



EMPLOYMENT TRIBUNALS

Claimant

Respondent

H

v

KPMG

Heard at: Birmingham

On: 31 August, 1 & 2 September 2022

Before: Employment Judge Wedderspoon

Representation:

Claimant: In Person

Respondents: Mr. G. Anderson, counsel

JUDGMENT ON PRELIMINARY HEARING

1. The Tribunal determines that :-
 - 1.1 KPMG is dismissed as a respondent from the proceedings;
 - 1.2 There is no reasonable prospect of the claimant establishing that there was an implied contract of any form between the claimant and KPMG
 - 1.3 There is no reasonable prospect of establishing the claimant was a worker or an employee for KPMG pursuant to section 43K or section 230 (3) of the Employment Rights Act 1996 or pursuant to section 83 (2) of the Equality Act 2010.
 - 1.4 There is no reasonable prospect of establishing that KPMG is liable for acts of discrimination or victimisation pursuant to section 109; 110 (1) and 112 (1) of the Equality Act 2010;
 - 1.5 There is no reasonable prospect of establishing that KPMG is liable for acts of detriment under section 47B or pursuant to the European Convention of Human Rights.
 - 1.6 The claimant is referred to as "H" in this judgment.

REASONS

1. By claim forms dated 6 July 2019 and 30 September 2019 the claimant brought complaints of discrimination, against her direct employer Highways England and a number of other respondents. This matter came before Employment Wedderspoon to determine a number of preliminary issues concerning the respondent, KPMG.
2. The case has some history and to date there had been a number of aborted hearings. On 22 November 2019 Employment Judge Camp ordered a further preliminary hearing to determine whether any parts of the claimant's claims against KPMG have no reasonable prospect of success or if a deposit order should be made. The matter came before Employment Judge Harding on 29 January 2020 who identified further issues to be determined at another preliminary hearing and the hearing was postponed. On 9 and 10 November 2020 the matter came before Employment Judge Camp who ordered a further preliminary hearing to take place and made various case management directions.
3. The matter came before Employment Judge Flood 8. 9 and 10 November 2021. It was postponed to determine the following issues:

Issues : The substantive preliminary issue

4.1 Was there an implied contract of any form between the claimant and KPMG?

Consideration of making a strike out/deposit order

4.2 Should all or part of the claim against KPMG be struck out under rule 37 (or an allegation or argument be made subject to one or more deposit order under rule 39 and if so for how much (because the following arguments of the claimant have little or no reasonable prospect of success) :

4.2.1 If there was an implied contract did the claimant fall within the extended definition of worker set out in section 43K of the Employment Rights Act 1996 ("ERA")?

4.2.2 Alternatively if there was an implied contract did she fall within the conventional definition of worker set out in ERA section 230(3)?

4.2.3 if there was an implied contract was the claimant in KPMG's employment within the definition set out in section 83(2) of the Equality Act 2010 ("EQA")?

4.2.4 If there was no implied contract was the claimant nevertheless KPMG's worker/in KPMG's employment under ERA/EQA?

4.2.5 KPMG is liable for its employees acts of discrimination/victimization in respect of the claimant under section 109 EQA (the claimant relies on the decision of the Employment Appeal Tribunal in London Borough of Hackney v Silvanandan & others (2003) UKEAT 0822/03/1811. In particular the comments at paragraph 21)

4.2.6 KPMG is liable for acts of discrimination/victimization in respect of the claimant under section 110(1) of the EQA

4.2.7 KPMG is liable for acts of detriment in respect of the claimant under section 47B (1A) (a) ERA;

4.2.8 KPMG is liable for acts of detriment in respect of the claimant under section 47B(1A) (b) ERA;

4.2.9 KPMG is liable for under section 112 (1) EQA;

4.2.11 KPMG is liable for acts of discrimination/victimization and/or whistleblowing detriment in respect of the claimant under the provisions of the European Convention on Human Rights (in particular Articles 10 and/or 14).

Hearing

4. The preliminary hearing was listed for three days. The Tribunal was provided with 4,204 pages. The claimant provided a witness statement along with a skeleton argument. The respondent relied upon two witness statements from Mr. Paul Meredith and Mrs. Elizabeth Herridge along with a skeleton argument. The parties also provided the Tribunal with a joint bundle of authorities consisting of 901 pages. This was added to on day 3 of the hearing with the addition of the case of **McMeechan** by the respondent's counsel to assist the claimant who heavily relied upon this authority.
5. Prior to the hearing the claimant had requested a witness order in respect of Chris Bealey. The Tribunal rejected the application on the basis that it would not have to determine the factual dispute of substantive issues. The claimant did raise this before the Tribunal at the commencement of the hearing and stated she had been subject to sexist behaviour by KPMG and that this individual had made out that the claimant was mentally unstable. The claimant further contended that senior members of KPMG were involved in the decision to suspend and to dismiss her. The Judge informed the claimant that she could not cross examine the witness unless she applied to treat him as a hostile witness in any event. The claimant stated that had been her intention. The Tribunal did not accept that the witness was relevant to the issues to be determined at the preliminary hearing and it would have to be exceptional circumstances for such a witness to be treated as hostile for the claimant to cross examine him. In the circumstances the Tribunal declined to review its decision to refuse the claimant's application that the witness should be ordered to attend.
6. On day 1 the claimant requested a restricted reporting order. Her concerns were that her disability may be revealed or discussed at the preliminary hearing. She stated that her disability did not interfere with her ability to work but she was not working at present and believed that if it was publicly known that she had a disability it could detrimentally affect her prospects of securing alternative work in the future. The claimant was anxious that her disability should not be revealed. The respondent took a neutral stance as to the claimant's application but reminded the Tribunal for the need for open justice.
7. In making an order 50 order the Tribunal must give full weight to the principle of open justice and to the convention right of freedom of expression; this means the right to be both heard and the right to listen. These rights must be balanced as against any other rights which are engaged and the Tribunal has the ability to prevent or to restrict the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act. The Tribunal determined that the claimant's article 8 rights for a private life were engaged by reason of her disability; an individual's health is a private matter. Understandably the claimant did not want it publicly known that she had a disability and held a genuine fear that if the public was aware of her disability there was a risk that it could inhibit

her securing new employment. In the circumstances the tribunal concluded that there was a cogent reason that the claimant's disability should not be publicly known and there was a risk that the claimant's disability may be referred to in the course of evidence given at the preliminary hearing. The Tribunal takes judicial notice of the barriers faced by disabled employees in the open labour market. In the circumstances it was determined to grant the claimant a restricted reporting order throughout the preliminary hearing and in terms of the judgment issued in the case.

