



THE EMPLOYMENT TRIBUNAL

Claimant
Ms Sally Morgan-Freelander

v

Respondent
South West London & St George's
Mental Health NHS Trust (1)
Pulse Healthcare Ltd (2)

Heard at: London South Employment Tribunal (by CVP)

On: 12 April 2022

Before: Employment Judge Martin

Appearances

For the Claimant: In person
For the Respondent: Mr Crozier - Counsel

WRITTEN REASONS

1. Judgment was given with reasons at the conclusion of the hearing. The written judgment was sent to the parties on 26 May 2022. On 30 May 2022 the Claimant made a request for written reasons. This was within the time allowed. This request was not referred to me until 29 November 2022. I have prepared these written reasons as soon as I have been able to after that date. I apologise to the Claimant for the delay in preparing and sending them.
2. The issue before me was whether the second Respondent should be dismissed as a respondent in these proceedings. The application was made on the basis that the second Respondent never employed the Claimant and that the allegations as set out in the particulars of claim relate only to the first Respondent.
3. There are three claims before the Tribunal:
 - a. Discrimination arising from disability
 - b. Reasonable adjustments
 - c. Harassment.

4. All the factual matters set out in the Claimant's particulars of claim relate to the first Respondent.
5. The second Respondent provides recruitment and personnel administration services to NHS trusts. It provides assignments to Bank staff including the Claimant. The Claimant is still engaged by the second Respondent. The second Respondent is contacted by a trust saying need someone. The second Respondent looks at its bank of candidates and pulls out suitable candidates for the assignment. It also provides services to the NHS trusts such as running ongoing payroll and administration services.
6. The Claimant is line managed in the trust within trust structures and is subject to their direction and control. This is a standard type of working arrangement.
7. The Claimant was assigned to work at the first Respondent from 9 March 2021. Her assignment ended on 5 June 2021. The first Respondent terminated the assignment.

The Respondent's submissions

8. Vicarious liability: Part 8 of the Equality Act 2010 is relevant to vicarious liability. The relevant provisions are sections 109 and 110.
9. An employer is liable for its employees and is a principal for agents and vice versa. This means that what is done by employee is done by the employer, and what is done by an agent is done by the principal.
10. The simple point is that the relationship between the first and second Respondent is not of employee or employer and not of agent and principal.
11. The Equality Act section 111 provides that another party, here Pulse, could be fixed if they instruct, cause, or induce another party to contravene The Equality Act. There is no suggestion here that second Respondent instructed the first Respondent to act as it did, caused them to act like that or induced them. The test against each is there is something to provide at trial to suggest some prior communication from the second Respondent to the first Respondent to say they should treat the Claimant in this way. There is no such communication. The concerns were from the management in the trust.
12. Final way in which liability can be fixed is under section 112, by aiding. The question is, did the second Respondent help the first Respondent to treat the Claimant as it is alleged she was treated. There is no suggestion of that at all.
13. The reference to vicarious liability was picked up by EJ Smith¹ as having all sorts of meaning in law and is often used to fix liability to third parties at common law. The Tribunal is a creature of statute and must apply the Equality Act. The provisions do not bite on the facts of her case.
14. However, the Claimant does in the claims against the first Respondent, even

¹ In a previous case management hearing

if she proves all allegations of discrimination none would attach to the second Respondent. It is pointless to maintain a claim against the second Respondent when it can not succeed at law.

15. As a final point, which does not go directly to the legal issue but does go to whether there is any reason that a Tribunal may not strike out a claim. It is noteworthy that the first Respondent does not raise any issue regarding its own liability if she succeeds in her claims. There is no issue with her status to bring a claim or the solvency of the first Respondent. If she wins, there will be a remedy. It matters not if the second Respondent remains as a party to this claim.

