



EMPLOYMENT TRIBUNALS

Claimants:

(1) Mrs N Manning
(2) Mr C Manning

v

Respondents:

Mr J Townsend (1)
Ms M Behan (2)

Heard at:

Reading (via Video)

On: 28 & 29 September 2023

Before:

District Tribunal Judge Shields
(sitting as an Employment Judge)

Appearances

For the Claimants:

In person

For the First Respondent:

Miss Johns (Counsel)

For the Second Respondent:

Mr Macdonald (Counsel)

RESERVED JUDGMENT

1. The first claimant was employed by the second respondent at the relevant time.
2. Any claims made by the first claimant against the first respondent are struck out. The claims by the first claimant against the first respondent are dismissed.
3. The second claimant was employed by the first respondent at the relevant time.
4. Any claims made by the second claimant against the second respondent are struck out. The claims made by the second claimant against the second respondent are dismissed.
5. The claim of sexual harassment by the first claimant is struck out under Employment Tribunal Rule 37(1)(a) because it has no reasonable prospect of success. The claim is dismissed.
6. At the relevant times, the second claimant was a disabled person as defined by section 6 Equality Act 2010 because of his mental impairment, namely anxiety. The complaint of disability discrimination can therefore proceed.
7. The second claimant is entitled to pursue a complaint of victimisation under the Equality Act 2010. The strike out application under Tribunal Rule 37(1)(a) is dismissed.
8. The first claimant is permitted to amend her claim to include direct sex discrimination.
9. The claimants' other complaints will proceed.
10. The cases are to remain linked together for hearing. A Case Management Preliminary hearing is to be held, by video, on the first available date, before a Judge sitting alone, in order to set out the directions for the cases to proceed to a final hearing. This will be a Case Management Preliminary hearing, in private, with a time estimate of one morning or afternoon session, with the Parties in attendance. A Notice of Hearing will be sent out in due course.

REASONS

Introduction and parties

1. These are claims pursued by both claimants against the respondents. The first claimant was employed as a housekeeper on a private estate, Newbottle Manor. The second claimant was employed as a gardener/handyman on the same estate. The claimants assert that although they were hired by the respective respondents separately, they were employed by both respondents to work on the estate as a whole. It was a joint 'couples' position.
2. The respondents deny that there was a joint role and assert that the contracts were two separate contracts between two separate entities. The first respondent states that they employed the second claimant. The second respondent states that they employed the first claimant.
3. The first claimant commenced employment on 7 September 2021. Her employment ended on 28 February 2022. The second claimant commenced employment on 31 August 2021 and his employment ended on 24 February 2022.
4. The claimants' claims were presented on 13 April 2022 after early conciliation ran from 23 March 2022 to 25 March 2022 in respect of both respondents.
5. The first claimant has brought complaints of direct sex discrimination, sexual harassment and victimisation under the Equality Act 2010. The Second Claimant has brought complaints of direct disability discrimination and victimisation under the Equality Act 2010.
6. Both respondents presented an ET3 and grounds of resistance on or before 27 June 2022. The respondents denied the claims.

Hearings and evidence

7. The respondents raised several preliminary issues. At a private preliminary hearing for case management held on 24 January 2023, a public preliminary hearing was scheduled for 28 & 29 September 2023 to decide those preliminary issues. The hearing was listed as an in-person hearing, however, the claimants have relocated to Scotland and asked that the hearing be heard by CVP video. The hearing was converted to a fully remote hearing by CVP video. All Parties joined remotely. The claimants joined remotely and were together. The respondents' witnesses, although separately represented by Counsel, were in one location. Their Counsel were separately located from them and each other. When providing their evidence, the respondents' witnesses were located in a separate room.
8. The respondents prepared a bundle for the preliminary hearing on 28 & 29 September 2023. The page numbers ran to 422 pages. The claimants provided two additional documents on the morning of the hearing. Counsel for the second respondent provided a skeleton argument. I decided to allow the inclusion of these documents.
9. At the start of the hearing on 28 September 2023, I noted the second claimant's claim of a disability, due to anxiety, and discussed with the Parties and in particular, the second claimant, as to any reasonable adjustments to the hearing under the Equal Treatment Bench Book. The adjustments made were as follows: we would take regular breaks, a slower pace and there were to be no tag or extended questions for the second claimant. If the second claimant needed to take a break or if I considered he needed to take a break then we would do so. These were adhered to throughout the two day hearing. I took some time for reading witness statements and the documents referred to in them. I also asked each party for a list of documents in the bundle

that were necessary reading prior to the hearing and each party supplied this to me. I read those documents prior to the commencement of the hearing.