8. On a number of occasions, during the preliminary hearing, the claimant stated that she was a litigant in person and was unfamiliar with the tribunal process. However, the claimant also told the Tribunal that she had appeared in person before Mrs. Justice Slade and Mr. Justice Wall and in the Court of Appeal. The claimant was a highly intelligent and articulate person who had researched the area of law thoroughly. The Tribunal found the claimant to be far more knowledgeable about the tribunal process and law than she sought to admit.
9. The claimant raised that disclosure from the respondent was still inadequate. The claimant expressed concerns that disclosure was incomplete concerning her dismissal. The lack of disclosure had been an ongoing issue raised by the claimant at the preliminary hearing in November 2020 and an order was made that the respondent was to disclose 'all documents relevant to the preliminary hearing'. The claimant also raised a lack of disclosure by the respondent before Employment Judge Flood at the preliminary hearing listed on 8 to 11 November 2021. A specific disclosure order was made on the agency issue then. Employment Judge Flood made it clear on that occasion that the only substantive issue to be determined at the preliminary hearing between the parties was whether there was an implied contract. Other matters concerning strike out and deposit orders required the tribunal to make a summary assessment (as opposed to conduct a mini trial). The bundle of documents for the preliminary hearing consisted of approximately 4,500 pages. The respondent objected to the suggestion disclosure was inadequate stating that it had provided more documents than it was duty bound to do so simply to satisfy the claimant's requests and the disclosure was more than adequate. The Tribunal commented that disclosure had to be proportionate and if the claimant wished to contend at the end of the hearing that the Tribunal could not determine any of the issues in the absence of any further documentation, the tribunal would take this into account. The tribunal determined it would be in the interests of justice to proceed with the case.
10. The Tribunal requested that the parties indicate all the documents they wanted the Tribunal to read before hearing evidence. The procedure to be followed would be that the Tribunal would continue reading into the case and then hear the claimant's evidence followed by the respondent's witnesses. Mr. Anderson on behalf of KPMG informed the Tribunal that Mrs. Herridge was unable to attend the tribunal until day 2. The claimant stated that she had never been given an opportunity to explain what her case was. She did not believe it was necessary to hear any evidence and that the parties could simply make submissions and the tribunal could make a

decision. The respondent stated that the usual procedure would be that evidence is heard followed by submissions; if the claimant did not wish to give evidence that was a matter for the claimant. The tribunal explained that a process needed to be followed and the first stage was to hear evidence, followed by submissions and then the tribunal would make an adjudication. The claimant stated that she had never been given an opportunity to put her case; she wanted to state her case and in fact there was no need for any evidence to be heard and the parties could simply make submissions on the legal points. The Tribunal repeated that a process needed to be followed and the process would be that evidence would be heard and then submissions could be made. The claimant continued to protest that evidence was not required and wanted to appeal. The Tribunal noted that the claimant was unhappy because it did not follow what the claimant wanted it to do. The Tribunal informed the claimant that she was welcome to appeal but the procedure to be followed today would be that the Tribunal would hear evidence followed by submissions. The Tribunal adjourned to read the papers.

11. Prior to resumption of the hearing and the claimant's evidence, the Tribunal was advised that the claimant had a panic attack/fainted. Two of the clerking team who were trained in first aid were requested to attend to the claimant. At 2.30 pm the Tribunal requested an update. The claimant was happy to proceed but submitted she was upset not to have obtained a witness order for Chris Bealey's attendance and she had not received full disclosure so to have a fair hearing. The claimant started to put her case to the Tribunal and was stopped and invited to give evidence. It was explained to the claimant that she would have an opportunity for re-examination following cross examination and give further detail as to any matters requiring clarification arising from the cross examination.

12. The claimant gave evidence and was cross examined by Mr. Anderson. Following this the Tribunal gave the claimant an opportunity to re-examine. It was explained to the claimant that it was a slightly unusual situation because the claimant was representing herself as opposed to a representative re-examining her but she could clarify evidence she had given in response to the questions put by the respondent. Following cross examination, the claimant stated that she required 2.5 hours to go through the paperwork to prepare her re-examination and she was not in a position to deal with re-examination at this stage. The respondent suggested he could interpose his witnesses which could give the claimant further time to consider her re-examination. The claimant agreed and the Tribunal considered this was an efficient use of the time.

13. The claimant cross examined the respondent's witnesses. In the course of the hearing, the claimant frequently requested where documents were in the bundle and was assisted by counsel for the respondent and the Employment Judge.

14. Following the conclusion of the respondent's evidence on day 2 the claimant was given the opportunity to re-examine. The claimant was reminded that the Tribunal was determining the issues contained in the list of issues and that the purpose of re-examination was simply to clarify matters which had arisen in cross examination. The claimant was reminded of this fact on a number of occasions but ignored the Judge's instructions and strayed far beyond the permitted remit of re-examination. In fact the claimant was intent on stating the details of her substantive case. The Tribunal gave the claimant some latitude in this regard but substantially the evidence she gave had not arisen from cross examination and was therefore inadmissible and the Tribunal did not rely upon it.
15. The claimant raised the point that the respondent's disclosure was incomplete. Mr. Anderson on behalf of the respondent disagreed stating that Judge Harding had determined the disclosure required which had been complied with. The claimant said she felt unwell and needed to stop. She then further articulated her arguments robustly suggesting 3.5 years she had not been able to set out her case. The Tribunal enquired if the claimant felt better or whether she needed a break. The claimant said she would continue. On day three the claimant said she wanted to clarify that she had a physical issue which was why she felt that she was unwell yesterday because she thought the Judge did not believe her. The Judge explained that the claimant had said she was unwell but then had continued to articulate her points; the Judge has asked a reasonable question in the circumstances.
16. On day 3 the claimant had emailed a number of documents she wished to rely upon in her re-examination.
17. Both parties had provided very detailed written submissions and provided an agreed authorities bundle. Mr. Anderson for KPMG assisted the claimant and the Tribunal by providing the case of McMeechan the claimant additionally sought to rely upon. The respondent made submissions in approximately 1 hour. The claimant was asked how long she would need and she stated she really needed 3 hours but she could submit in 2.5 hours. She wanted a shorter lunch break so she would have longer to make submissions. The Judge reduced the lunch break from 1 hour to 40 minutes so that the claimant could have the time that she said she needed (2.5 hours) and the hearing finished at 4.50p.m.
18. For completeness the Judge had enquired about the claimant's means. The claimant became upset and said she could not talk about that. Mr. Anderson for the respondent directed the Tribunal to the order of Judge Flood at paragraph 33.6 which described the difficulty the claimant had in discussing her financial means. The Tribunal apologised to the claimant and did not further pursue this matter with her.

