and not one for an appellate court, as illustrated by the speech of Lord Bingham in **Hallam**.

38. The appeal on this ground is therefore allowed.

39. **Ground (4): section 111 and Second Respondent**. This ground is that the EJ failed to consider the potential application of section 111 against the Second Respondent. In the absence of any reasons explaining why such a claim stood little prospect of success, it is argued that the Claimant does not know why a deposit order was made against him in relation to this part of his claim.

40. Nowhere in her judgment did the EJ refer to a claim against the Second Respondent based on section 111 **EqA**, even though such a claim was raised in Claimant's pleaded claim in relation to the Second Respondent, was in the agreed list of issues before the PH and was referred to in the Claimant's written submissions for the PH. This appears to amount to an error of law.

41. However, there is a fundamental problem with such a claim, although this was not raised before the EJ or by either party to the appeal. To get such a claim off the ground, the Claimant would need to show that the Second Respondent was in a position to commit a "basic contravention" in relation to the First Respondent: see section 111(7). A "basic contravention" means an act which contravenes Parts 3-7 of the EqA, section 108 (relationships that have ended) or section 112(1). Section 112(1) in turn refers to knowingly helping another to contravene Parts 3-7, section 108 or section 111. Not only must A instruct, cause or induce B to discriminate against C, the third party; the relationship between A and B must entail that A is in a position to discriminate against B *under the Act*.

42. According to the Explanatory Notes to section 111(7), which are a legitimate aid to interpretation, "the section only applies where the person giving the instruction is in a relationship with the recipient of the instruction in which discrimination, harassment or victimsation is prohibited". An obvious example is where A, the person giving the instructions or inducing the contravention fo the Act, is the employer of B. The purpose of the provision is, presumably, only to impose liability on A where A has some sort of authority, influence or power over B, exemplified by circumstances in which B is an employee of A's

(contrast section 112, which contains no such restriction).[1] Reinforcing that interpretation is the fact that B, and not only the third party who is the victim of the contravention (C), may potentially bring proceedings under section 111(5) if he or she is subject to a detriment.

43. But here the relationship between the First and Second Respondents, both of whom are corporate bodies, was not such that the Second Respondent was in a position to discriminate against the First Respondent under Parts 3-7 or section 108. Nor does it appear that the Second Respondent was in a position to breach section 112(1), on helping discrimination, in relation to the First Respondent.

44. In light of section 111(7) and after taking instructions, Mr Horan accepted that the Second Respondent could not be liable under section 111 and it would serve no practical purpose for the matter to be remitted even if there were an error of law in the Tribunal's approach because the inevitable result would be that the claim would fail. In that light, he sensibly decided not to pursue the second ground of appeal, which is therefore dismissed.

45. **Ground (9) - sections 110, 111 and 112 against Second Respondent**. In this final ground of appeal, the Claimant argues that the EJ erred in her approach to the deposit order made in relation to all three claims against the Second Respondent.

46. The claim based on section 111 is resolved in the same way as ground (4) above owing to the condition in section 111(7) not being met, and so this element of the appeal is dismissed. But the Claimant maintains that the EJ erred in her approach to deciding that he had little reasonable prospect of establishing that the Second Respondent (i) was the agent of the Respondent within the meaning of section 110 and (ii) helped the First Respondent discriminate for the purpose of section 112.

47. In his amended skeleton argument, Mr Horan sought to argue that the EJ misdirected and misapplied the law of agency. By reliance on cases such as **Yearwood v Metropolitan Police** [2004] ICR 660 and **UBS AG v Kommunale Wasserwerke Leipzig GmbH** [2017] EWCA

[1] This was an express feature of the predecessor legislation based on "instruction", which required the instructor to have "authority" over the other person: see section 30 of the Race Relations Act 1976 and **Commission for Racial Equality v Imperial Society of Teachers of Dancing** [1983] ICR 473. Although the reference to s.112(1) in s.111(1) is rather obscure, the effect of s.111(7) means that A must be in a position knowingly to help discrimination under the Act against B.

Civ 1567, he submitted that the EJ misdirected herself at paragraph 20 of her judgment. Miss Tutin objects to this point being raised because, she says, it goes beyond the scope of the Notice of Appeal. She points out that in the amended Notice of Appeal the Appellant deleted original ground (6), in which it was stated that the EJ had misdirected herself on agency and in which express reference was made to **Yearwood** and **UBS**. I agree. I do not consider this point can be pursued on appeal in circumstances where no application was made to amend the Notice of Appeal, revised ground (9) did not refer to a misdirection in relation to agency and, given the express deletion of original ground (6), it was clear no such point was being pursued on appeal.