10. All the witness statements were taken as read. I first heard evidence from Mrs Manning, the first claimant, followed by Mr Manning, the second claimant. Both had prepared witness statements. They were each cross-examined by the respondents and re-examined by each other.
11. On 29 September 2023, I heard evidence from the second respondent, Mrs Behan. She had served a witness statement. She was followed by Ms Perry. She had also served a witness statement. The first respondent did not appear as a witness. Each witness for the second respondent was cross-examined by the claimants and the other respondent and re-examined by their own counsel.
12. The claimants and the respondents' Counsel made oral submissions after the witness evidence. The second respondent's Counsel provided his skeleton argument.
13. There was not enough time for me to make my decisions and tell the parties my decisions at the hearing. I told the parties I would send my decisions in writing. I estimated it would take approximately six weeks to make my decision. I apologise to the parties and their representatives for the delay of an additional period. It happened because of the current workload in the tribunals and my allocation of sittings and other duties since the hearing date.

Issue for determination

14. The hearing before me was to determine seven preliminary issues.
15. I am at this stage considering whether the claimants' claims get over the preliminary legal hurdles to enable them to proceed to the next stage. I am not at this stage determining the merits of the claims brought by the claimants.
16. The preliminary issues for determination by me were set out in the case management summary of Employment Judge French made on 24 January 2023. They are:
 - 16.1. Whether the first claimant was an employee of the first respondent?
 - 16.2. The first respondent does not admit that the second claimant was disabled at the relevant time and deny actual and/or constructive knowledge of the second claimant's alleged disability. The second claimant relies on a mental impairment, namely anxiety. The Tribunal will need to determine:
 - a. Did the second claimant suffer from that mental impairment at the relevant time of the allegations giving rise to the claim ("the relevant time")?
 - b. If so, did the impairment have a substantial adverse effect on his ability to carry out day to day activities at the relevant time?
 - c. If so, was that substantial adverse effect long-term?
 - d. If so, did the respondents know, or ought they to have known, that the second claimant was disabled at the relevant time?
 - 15.2 In relation to the victimisation claim, whether or not this has reasonable prospects of success given the protected act relied upon by Mr Manning is Mrs Manning's allegations of sexual harassment.
 - 15.3 Whether the second claimant was an employee of the second respondent?
 - 15.4 Whether the first claimant should be permitted to amend her claim to include direct sex discrimination?

- 15.5 Whether in relation to the first claimant's sexual harassment claim, it is third party harassment and therefore not actionable. The second respondent states that they did not employ those responsible for making the comments to the first claimant.
- 15.6 Is the act of harassment on 18 December 2021 out of time having been made after the limitation period expired?

Findings of Fact

17. I make the following findings of fact from the evidence I heard at the hearing and read in the tribunal bundle. Page references are to the bundle.

Background

18. The Newbottle Estate is not a legal entity. It is the collective term used for a farming business and property between Newbottle and Charlton, South Northamptonshire, which was originally owned by Mr and Lady Juliet Townsend. It is a large estate that includes family homes, a working farm, commercial and rental properties.
19. The estate has been divided up between different family members. The farming business is owned and run by the elder sibling of the second respondent, Alice, with the first respondent, their father.
20. The second respondent owns Newbottle Manor which was undergoing extensive building works in May 2021. The second respondent is not involved in the farming business or other property owned by the first respondent.
21. Ms Perry commenced employment with the farming business partnership (held by the first respondent and Alice), in April 2021.
22. I accepted the evidence from Ms Perry that the three children of the first respondent and his wife had been left properties across the Estate with some being purely owned by each sibling, some in trust and some jointly owned. Each sibling is responsible for their own owned elements and their associated costs. The evidence in the bundle at pages 89-119 indicate that employees on the Harbottle Estate have different employers indicating the individual property or business owner.
23. The witness for the second respondent, Ms Perry, is employed by the farming business which is a partnership between the elder sibling, Alice, and the first respondent. She confirmed that the farming partnership charges a management fee to cover work that she carries out for other family members on the Newbottle Estate.
24. I accepted the evidence of the second respondent that an employee employed on the estate by a specific employer had a set hourly rate and they completed timesheets. Payroll is set up for each employee with the specific employer and that employer pays the wages of their own employees. Due to the family nature of the estate, if an employee carries out a task for another specific person or entity then payment is cross charged back to the "borrowing" person or entity. The timesheets included in the tribunal bundle at pages 126-142 have columns that identify the person, or business entity, to whom the hours are allocated and at the bottom of the form it specifically states the following "Use blank columns to tell us who we should charge for your hours – e.g. NDR, Eleanor, Alice, Margaret, joint girls, a specific property, book shop, butchers."