Further Rule 50 application

19. After the hearing and prior to sending the parties the reserved judgment the claimant requested a rule 50 order on the basis that she did not want details

of her disability or her son referred to in a judgment appearing on a public website. She relied upon more detailed grounds but essentially these encompassed her genuine fear that people could stigmatise her about her health which was a private and confidential matter unrelated to the proceedings but could damage her in respect of future job applications and concerns for any affect on her son. For the reasons referred to above and in the circumstances that there was no opposition to this application the Tribunal determined that the claimant's name would be anonymised in this Judgment to be referred to as "H".

LAW

Implied contract of employment

13. The law restricts the circumstances where an implied contract can exist. The position is summarised in the case of **Baird Textiles Holdings Limited v Marks & Spencer plc (2001) EWCA Civ 274** where it was held that the law will only imply a contract by reason of the conduct of the parties if (a) it is necessary to do so and (b) there was an intention to create legal relations and (c) the essentials of the contract are sufficiently certain.

Worker

14. In the case of *Sharpe v Bishop of Worcester* (2015) ICR 1241 it was stated

Section 43K (1)(a) of the Employment Rights Act 1996 states that 'Section 43K(1)(a) like section 43K(1)(b) on its true interpretation requires a person to have a contract with the person of whom he is said to be a worker so the claimant can not be a worker for the purposes of a claim against the respondent.

Agency

15. In the case of **Kemeh v Ministry of Defence (2014) IRLR 377** Lord Justice Elias paragraph 40 he stated *'whatever the precise scope of the legal concept of agency and whatever difficulties there may be of applying it in marginal cases, I am satisfied that no question of agency arises in this case. In my view it can not be appropriate to described as an agent someone who is employed by a contractor simply on the grounds that he or she performs work for the benefit of a third party employer. She is no more acting on behalf of the employer than his own employees are and they would not typically be treated as agents.'*
16. It would be a very unusual set of circumstances for a person to be an employee of A and an agent of B in the same transaction. It was stated in the same case that *'in my judgment there would need to be very cogent evidence to show that the duties which an employee was obliged to do as the employee of A were also being performed as an agent of B. It is in general difficult to see why B would either want or need to enter into the agency relationship. This is so whichever concept of agency is employed.'*
17. Lord Justice Underhill in the case of **Blackwood v Birmingham & Solihull Mental Health NHS Foundation Trust (2016) EWCA Civ 607** held that *"it was settled law that references to agency concepts on this legislation are to be*

given their ordinary common law meaning. In my view the scheme under sections 109 and 110 of the 2010 Act depends on the concept of agency being applied in accordance with the ordinary understanding and a departure from that approach would be inconsistent with a fundamental feature of the legislation”

Equality Act provisions

18. From 2013 the prohibition on third party harassment was repealed pursuant to section 65 of the ERA 2013.
19. Pursuant to section 109 (1) of the EQA Anything done by a person (A) in the course of A’s employment must be treated as also done by the employer.
20. Further section 109 (2) states “Anything done by an agent for a principal with the authority of the principal must be treated as also done by the principal. (3) It does not matter whether that thing is done with the employer’s or principal’s knowledge or approval.
21. Pursuant to section 110 (1) of the EQA A person (A) contravenes this section if –(a)A is an employee or agent (b)A does something which by virtue of section 109(1) or (2) is treated as having been done by A’s employer or principal (as the case may be) and (c)the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).
22. Section 111 of the EQA states
 - (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.
 - (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.
 - (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.
23. Section 112 (1) of the EQA concerns aiding discrimination. It states “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)”

Facts

24. From 5 March 2018 the claimant was employed by Highways England (now National Highways) as a Solutions Architect. The claimant was a highly skilled employee and from about 23 November 2018 she formally stepped into the role of the Head of Digital Services-Oracle Platforms when her manager was absent

from work (see page 1830); the claimant was doing this role informally prior to this date.

25. Highways England engaged KPMG as a contractor to provide management consultancy services to review its systems including Oracle Fusion. The claimant worked on Oracle Fusion.
26. KPMG entered into a 'CCS MCF2-Lot 4' contract with Highways England to provide management consultancy (page 1513). The role of KPMG was set out at page 1430 of the bundle namely to *'improve a number of processes across the business' including a review of the oracle fusion system* (see page 1445). Further it states that the project was to *'improve the efficiency and effectiveness of corporate processes, improve controls and reporting and ensure policies are fit for purpose'* (page 1444).
27. Mr. Meredith of KPMG prepared a presentation for Highways England. This set out proposals, timescales and the team for the project (p.1443-1449). The project charter set out a list of stakeholders across Highways England who were to be involved in the project. Highways England had provided to KPMG information about the individuals in the relevant roles. Further it set out a governance structure as to how Highways England and KPMG would work together and also the structure of the core team working on the project (from KPMG and Highways England). Mr. Meredith had oversight of the project and KPMG's work, Richard Hancher and Lorraine Mackin at a higher level were leading on the project for KPMG. KPMG worked with staff employed by Highways England in order to understand what worked best for Highways England and how efficiencies could be made. However there was a clear understanding that KPMG and Highways England were two separate entities with separate staff working together on a particular project.
28. The terms of the contract do not reveal any intention on the part of KPMG or Highways England, to create a legal relations in respect of Highways England's direct employees other than KPMG to provide services to Highways England through the supplier personnel.
29. Pursuant to clause 28.1 it is stated that *"the supplier shall (a) provide a list of names of all supplier personnel requiring admission to customer premises specifying the capacity in which they require admission and giving such other particulars as the customer may reasonably require"* (see page 1471). At Clause 50.1 (page 1510) it is stipulated that *"nothing in the KPMG-Highways Agreement was to create a relationship of employer and employee or principal and agent between the parties or authorise either party to make representations or enter into any commitments for or on behalf of any other party."*
30. In November 2018 KPMG requested Highways England to suggest one or two individuals from Highways England to meet and discuss with KPMG their experiences of Oracle Fusion (see email dated 7 November 2018 page 1827).
31. By letter dated 22 January 2019 (page 1515) Matthew Diggle, Procurement Manager for Corporate Services Procurement of Highways England wrote to KPMG accepting their offer dated 12 December 2018 for the process simplification CCS MCF2 Lot 4. The operative period of the contract was for 11 months from 22 January 2019 until 21 November 2019.