Claimant's submissions

16. The Claimant submitted that when the Respondent is talking about instructing the Trust under s111, it is relevant that before she started the assignment with the second Respondent it made her do an occupational health assessment which flagged type 1 diabetes. Normally they should tell the Trust to treat her in a certain way, that is, she has a disability, and they should have reasonable adjustments in place. Crux of why the Claimant is bringing this claim, aside from vicarious liability is that the second Respondent also had responsibility for health and safety during the assignment.
17. In the bundle are pages that allude to them asking Trust to abide by health and safety and for the Trust to inform them of changes to Health and safety at a time when the pandemic was at its height.
18. It was scary. Nothing was ever questioned about risks changing, When the Claimant asked for reasonable adjustments to return to Barnes, they accepted they had seen the risk assessment. They thought it was okay for her to work there, under risk. So they were complicit with the discrimination by not questioning it. Need to protect their locum who was working on their books.
19. It is not in the claim form that there was a person allocated check in with me. I spoke to her when she was placing me about the pandemic and my vulnerability and my growing concerns when working in the Trust. It was all about money for them.
20. Vicarious liability, ACAS advised me that the second Respondent had a duty of care regarding the risk assessment the Trust produced about my personal risk, Pulse deemed it was acceptable and did not question it further.
21. The Claimant classifies Covid 19 as substantial change but no one from the second Respondent thought to contact the Trust if they not heard from them. Trust had to do risk assessments for everyone at work, Pulse should be aware of the conditions due to the agreement they have with the Trust, and queried it when one weeks notice given.

The Respondent's reply

22. Everything the Claimant has talked about is what says she says the second Respondent should have done but did not do. The relevant statutory

provisions are provisions about actively causing inducing instructing or aiding. Nothing the Claimant says suggests this.

My conclusions

23. I have carefully considered the submissions made by both parties.
24. The specific acts complained of were done by the first Respondent. The Claimant relies on vicarious liability and duty of care to fix liability on the second Respondent. When considering vicarious liability I must consider the wording of the statute and not the day to day, colloquial use of the term.
25. The relevant statutory provisions are found in the Equality Act 2020:
 - a) s109(1): 'Anything done by a person (A) in the course of A's employment must be treated as also done by the employer'. There must be an employment relationship between the employer and alleged discriminator.
 - b) S110: A person (A) contravenes S.110 if:
 - I. A is an employee or agent
 - II. A does something that by virtue of S.109(1) or (2) is treated as having been done by A's employer or principal (as the case may be), and
 - III. the doing of that thing by A amounts to a contravention of the EqA by the employer or principal (as the case may be) — S.110(1) EqA.
 - c) Section 111(1)–(3): a person (A) must not instruct, cause or induce another person (B) to do in relation to a third person (C) anything which contravenes Parts 3–7, S.108(1) or (2), or S.112(1) of the EqA. covers, among other things, all forms of discrimination, victimisation and harassment in employment.
 - d) S.112(1): a person (A) must not knowingly help another (B) to do anything which contravenes Parts 3–7, S.108(1) or (2), or S.111 of the EqA.
26. I am satisfied the relationship between the first and second Respondent is not of employer/employee or principal/agent. The arrangements are not an unusual set up.
27. There is no suggestion in the pleadings or anything the Claimant has said that pursuant to s111 there was any instruction, causing or inducement to another party to contravene EqA. There is no suggestion here that the second Respondent instructed the first Respondent to act as it did, caused them to act like that or induced them. I accept the second Respondent's submission
28. There is no suggestion in the pleadings or anything the Claimant has said that pursuant to s112 that second Respondent aided the first Respondent in any act of discrimination.

29. In relation to duty of care the question is what did the second Respondent do to stop the actions of the first Respondent. The pleaded case is that the second Respondent only knew 29 May 2020 of issues just before Claimant's assignment was terminated.
30. Before the Second Respondent's Clinical Governance Department could review the matter it was informed by telephone on the same date (29 May 2020), that a telephone conversation had taken place between the First Respondent and the Claimant and that the Claimant's assignment with the First Respondent had been terminated.
31. In all the circumstances the Claimant's claims against the second Respondent have no reasonable prospect of success and are struck out. The Claimant's claim against the first Respondent is unaffected.

Employment Judge Martin
Date: 2 December 2022

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing, or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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