25. The second respondent is the sole shareholder and a director of a limited company, Smith and Clay Limited (formerly Brackley Butchers Limited, company number 05814962), which is an independent retail butchery and deli business operating from two shops, one based in Brackley and one based in Buckingham.
26. Smith and Clay Limited rents a small unit from the farming business to use as a cutting room for the butchery and deli business. Smith and Clay Limited also employs butchers. The two butchers working in the cutting room on 18th December 2021 were employed (on the relevant date) under written employment contracts with Smith and Clay Limited (pages 88-109).

The claimants' recruitment

27. In May and early June 2021, Ms Perry started to commence discussions with the first respondent regarding a replacement for a long term employee, Mr Brown. She further discussed the second respondent's requirements for a part-time housekeeper. She commenced her recruitment by advertising for individuals or a couple through job boards. The jobs descriptions are in the bundle at pages 66-69.
28. Miss Perry explained the recruitment process and that the first and second respondent were considering recruiting the first and second claimant as a couple.
29. The second respondent detailed the interview process in her witness statement.
30. The offer letter on page 70 of the tribunal bundle informs the first and second claimant that they have been successful in their application for the domestic couple position at Newbottle.
31. The offer letter dated 28th July 2021 sets out the terms of the offer. Within the letter, the claimants were informed that a contract would be issued to them shortly. There is no written acceptance from the first and second claimant to the terms of the offer letter dated 28th July 2021.
32. Ms Perry details that, following the interview and the offer letter, the first and second respondent, along with Ms Perry, took advice on the logistics of employing the first and second claimant on a joint basis. She details that they did not know how to draft and prepare a joint contract and therefore they took advice about the contractual arrangement and the service occupancy agreement.
33. I accepted the evidence of Ms Perry that the property in which the claimants would reside is owned by the first respondent and therefore it would not have been appropriate for the second respondent to enter into a contract which provided one of her employees with permission to reside in a property that was not owned by her. I further accepted the position that Ms Perry spoke to the claimants in mid August to explain there was a delay in providing the written contracts of employment to them because of the difficulties in the drafting and the complexity of who was employing who. On 24th August 2021, contracts were sent to the claimants, but they were then asked not to sign them as they needed to be updated (page 253).

The claimants' employment

34. Ms Perry detailed her meeting with the claimants on 26th August 2021. The first claimant did not challenge the evidence on these issues. The second claimant confirmed in his statement that they were presented with two separate contracts once they arrived at the Estate.

35. These issues were reflected in an email at page 242 of the bundle. This was a contemporaneous e-mail of 25th August 2021 from the first respondent to the second respondent. It states that the first respondent was the employer of the second claimant and that the first claimant was employed by the second respondent. It highlights the issue that the first respondent owns the property in which the couple will reside and that the second claimant should be the individual who has the right to occupy the cottage in order to fulfil his job.
36. Within the tribunal bundle there are emails from the claimants to Ms Perry detailing queries on the contracts of employment, such as working hours (pages 254-256). Meetings also took place on the terms of the employment between the claimants and Ms Perry. The claimants then progressed to ask for the contracts to be signed. These were signed on 28th September 2021 and copies of the contracts are contained in the bundle at pages 72-87.
37. The first claimant's contract is at page 72 of the bundle. The nominated line manager is stated to be the estate administrator, Ms Perry. Her employer is stated to be the second respondent.
38. The second claimant's contract is at page 80 of the bundle. His employer is stated to be the first respondent.
39. In both contracts at paragraphs 2 and 11 state that the claimants are employed as a couple to look after the property and family needs at Newbottle. The employments are described by the contracts as linked.
40. The first claimant's employment was delayed as she sought some flexibility with regard to her start date due to making arrangements for the children to commence school. Those discussions took place with the second respondent.
41. The second claimant sought an advance of wages. This was paid by the first respondent and recuperated over the following three months from the second claimant.
42. There were no communications from the claimants regarding who was their correct employer, prior to the commencement of their employment, nor during the discussions about the contracts of employment and terms and conditions, nor at any later stage before or after signature of the contracts of employment.
43. The second claimant commenced employment on 31st August 2021 and the first claimant commenced employment on 7th September 2021.