32. The process simplification project charter dated 1 February 2019, phase 1 was to be led to Liz Herridge with the supporting partner, KPMG. The overview described this project as *'Highways England is looking to improve its processes across its corporate functions. This project will focus on simplifying processes within P2P and Employee Lifecycle process groups, to drive efficiency and consistency.'*
33. The time line for phase 1 is set out at page 1446 running from week 1, 28 January 2019 until week 9 25 March 2019. The last day the claimant was in work was 2 April 2019. KPMG were in fact involved from 22 January 2019 until 18 December 2019. The claimant's involvement with KPMG ran until 31 July 2019 when her manager actually retired (he had been off sick prior to this date).
34. The team structure of the project shows (see page 1449) the core KPMG and Highways England teams; the teams were clearly identified and kept separate on the plan with Paul Merdith of KPMG described as Engagement Manager sitting below Richard Hancher of KPMG, Engagement Director and Lorraine Mackin of KPMG, Engagement Partner. Chris Beeley of KPMG is described as Lean SME of Bourton. The requisition to pay work stream included Kenneth Se, Workstream Lead; Vinod Venkat, Process Lead and Tim Bell, Process Consultant. The employee lifecycle work stream consistent of Farhana Qadir, Workstream Lead and David Keen, Process Consultant. On Highways England side Vanessa Howlinson is the project SRO (senior responsible owner) with Liz Herridge, Project Owner sitting below her. Below Ms. Herridge is Rosemary Braithwaite, Delivery Champion and Gloria Frith, Programme Manager. The HE Core project group included Sharon Banks, Ben Milward, Patrick Hagg, Charlotte Foster, Jennifer Mills, Jim Lee, Rob Andrews and Sonia Kauser. The claimant had contact with both Liz Herridge and Sonia Kauser on the HE team.
35. By email dated 30 January 2019 (page 1108) Vinod Venat of KPMG emailed Sonia Kauser and Amrit Malhi following a discussion that day about the key main points and the extent of the issues faced within the requisition to pay process. Mr. Venat suggested a placeholder meeting should be set up and he requested Highways England to identify the other stakeholders it would like to involve. The brief context states *'Highways England is looking to improve the efficiency and reduce the cost to serve across a number of its operational processes. A process simplification project has been kicked off with an objective to improve the efficiency and reduce the cost of corporate processes selected for improvements and also look to put in adequate controls to operate them. Highways England has engaged KPMG and Bourton Group as partners to support this initiative. The requisition to pay process has been selected as one that is causing a lot of pain or has the ability to yield most benefit to a wide group of stakeholders across Highways England. This meeting is to understand the various pain points you have experienced and root causes of these pain points to inform the future design of the processes.'* The claimant accepted under cross examination that this context was a fair representation of the reality of the situation.
36. Sonia Kauser of Highways England responded to this email on the same date (page 1107). She suggested that Darren Sale, System Accountant and Natalie Philpott/Neil Kennedy, Procurement should be included in the meeting. Both the claimant and Darren Sale were in the IT directorate of Highways England and Darren was line managed by Rosemary Braithwaite. Highways England not

KPMG from this evidence were choosing who should be invited to the meeting with KPMG.

37. On 31 January 2019 (page 1106) Amrit Malhi highly recommended the claimant to join the meeting as Oracle Solution Architect/PFP system team lead. He then says *'H and Darren can decide if they both want to attend'*. The Tribunal rejected the claimant's evidence that she was pressured to attend and found that this email demonstrated that even the employer Highways England were not forcing either the claimant or her colleague Darren to attend the meeting. Furthermore, KPMG were not either. Mr. Malhi also requested KPMG to re-arrange a workshop for week commencing the 11th.
38. In response to this email on 31 January 2019 (page 1105-6) Kenneth Se, senior manager Finance transformation of KPMG suggested a further meeting with Highways England and asked whether this could be on 6 February for 3 hours with attendees Sonia, Amrit, Chris Beeley, Kenneth Se, Vinod Venkat, Tim Bell from KPMG and one of 'our KPMG Oracle Fusion SMEs'. KPMG were asking permission from Highways England if this meeting was convenient and whether Highways England agreed to the suggested attendees. The claimant in evidence was that when she could not attend a meeting she *"got grief off KPMG via emails"* and felt if she did not attend she would lose her job. However, the claimant did not show any emails in the bundle of over 4000 pages of documentation any evidence of this whatsoever. Sonia Kauser of Highways England was *"happy to run with this"* and accepted the suggestion of KPMG for the meeting and the attendees. The Tribunal rejected the claimant's evidence that KPMG were in the driving seat as to who was invited; this was not shown by this email exchange.
39. On 4 February 2019 Vinod Venkat of KPMG emailed Gloria Frith of Highways England following a discussion with Sonia Kauser of Highways England. Sonia had suggested some stakeholders meetings. At Sonia's suggestion there was to be a meeting with Tom Joyce who was the procurement system designer and worked under the claimant. Sonia also suggested the date of the meeting of either 13 or 14 February. Vinod ends the email to Gloria Frith as *"Let me know what you think and whether you will be able to kindly assist us in setting these up with introductions."* In response to questions in cross examination about Sonia selecting who should be invited, the claimant claimed she was demoted by KPMG and the nature of her employment contract was changed by KPMG since she was the solution architect and this was not Tom's role. The Tribunal rejected this interpretation; the email indicated that Sonia of Highways England was dictating who should be invited to the meeting and the date of it and not KPMG. Nor did this email evidence that KPMG did or could demote the claimant. In fact it showed that KPMG were going through Highways England to set up meetings and relying upon Highways England to suggest suitable attendees.
40. In his further email dated 4 February 2019 (page 1131) Mr. Vinod states *"I had a call with Sonia today about the wider stakeholder session for w/c 11 Feb. Her view was that bringing too many people with varied backgrounds into the same meeting would not be effective and we might not get any outputs."* He ended the email stating *"She also mentioned that H may or may not attend the 6-Feb session."* The Tribunal found this was further evidence that Highways England were determining who should attend the meeting with KPMG and further that the claimant could make a decision whether she attended the meeting or not.