48. What remains of the agency appeal, therefore, is whether the EJ erred in paragraph 22 in ordering a deposit. The EJ acknowledged that there was a written power of attorney granted to Mr Sargautis, described in it as a representative of the Second Respondent, to sign the contractual termination documents with the Claimant, and the EJ took this into account in concluding that it could not be said the agency argument stood no reasonable prospects of success. But she ordered a deposit for two reasons: first, she said the claim was based on "mere assertions" and, second, it ignored the employment relationship with the First Respondent.

49. I consider these reasons do not provide a sufficient basis for ordering a deposit. In his written submissions on agency for the PH, the Claimant relied on three matters as supporting an agency relationship between the First and Second Respondent: the written power of attorney under which Mr Sagautis in fact acted by signing the document terminating the Claimant's employment; that in practice the First Respondent only had one employee so that management and employment functions, such as HR, were delivered by means of persons within the Second Respondent, acting as agents for the First Respondent; and that he was told the dismissal had been approved by Mr Avellan, the chairman of the Second Respondent (as confirmed by the Claimant's handwritten notes of his meeting on 24 May). Some of these facts, such as the existence of the power of attorney, do not appear to be in dispute and others were supported by documents. Even if other factual matters necessary to show an agency relationship were in dispute, the matters put forward provided a foundation more secure than "mere assertions" to support the existence of an agency relationship.

50. In addition, that the Claimant was employed by the First Respondent did not provide a proper

basis for doubting that he would be able to establish the facts he asserted to support an agency relationship between the First and Second Respondent. On the contrary, his employment by the First Respondent was entirely consistent with the Second Respondent acting as its agent when, for example, the Claimant was dismissed by Mr Sagautis pursuant to the power of attorney.

51. Ms Tutin sought to uphold the EJ's reason by arguing that because the Claimant was employed by the First Respondent, he had a valid claim against it for discrimination and so would suffer little prejudice if his claim against the Second Respondent were dismissed. Her argument was that the EJ took into account the fact of employment by the First Respondent not in considering whether the threshold of little reasonable prospect was crossed but, rather, at the second stage in exercising the discretion to order a deposit. The principal difficulty is that this is not what the EJ said in paragraph 22. She treated the existence of an employment relationship with the First Respondent as one of the two reasons why, as she said, there was "little reasonable prospect of the claimant establishing agency".

52. The remaining element of ground (9) relates to section 112 of the **EqA**, and the claim that Second Respondent knowingly helped the First Respondent to commit a "basic contravention" against the Claimant. In support of this aspect of his claim, the Claimant relied on similar factors in his written submissions for the PH as he relied on in relation to agency. The EJ dealt with this matter briefly at paragraph 22, saying she relied on the "same findings" in ordering a deposit in relation to section 112 as she had reached in relation to the agency relationship. By this, she presumably meant the claim was based on "mere assertions" and was undermined by the fact the Claimant was employed by the First Respondent.

53. Once again, I consider that the reasons expressed by the EJ at paragraph 22 do not amount to a sufficient basis for concluding the claim had little reasonable prospect of success. The Claimant had put forward facts, some of which were supported by documents, to show why Mr Sargautis or Mr Avellan, both of whom were employees or agents of the Second Respondent, may have "helped" his dismissal from employment with the First Respondent. The requisite knowledge element of section 112 received some support from the reference in the Claimant's contemporary handwritten note to "maybe culture" as one of the reasons he was told at the time for his dismissal. Just as I have held in relation to the agency relationship, the existence of his employment relationship with the First Respondent did not undermine the

contention that the Second Respondent knowingly helped in discrimination against the Claimant and the matters he proposed to support that claim went beyond mere assertions.

Conclusion

54. The upshot of my judgment is that the appeal succeeds in relation to ground (2) above and, save in respect of the argument based on section 111 **EqA**, ground (9) above. The appeal fails on ground (4) because the Claimant accepts that claims based on section 111 **EqA** will ultimately fail. The deposit orders made in relation to both the Second and Fourth Respondent cannot, therefore, stand and as a consequence the strike out orders based on the Claimant's failure to pay the sums ordered must fall away.

55. I understand from the parties that a full hearing is due to take place in respect of the claim against the First Respondent between 25 and 28 July 2022. It is to be hoped that this judgment does not put that timetable at risk. While the claims against the Second and Fourth Respondents are now resurrected, the factual matters they raise will, no doubt, mostly to be explored anyway in the claim against the First Respondent. Nonetheless, it would be prudent for the parties to seek early case management directions from the tribunal in the light of this judgment, in order to clarify the issues, evidence and timetable for the full hearing.