Pay and benefits

44. The contract provided for the first claimant to be paid by the second respondent. The pay slips of the first claimant identify the second respondent as the paying person (pages 125).
45. The contract provided for the second claimant to be paid by the first respondent. It was confirmed that the second claimant was paid by the first respondent as the paying person.
46. Clause 14 of the second claimant's contract of employment identifies that he occupies the cottage as part of his duties.
47. The Licence to Occupy the Cottage is at page 224 of the bundle and states the first respondent is contracting with the second claimant. Clause 5.15 specifically permits the family members and dependants to occupy the property as long as the second claimant remains in employment.

Management of the claimants

48. Separate inductions by each respondent were held with each claimant when they commenced their employment. A joint induction was not held with the claimants.
49. The first claimant wanted to work on a full time basis and she was therefore requested to provide help to Smith and Clay Limited with social media management. This she was able to do working from home. The claimant did not pursue any claims or complaints against Smith and Clay Limited.
50. The first claimant was line managed by Ms Perry.
51. The second respondent was consulted on issues relating to management performance and holiday dates of the first claimant. Ms Perry monitored the hours of the first claimant on behalf of the second respondent. The management team of Smith and Clay reported to the second respondent about the first claimant.
52. The second respondent directed how the first claimant should spend her time.
53. The time sheets completed by the claimants, at pages 126-142, identify the hours worked for each family member (referred to in the background section above). The hours worked by the first claimant are mostly for the second respondent. Other family members are identified. The first claimant does not claim that she was employed by any other family member. Nor does the second claimant although his timesheets are not included within the bundle.
54. I accepted the evidence from Ms Perry that if the first respondent wanted the first claimant to cater for him then he would ask Ms Perry who would ask the second respondent to ensure that permission was sought and it was convenient for the second respondent.
55. There were emails within the tribunal bundle, pages 145-150, where the second respondent was dissatisfied with the fact that the first claimant was covering the work of the first respondent's absent housekeeper. It is noted that Ms Perry apologised for failing to obtain the permission of the second respondent. The second respondent informed Ms Perry that the first claimant was her employee, she paid for her salary and it was her decision on where, when and how she worked.
56. The second respondent was not involved with the second claimant's employment, pay, hours, management performance reviews or holiday dates. The second respondent sought the agreement of the first respondent if she required any assistance from the second claimant. The evidence of the second respondent was that she was not consulted about the termination of the second claimant's employment (see below in my findings of fact).
57. When the first claimant had any queries, for example, holiday pay, pages 145-149, she raised these with Ms Perry and the second respondent. She did not include the first respondent.
58. The claimants refer to the WhatsApp group as evidence in favour of employment of both claimants with both respondents. I did not consider this supported the proposition. The second respondent resided in London and Newbottle Manor. The first respondent resided on the estate on a permanent basis. The use of WhatsApp was therefore convenient as a communication method but was not a complete representation of the accurate employment position.

59. When giving oral evidence, the first claimant referred to the second respondent as her employer on several occasions. Similarly, the second claimant referred to the first respondent as his employer. Neither referred to the other respondent as their employer.
60. The first claimant did not pursue any claims or complaints against Smith and Clay Limited. Neither claimant pursued claims against Ms Perry, the farming business nor any other party to whom they may have provided services on a peripatetic basis, such as the elder sibling of the second respondent or the farming business.

The 18th December Incident

61. The first claimant spent the 18th December 2021 in the cutting room of Smith and Clay Limited.
62. The two butchers referred to are employed by Smith and Clay Limited. My findings of fact in relation to this issue are stated above and I will not repeat them here.
63. The corporate entity of Smith and Clay Limited is a separate legal entity to any individual person.

The end of the claimants' employment

64. The termination of the second claimant's employment was carried out by letter on 25th January 2022. The letter was signed by the first respondent. The letter refers to the second respondent being involved in a meeting with him, Alice (the elder sibling), and Ms Perry following receipt of an email dated 20th January 2022 and a statement from the first and second claimant. However, it goes on to state that it is the first respondent's view that things have not worked out. The second respondent was not involved in the second meeting, held on 24th January 2022 with the second claimant.

The second claimant's disability

65. The second claimant has anxiety and he claims that this is a disability under the Equality Act 2010.
66. The second claimant did not declare any health issue on his health questionnaire when he commenced employment. The respondents did not include a copy of the completed health questionnaire within the tribunal bundle.
67. On page 221, the second claimant states that he has had anxiety and panic attacks since 2003.
68. The second claimant describes his anxiety as panic attacks that are debilitating and give him an upset stomach. They prevent him from going to work on occasions, he has had weight loss and loss of appetite with a general feeling of panic and unease. In a public place or somewhere that is loud, he states that he needs to go somewhere where he feels safe and where he can practise his breathing techniques.
69. The day-to-day activities that the second claimant states are impaired are activities such as shopping or looking after his children. He needs to be completely alone when he feels anxious or has a panic attack which means that he cannot be at work, with his children or in a busy public place. He has to remove himself from the situation causing the anxiety.
70. The second claimant is not on any medication but he has had treatment by way of counselling for his panic attacks, including counselling sessions after his employment has ended.