41. The project objectives are set out at page 1445 namely *“we will identify opportunities to improve the efficiency and effectiveness of corporate processes, improve controls and reporting and ensure policies are fit for purpose; processes will be simplified with a view to standardising across directorates and regions, reducing deviation where possible on the back of the leading market practices and thinking, retain compliance with wider government and public sector requirements, whilst leveraging the oracle fusion solution; existing highways England frameworks and models will be considered and included into the future design as required.”*
42. On 4 February 2019 Vinod Venkat emailed Mr. Malhi of Highways England concerning the working session and he stated *“Let us know if there are any other key artefacts that you think would be useful to talk through and we can arrange to get them printed out.”* Mr. Malhi responded on the same date stating *“Vinod can you kindly invite H to the kick off meeting part tomorrow.”* The Tribunal found this was evidence that Highways England determined that the claimant should be invited to a meeting not KPMG. Under cross examination when this email was put to the claimant and she was asked whether she accepted that Highways England were in the driving seat, the claimant accepted that it did but stated there were other emails the other way but failed to identify any emails in the bundle of documents to support her contention.
43. Gloria Firth of Highways England emailed Mr. Venkat of KPMG on 6 February 2019 (page 1141-2) requesting Mr. Venkat to arrange two meeting appointments. The Tribunal found that this was evidence that Highways England were dictating to KPMG who was to be included in the meetings and the timings. Gloria had wanted Jeni to be included (see page 1143). Mr. Venkat responded on the same date stating that he just had a meeting with Sonia, Amrit and the claimant and the decision made was that the meeting should be deferred.
44. On 26 February 2019 (page 1188-9) Hannah Lewis invited a number of people (including the claimant) from Highways England to the KPMG offices for a purchase to pay playback session. The invitation stated, *“You have been invited to this session due to your input into the previous workshops and your invaluable contributions to the solutions proposed.”* There was no evidence that the attendance of the invitees including the claimant was mandatory and the claimant could choose whether to attend. Under cross examination the claimant stated that although she headed up the system, KPMG were inviting others without discussing it with her. The claimant felt undermined and that KPMG did not recognise her as the head. The Tribunal found that rather this reflected the position that Highways England and KPMG were working together but were separate entities with KPMG having a specific advisory role to perform pursuant to its contract with Highways England.
45. On 11 March 2019 Sonia Kauser of Highways England sought to forward two invites including the claimant to SKYPE webinar. She was unable to forward the details to the claimant and requested Tim Bell or Hannah Lewis to do so. When the claimant was asked about this invitation under cross-examination she stated that KPMG were speaking to people she managed without going through her. The Tribunal did not accept that this particular email evidenced that.
46. On 13 March 2019 Sonia Kauser emailed the claimant to state she was going to ask Rose Braithwaite of Highways England if she could take the claimant to the

opportunities meeting on 13 March at the KPMG offices. Sonia asked the claimant if she was free on that date stating it was the key meeting of the changes which they will be suggesting we implement their findings. It was put to the claimant in cross examination that she was being invited; and that she was given the option to attend the meeting; the claimant stated that KPMG removed her because she was a whistleblower. The Tribunal concluded, having also taken into account the claimant's email of 11 March 2019 (page 1914) which states "*when I spoke to Liz on Friday she was fine with me going to meetings if I wanted to ..*" that the claimant was invited to the meeting and she could choose whether to attend or not. She was not required to attend by either Highways England or KPMG.

47. By email dated 18 March 2019 (page 1194) Kenneth Se of KPMG emailed Highways England setting up a meeting on 21 March 2019. In the email he mentions that the claimant has been invited and states "*please just let me know if you'd like to attend them or not*". In response to a question about this email, the claimant stated that KPMG did not directly come to her but went through others.

48. On 22 March 2019 (page 1285) Hannah Lewis of KPMG emailed the claimant

"I am conscious that you had the most opportunities on the board and wondered if there were a sub-set you wanted to focus on due to the timescales – leaving the others to the alternative contacts? The following opportunities had you as a key contact 10. Invoice scanning functionality." Hannah Lewis of KPMG wanted to meet with the claimant again. The claimant was not sidelined out of this project. This email was followed up by Hannah Lewis on 25 March 2019 (page 1307) stating "*do you have time for a call or meeting today or tomorrow to go over the possible timelines and approval routes etc for the below opportunities? Are you able to attend this meeting tomorrow? As this is at the KPMG office we could perhaps fit in a meeting either before or afterwards if that suits you.*" There was no evidence here as the claimant suggest that she was placed under pressure to attend at the call of KPMG.

49. On 26 March 2019 (p.1319) the claimant emailed Ken Se at KPMG stating "*unfortunately we do not have any spare resource at the moment to work on these. In order to allocate resource this must go through the IT customer journey in HE (and in fact should really have done so before time was used by Tom and also Darren's time). Yesterday I advised Rose about this problem..*" The claimant's evidence is that to find a separate resource to allocate to KPMG on the issue she was pressured to work with KPMG. However, the Tribunal found that this email does not indicate this. In fact, KPMG accepted the claimant's response and escalated this to Highways England

50. On 27 March 2019 p.1333 Gloria Frith of Highways England emailed Kenneth Se about a 1 to 1 with Robert Greaves. She stated "*This role is to be an advocate for the project and be out point of contact for IT. I feel now is the time we really need him to get involved and help us navigate through some of this.*" Ms. Frith was pushing the advocate role. Kenneth Se contacted the claimant on the same day "*would it be okay to schedule an hour session with Tom at some point over the coming days to discuss this with you or a suitable member of your team.*" Mr. Se was not going directly to Tom and cutting out the claimant but actually asking the claimant if they could contact Tom. In response the claimant suggested Mr. Se liaise with Stuart Hibbert who felt should be able to

help you as he works regularly with the underlying structure for reporting. The claimant complained that she was disappointed that Mr. Se had emailed Tom because they had a private conversation. The claimant contended that KPMG had caused her considerable personal difficulty with the approach so far. The email from Mr. Se to Gloria Firth that Sonia Kauser from Highways England recommended KPMG contact Tom Joyce about the Oracle tables fields given his knowledge. He also stated that as the claimant had been challenging with regards to access of the IT resource it was discussed that the claimant be copied in so the claimant was aware of the ask. Gloria confirmed in her email on 1 April 2019 that there was an agreed approach to contacting Tom. On 3 April 2019 Mr. Se emailed Hannah Lewis about accessing Tom Joyce and on the suggestion of Gloria of Highways England conscious they did not want to trigger another email from the claimant. A request was made to Liz Herridge of Highways England requesting to meet Tom. The Tribunal did not find this exchange indicated that KPMG were pushing out the claimant.

