



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Ourique-Kirkham

Respondent (1): NDL Yorkshire Ltd (formerly Newby Developments Ltd)

Respondent (2): HR Business Plus Ltd

Respondent (3): Sheila Watson

HELD by: CVP

ON: 22 March 2022

BEFORE: Employment Judge Shulman

REPRESENTATION:

Claimant: In person

Respondent (1): Mr S Hepden, Director

Respondents (2 & 3) Mr C Graham, Solicitor

JUDGMENT

All of the claims by the claimant against the second respondent and the third respondent are struck out on the grounds that they have no reasonable prospect of success.

REASONS

1. Introduction

This is an application by the second respondent and the third respondent to strike out and/or make Deposit Orders in respect of claims which are in the grounds of claim against the second respondent and the third respondent. These can be found at paragraphs 11u, 11v, 11w, 11x, 11y, 12, 13, 14 and 15. These claims relate to sex discrimination and pregnancy and maternity. The

claims are not yet completely specified as between direct discrimination, indirect discrimination, harassment and/or victimisation. No application was made before the Tribunal by the first respondent, save for an application to adjourn, to enable the first respondent to obtain legal representation, but that was not part of this application. At the beginning of the day the claimant indicated that she was unwell and therefore did not wish to proceed with the hearing but although she was not feeling 100% she subsequently changed her mind and took a full part in these proceedings.

2. Second Respondent and Third Respondent

The second respondent is a company in the human resources business and the third respondent is a shareholder, director and employee of the second respondent. The second respondent provided human resources and advisory services to the first respondent. No legal relationship existed between the first respondent and the third respondent.

The Claimant's Case at large

3. The second respondent and the third respondent held a redundancy process on behalf of the first respondent in or about April 2021. The claimant had various complaints about the way in which the second respondent and the third respondent went about the process and the third respondent also raised activities outside her employment undertaken by the claimant. The claimant maintained that the third respondent discriminated against her and the claimant lodged a grievance. The claimant alleged sex and pregnancy/maternity discrimination against the third respondent, as well as victimisation.

4. Status of the Second Respondent and the Third Respondent

Section 109(2) Equality Act 2010 provides that anything done by an agent for a principal with the authority of a principal must be treated as also done by the principal. This subsection is the path by which an entity or person can become liable for discrimination if not an employer. If neither employer nor agent, the Equality Act 2010 does not provide in employment terms other means of liability. We know that the second respondent and the third respondent were not the claimant's employers, so there was the possibility that either or both of the second respondent or the third respondent who could be agents of the first respondent. The test whether the relationship is one of principal and agent is not determined by the Equality Act 2010 but is a common law test. Mr Graham referred the Tribunal to Bowstead and Reynolds, the leading work on agency and in particular the following principles:

- 4.1. One person, the agent, may directly affect the legal relations of another, the principal. These are called third parties.
- 4.2. Legal relations with third parties are affected by acts which the agent is said to have the principal's authority to perform on the principal's behalf and which when done are in some respects treated as the principal's own acts.
- 4.3. A justification for the agent's power is a unilateral manifestation by the principal of his or her willingness to have their legal position changed by the activities of the agents.

5. **The First Respondent and its relationship with the Second Respondent and the Third Respondent**

The first respondent conferred authority on the second respondent to arrange and attend redundancy consultation meetings. The second respondent was required to report back and provide such advice as may be necessary to enable the first respondent to make decisions. The authority of the second respondent and the third respondent was no greater than that. The first respondent's authority did not extend the authority greater than that. The second respondent and third respondent were advisors and consultants only. All decisions remained that of the first respondent.

6. **The Second Respondent, the Third Respondent and the Claimant**

The second respondent and the third respondent were unable to affect the legal relationships between the first respondent and the claimant, and the claimant had no relationship with the second respondent or the third respondent.

7. **Agent or Other?**

By application of the common law principles the second respondent and the third respondent cannot be regarded as the first respondent's agents because of the nature of their retainer. They were obviously not employers of the claimant either. As I have said accordingly the claimant had no relationship with the second respondent and the third respondent.

8. **The Claimant's arguments**

The claimant rightly referred to the case of **Anywanu and Another v South Bank Student's Union and Another** [2001] ICR 391, in which the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact sensitive and require full examination to make proper determination. The claimant also mentioned other cases which were relating to fact sensitivity. The claimant was also mindful of the conduct meted out to her by the third respondent.

9. **Conclusion**

The Tribunal had already raised the case of Anywanu with Mr Graham before the claimant had done with the Tribunal. Anywanu makes reference to not striking out except in the most obvious cases, as they are generally fact sensitive and require full examination to make proper determination. Here we have a case where the question of fact sensitivity is not the central issue. We have a case where there is a different point of law. Having regard to that point of law what is the status of the second respondent and the third respondent? Are they employers? – no. Are they agents? – no. Then they should, that is the second respondent and the third respondent, really not be here in these proceedings. This should be easy for the claimant to understand. She is a professional person, a quantity surveyor. She says that it is the clients that give her instructions. It is exactly the same principle as here. It is the first respondent who give the second respondent and the third respondent instructions. We have also considered the question of making a Deposit Order. The legal principle for Deposit Orders in this sense is the same as for strike out orders (and incidentally the same principle itself was given by Anywanu in relation to Deposit Orders). So because of the legal principles that the claimant is neither an employee of the second or the third respondent and because of the principle that the second and third respondents are not agents of the first

respondent we cannot find it appropriate to do other than make a striking out order in respect of the claims against the second and the third respondent and further we do not feel it appropriate for the reasons set out above to make a Deposit Order. Our view is that because of the status of the second respondent and the third respondent there is no reasonable prospect of success of the claimant succeeding against them nor is there little reasonable prospect of success. However at this point the claimant is left with her claims against the first respondent.

Employment Judge Shulman

29 March 2022
Date _____

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