51. On 8 April 2019 Kenneth Se was asking Liz Herridge whether she had asked the claimant if they could access Tom; Kenneth Se was under the impression that the claimant was still in work. Miss. Herridge of Highways England informed Mr. Se that the claimant was currently off long term at present. KPMG were unaware until informed by Highways England that the about this. Mr. Se's lack of knowledge as to the claimant's whereabouts did not support the claimant's contention that KPMG had been active in encouraging her removal from her from her employment with Highways England.
52. In the time that KPMG were contractually involved with Highways England and whilst the claimant was at work she had two meetings with KPMG. Under cross examination the claimant was unable to state any specific work she carried out for KPMG.
53. From February 2019 KPMG provided workshops to Highways England staff on its proposals and sought information and input from them. The claimant was included. The claimant accepts there was no written contract between herself and KPMG. Although Mr. Meredith stated under cross examination that at a meeting with KPMG the claimant "*was working for KPMG*" which the claimant relies upon as evidence of being a worker for KPMG, the Tribunal notes that Mr. Meredith is not a legal expert. The claimant was in the course of her employment with Highways England providing her specialist knowledge to KPMG so it could advise her employer, Highways England. Although the claimant's case is that KPMG instructed her, the Tribunal do not accept this. KPMG invited the claimant to meetings via the claimant's employer because KPMG required the expertise knowledge of the claimant to fulfil its consultancy role for Highways England. The contact with KPMG with the claimant was limited.
54. Although the claimant contended she was instructed or controlled by KPMG, the Tribunal found that there was no evidence of this. In fact, her case was that she was excluded by KPMG from the project in preference to others. This the Tribunal found to be inconsistent with her evidence that there was a master/servant relationship between herself and KPMG.
55. The claimant emailed Liz Herridge on 29 March 2019 (see page 80) stating '*It really is not helpful for an external team to speak to me and deal with me like*

this. The Tribunal determined at this time, the claimant did not believe she was part of the KPMG team. The claimant decided to speak to KPMG and provide them with her availability. This is clear from pages 1285, 1288 and 1339 and declined to assist KPMG (page 1319) which was accepted by KPMG without any complaint from them (see page 1322). Despite the claimant's evidence that she was being instructed by KPMG, the claimant was not required to attend a workshop session (see page 1310). In contradiction to the claimant's assertions, she then gave evidence under cross examination that she was discouraged by senior management not to co-operate with KPMG and she was free so to do. The claimant decided what things she needed to focus on see (page 1285). If the claimant was unable to assist KPMG, KPMG was able to go to other members of the Highways England (see page 1333).

56. Throughout the project, the claimant accepted in evidence that she remained an employee of Highways England and was paid by them. She did not receive any wages from KPMG. When asked the claimant was unable to state the terms and conditions of any contract between herself and KPMG.

Submissions

57. The respondent submitted there was no implied contract between the claimant and KPMG. There was no necessity to imply a contract between the claimant and KPMG; the parties could have acted exactly the same way in the absence of a contract between them (see *The Aramis* (1989) 1 Lloyds Rep 213. The claimant's involvement with KPMG is explained by the fact the claimant was an employee of Highways England. KPMG was providing services to Highways England with some necessary collaboration with Highways England's employees. Judging objectively there was no intention to create legal relations. The contractual arrangement was for KPMG to provide the services to Highways England through the supplier personnel. The agreement at clause 50 clearly stated that it was to create a relationship of employer and employee or principal and agent between the parties or authorise either party to make representations or enter into any commitments for or on behalf of any other party. There was no understanding that such implied contract existed because the claimant only ever worked with KPMG for Highways England. There is no evidence as to the terms of any arrangement between the claimant and KPMG which reveals an absence of intention to create legal relations. No consideration was passing between the claimant and KPMG; KPMG was not paying the claimant.

58. The respondent submitted that the claimant does not satisfy the definition of worker pursuant to section 43K(1)(a) of the ERA because there was no contract between herself and KPMG see **McTigue v University Hospital Bristol NHS Foundation Trust (2016) ICR 1155; Sharpe v Bishop of Worcester (2015) ICR 1241 and Hoppe v Cabinet Office and Civil Service commission 2413478/18**. In addition the respondent submitted that the claimant was not an employee pursuant to section 83(2)(a) of the EqA (which is aligned with the definition in section 230(3) of the ERA). Again it was submitted in the absence of a contract with KPMG the claimant can not satisfy the definition for employee under the Equality Act 2010.

59. The respondent relied upon the case of **Kemeh v Ministry of Defence (2014) IRLR 377** where it was held by Lord Justice Elias that *"it can not be appropriate to describe as an agent someone who is employed by a contractor simply on grounds that he or she performs work for the benefit of a third party employer. She is no more acting on behalf of the employer than his own employees are and they would not typically be treated as agents*. Although the case law is unclear as to whether it is

possible for a person to be an employee of A and an agent of B in the same transaction the court of appeal stated that would be an unusual set of circumstances. KPMG can not be liable for actions undertaken by KPMG in the course of KPMG's agency for Highways England. Section 47B(1B) creates specific legal fiction conceptually distinct from say vicarious liability. In respect of the argument that KPMG itself is an agent of Highways England, it was submitted that it has to be established that KPMG must have been doing that specific discriminatory act as an agent with the authority of Highways England and within the scope of agency. Relying upon *Bowstead and Reynolds on Agency* an agent must have the power to affect the legal relations of the principal vis a vis third parties and that the agent/principal relationship is "constituted by the conferring of authority by the principal on the agent which may express or implied form the conduct or situation of the parties and may or may not involve a contract between them. "It was submitted that there is nothing in the very ordinary commercial arrangement between Highways England and KPMG that comes close to one whereby KPMG was authorised to act for Highways England vis-à-vis third parties in such a way to change Highways England's relationship with them. The simple fact of doing work for a person does not indicate an agency relationship. The respondent also submitted there was an inconsistency in the claimant's case there was an agency relationship; (a) she asserts she was KPMG's worker or employee and (b) KPMG engineered a position or instructed Highways England to remove her from the project and her employment. The respondent argued that if KPMG were the agent there would be no need for it to get Highways England to do its dirty work and it could do itself within the framework of Highways England's authority.

60. The respondent submitted that the reliance of the claimant upon section 109 of the Equality Act 2010 does not provide a route for the claimant to bring claims against KPMG. In respect of direct claims KPMG has to do something which amounts to less favourable treatment of the claimant because she is a woman or victimised her and KPMG is liable for that discrimination/victimisation. Reading with section 110(1)(c) any liability on KPMG could only arise in a context where the doing of a thing by KPMG amounts to a contravention of the Act by KPMG. A contravention occurs where the employer discriminates against, victimises or harasses an employee or a job applicant. KPMG is not the claimant's employer so it can not have breached section 39. In the circumstances KPMG has not breached the Act and there is no form of vicarious liability. In respect of the claimant's reliance on **Hackney v Sivanandan & ors (2003) UKEAT/0622/03/1811**, this case was decided on the basis of the Race Relations Act 1976 which did not contain any equivalent of section 100(1)(c).

61. The claimant submitted that she relied upon **Rhodes v Fielder (1919)** and that her relationship with KPMG was one of agency and submitted that KPMG were in charge. She further submitted that both companies together jointly aided each other. In respect of the case **Kemeh** the claimant submitted that the employee in the case was at a similar level to her. Mr. Beeley had emailed Mr. Meredith about his concerns about her behaviour. Highways England have a dodgy system which KPMG did not act respectfully and tried to cover up the system. In respect of a fiduciary system they had to be trust as they were covering up wrongdoing. KPMG has admitted in evidence I went to their office and I did work for them. The claimant submitted she accepted she did not do much work for KPMG but would have continued to do so at a high level.

62. The claimant submitted she can not say KPMG were not her employer but requested the Tribunal to consider the reality of the situation. In reality an agency relationship did exist. The claimant relied upon the **Hackney v Sivanandan** case and submitted that it clearly states if KPMG is an agent as a matter of course the agent is

liable. Judge Camp had misunderstood her case. KPMG should remain in the proceedings. The claimant submitted in **Kemeh** she was at a similar level to that individual. In respect of the agency relationship the claimant relied upon the evidence of KPMG at the hearing that she had gone to their office to work. The claimant accepted that she did not work very often for KPMG. However, this was a relationship of master and servant between herself and KPMG. She submitted KPMG and Highways England were jointly liable. Both were involved in the claimant's dismissal.

63. The claimant submitted it would not be appropriate to strike out her claims without full disclosure. The claimant invited the Tribunal to consider the hidden reason for her dismissal; see **Jhutti**. There needed to be a full hearing of the evidence before all issues could be determined.

64. The claimant submitted that Highways England are the principal and KPMG is the agent. The claimant invited the Tribunal to consider the cases of **McMeehan, Higg v Dover College** and **McTigue**. The claimant submitted she was not allowed to speak when she was dismissed. The claimant submitted that KPMG were the end user. Full disclosure was required to answer the questions. In respect of Bowstead there was a principal relationship.

Conclusions

65. The Tribunal was provided with a wealth of documentary evidence for this hearing. The respondent informed the Tribunal that it had provided far more disclosure than was required due to the claimant's constant complaints that disclosure was inadequate. The claimant made a general submission that disclosure was inadequate and incomplete but the Tribunal was not persuaded this was the case. The claimant was unfamiliar with the material requiring the Employment Judge and Counsel to assist her in the course of the hearing to find documents. The Tribunal formed the impression that the claimant was unclear herself as to what was included in the bundle and the Tribunal was unable to conclude that disclosure was inadequate. The Tribunal determined that it had a satisfactory amount of material taking into account the witness evidence and written submissions to determine the preliminary issues.
66. At this preliminary hearing stage, the Tribunal must determine in respect of the strike out application pursuant to Rule 37 of the 2013 Rules whether the claims have no reasonable prospect of success by considering each of the identified issues. In the case of **Mechkarov v Citibank NA (2016) ICR 1121** the proper approach to a strike out application is that (a) only in the clearest case should a discrimination claim be struck out (b) where there are core issues of fact that turn to any extent on oral evidence they should not be decided without hearing oral evidence (c) the claimant's case must ordinarily be taken at its highest (d) if the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents it must be struck out and (e) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.
67. In respect of a deposit order the Tribunal must be satisfied that the allegations have little reasonable prospect of success. **Garcia v The Leadership Factor Limited (2022) EAT 19** (at paragraph 36) it was held that deposit orders have a valuable role to play in discouraging claims or defences that have little reasonable prospects of success without adopting the far more draconian sanction of dismissing the claim or response altogether. The deposit order

affords a paying party the opportunity for reflection. Evaluating the likelihood of success for these purposes entails a summary assessment.

68. In the case of **Hemdan v Ishmail & Al-Megraby (UKEAT/0021/16)** it was stated that the purpose of a deposit order is not to make it difficult to access justice or to effect a strike out through the back door. The requirement to consider a party's means in determining the amount of a deposit order is inconsistent with that being the purpose..”
69. The claimant was employed by Highways England as a solution architect. There was no express contract between the claimant and KPMG written or oral. KPMG won a tender process and entered into a contract to provide consultancy pursuant to services to Highways England. KPMG was to provide specialist expertise of process simplification in relation to corporate services especially within the public sector. KPMG fed into Highways England in particular Ms. Herridge as project owner and Gloria Frith as Project Manager. Highways England would then try to match that need for resource by giving KPMG access to Highway England employees engaging internal contractors or requesting that KPMG provide the resource. KPMG were given a reasonable degree of autonomy to make requests to the nominated employees for assistance or attendance. KPMG could only make requests for attendance or tasks but it had no authority to instruct Highways England and did not have authority and did not have the authority to issue employees with instructions or require them to carry out work or attend meetings or reprimand or discipline Highways England employees.
70. Under cross examination Mr. Kerridge did agree that when the claimant attended KPMG's office she was working for KPMG. However, the Tribunal does not consider that this has the significance the claimant attaches to it namely that it establishes she had an employment contract with KPMG. First Mr. Kerridge has no employment expertise. Secondly from the evidence there was no written or oral contract between KPMG and the claimant and it was clear that the claimant was directed at all material times by Highways England; she was assisting when she attended the office of KPMG for KPMG to fulfil its contract with Highways England; such assistance was voluntary on behalf of the claimant and there was no obligation upon her to do so imposed by KPMG.
71. The law is clear; a contract will only be implied by reason of the conduct of the parties (a)it is necessary to do so (b)there was an intention to create legal relations and (c)the essentials of the contract are sufficiently certain in accordance with **Baird Textiles Holdings Limited v Marks & Spencer plc (2001) EWCA Civ 274**. The claimant has not shown any need to imply a contract between herself and KPMG. The claimant was employed directly by Highways England. KPMG had a contract with Highways England to provide consultancy advice. The claimant in her employment role with Highways England and by reason of her expertise assisted KPMG to a limited extent by providing KPMG with information about the present Highways England processes; the claimant was not obliged to give this assistance by KPMG; her involvement with KPMG is explained by the fact she was an employee of Highways England. The project charter referred to above (page 1449) refers to “A core KPMG/Bourton team will be responsible for delivering the project with the support of Highways England project counterparts.”

72. The Tribunal determines that there is no reasonable prospect of establishing there was any intention to create legal relations. Pursuant to clause 50.1 of the agreement it states that nothing in the KPMG-Highways Agreement was to create “a relationship of employer and employee or principal and agent between the parties, or authorise either party to make representations or enter into my commitments for or on behalf of any other party.”
73. Further as indicated above the claimant decided when she would speak to KPMG (pages 1285,1288 -9) and refused to meet with them if she did not wish to and KPMG made no complaint (see page 1322). Contrary to the claimant’s assertions at the hearing, the claimant did not consider herself part of the KPMG team as evidenced in her email to Ms. Herridge on 29 March 2019 when she complained “it is not helpful for an external team to speak to me and deal with me like this.”
74. The claimant has not established the essentials of any contract so to be sufficiently certain. The claimant accepted in evidence KPMG did not pay her and did not provide evidence of any fundamental terms of the alleged contractual relationship. The Tribunal concludes there was no implied contract between the claimant and KPMG.
75. The Tribunal determines that there is no reasonable prospect of establishing that the claimant was a worker for KPMG. The Court of Appeal considered the statutory definition of a worker pursuant to section 43K (1)(a) in the case of **Sharpe v Bishop of Worcester**; it concluded there must be a contractual relationship. The Tribunal finds that there was no contract between the claimant and KPMG. The proper analysis here is that Highways England instructed the claimant to do some work for KPMG. In the circumstances the claimant can not be a worker for the purposes of section 43K(1)(a) of the Employment Rights Act 1996. Pursuant to the claimant’s contract with Highways England, Highways England instructed the claimant in some instances to assist KPMG on their project. At all material times the claimant continued to work on other work for Highways England.
76. Further the Tribunal finds that there is no reasonable prospect of the claimant establishing that she was an employee under section 83 (2)(a) of the Equality Act 2010. The claimant did not have a contract with KPMG.
77. In respect of the claimant’s argument that KPMG employees or KPMG were agents of Highways England, the Tribunal finds that this has no reasonable prospect of success. Lord Justice Elias in the case of **Kemeh v Ministry of Defence (2014) IRLR 377** stated “..it can not be appropriate to describe an agent as someone who is employed by a contractor simply on the grounds that he or she performs work for the benefit of a third party employer.” The Tribunal determines that the mere fact that KPMG and its team of employees were employed as contractors by Highways England does not make KPMG its agent. The contract as set out above is very clear in its terminology that KPMG is providing a consultancy service and nothing more. In the Tribunal’s judgment that is insufficient to establish anything close to an agency arrangement.
78. Bowstead and Reynolds makes it clear at paragraph 0001 “agency is the fiduciary relationship which exists between two persons one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to

affect his legal relations with third parties.” This involves “..conferring of authority by the principal on the agent which may be express or implied from the conduct or situation of the parties and may or may not involve a contract between them.” It is essential that the principal confer authority on the agent to act on the principal’s behalf so to affect its legal relations with third parties. The contract between KPMG and Highways England does nothing of the sort. The Tribunal has already recognised the consultancy role played by KPMG and the fact that the claimant could refuse a request by KPMG to assist them with this; KPMG had at all material times to ask the permission of KPMG to approach the claimant and any other employees of Highways England. The Tribunal determines that there is no reasonable prospect of establishing via the contract between KPMG and Highways England or via their conduct, that KPMG itself was an agent of Highways England.

79. Alternatively in respect of the claimant’s argument that an employee of KPMG was also an agent of Highways England, the Tribunal determines this argument has no reasonable prospect of success. KPMG worked with staff employed by Highways England in order to understand what works best for Highways England and how efficiencies can be made. KPMG has no liability for its employees in respect of the claimant pursuant to the Employment Rights Act 1996 in the course of their employee’s work for Highways England.
80. Pursuant to section 65 of the ERA 2013 the prohibition of third party harassment was repealed. The claimant relies upon the case of **Hackney v Sivanandan (2003) UKEAT 0622/03/1811** to establish liability for discrimination against her by KPMG or its employees. This case was decided prior to the Equality Act 2010 and under the old law of the Race Relations Act 1976 which did not contain a similar provision to section 110(1)(c) of the Equality Act. Pursuant to section 110(1)(c) of the Equality Act 2010 KPMG’s employees are only liable where the discriminatory act amounts to a contravention of the Act by KPMG. There is no reasonable prospect of establishing that KPMG was the claimant’s employer; in the circumstances KPMG can not be vicariously liable for acts by its employees against the claimant.
81. The Tribunal concludes that the claimant’s allegations that KPMG instructed or knowingly helped Highways England to discriminate against her have no reasonable prospect of success. Pursuant to section 111 (7) of the Equality Act 2010 the instruction provisions under the Equality Act 2010 apply if “the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B.” The respondent relied upon commentary from Harvey On Industrial Relations and Employment Law which states “*..the most likely example B would be an employee of A and since that would mean that A could commit discrimination against B contrary to EqA 2010 Part 5 section 39, section 111 would apply so that A would be acting unlawfully if it were to instruct B to act in a discriminatory way. This is a roundabout way of ensuring that liability for instructing, causing or inducing only applies if the person seeking to influence the other has some kind of relationship with the other from which the influence could stem.*”
82. The claimant’s case is that her employer Highways England complied with the wishes of KPMG in that KPMG were sexist and did not want to work with the claimant as a woman on technical aspects of the work and instructed or knowingly helped Highways England to remove the claimant. Evidentially this is not established on the material before the Tribunal. Further KPMG did not know

that the claimant was no longer in the workplace. However, putting that aside and considering the claimant's case at its highest; the claimant has not indicated what KPMG did to assist this. On the basis of the material before the Tribunal it finds that these allegations have no reasonable prospects of success.

83. In the circumstances KPMG is dismissed from the proceedings.

Employment Judge Wedderspoon

14 November 2022

Sent to the parties on:

...15th November 2022....

For the Tribunal:

...Eamonn Murphy....

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.