71. The letter from Dorset Healthcare University is dated 23 July 2021. The second claimant self-referred to the Wellbeing Service in Dorset (page 263). This was before his employment commenced. It does not state that his GP referred him to the Wellbeing Service however, on page 263, the claimants both state this was a self-referral not a GP referral.
72. At page 244 of the bundle, the second claimant provided a letter from a personal trainer (a friend of the second claimant) that stated he was providing professional assistance to the second claimant about a system of exposure therapy designed to alleviate anxiety, amongst other things. He was seeing the second claimant for one to one and online consultations to resolve his ongoing depression. Seven sessions were attended between August 2020 to January 2021.
73. On 13th October 2021, the second claimant left the pest control course training facility. He emailed Ms Perry. The contents of the email are on page 258. He stated that he wanted to make Ms Perry aware of something that was confidential and a little embarrassing. He said that he had to leave the pest control course because he experienced a severe panic attack which escalated quickly from nowhere. He went on to state that over the past 18 months during the COVID crisis he had suffered a loss in confidence and had experienced some anxiety. He went on to say that his anxiety had been non-existent since arriving at Newbottle. He stated that he felt safer leaving the environment and getting in his car. He sought to reassure Ms Perry that it wouldn't affect his working capabilities on the Estate and he would be seeking some additional support from Steps to Wellbeing. He asked to attend the course online.
74. Ms Perry contacted the second claimant to discuss the panic attack. The second claimant did not want to discuss it anywhere but the cottage where he resided due to confidentiality. She went to his cottage to discuss his mental health. She encouraged the second claimant to see his GP and he stated that he would sign up with the local GP and would seek assistance from a Steps to Well-being Service. Ms Perry did not enquire as to how the Claimant knew about a well-being service being available. It did indicate that he had some prior knowledge of the mental health services available and that there was a past familiarity with the services available for mental health and well-being. She states that she reassured him that he could take time off to go to any appointments that he needed.
75. Ms Perry called to speak to the first claimant about the second claimant's email and panic attacks. The first claimant was concerned not to disclose the second claimant's health issues without his knowledge and referred her back to the second claimant.
76. Miss Perry states that she asked the second claimant about a week later about his mental health and he came across as embarrassed and apologetic.
77. The second claimant requested to complete his pest control course online due to his anxiety during the meeting on 8th December between the second claimant and Ms Perry. This is on the transcript of the meeting, on page 381, Ms Perry refers to "getting him on the online course" for pest control. She does not refer to why an online course is to be arranged. The reason for asking for an online course was due to the second claimant's mental health preventing him from attending the course in person.
78. The second claimant was signed off work by his GP from January to February 2022 and did not work his final month's notice.
79. The letter from his GP, at page 229, refers to his having been seen by the GP for anxiety on 15th December 2021 and 29th December 2021. He was seen by an alternative GP at the practice on

2nd February 2022. It states that he was seen and referred for treatment regarding low mood and confidence issues in 2005.

80. During the preliminary hearing, reasonable adjustments had been made to the hearing and in particular to accommodate the second claimant's anxiety in accordance with the Equal Treatment Bench Book as follows: we took regular breaks, a slower pace and there were no tag or extended questions for the second claimant. The second claimant needed to take a break when giving his evidence, as he became overwhelmed, on at least two occasions. He was visibly upset and he was unable to answer the question put to him when discussing his anxiety. After a break, he resumed his evidence.

The Employment Tribunal claim by the first claimant

81. The claim form of the first claimant, received by the Tribunal on 13 April 2022, claims sex discrimination but fails to refer to direct sex discrimination. It does refer to sexual harassment and victimisation on the grounds of sex.

82. The factual issues as claimed by the first claimant remain the same factual issues in dispute. The time limit issues raised by the respondents are issues that remain in issue, to be determined at the final hearing.

83. The second respondent has been aware of the sex discrimination claim and the facts of the issues since the commencement of ACAS conciliation process and the claims.

The law

84. The complaints are:

84.1. From the first claimant: direct sex discrimination (subject to the amendment application), sexual harassment and victimisation under the Equality Act 2010; and

84.2. From the second claimant: direct disability discrimination and victimisation under the Equality Act 2010.

Employment

85. The preliminary issue for me to consider is: who are the claimants' employers?

86. The general common law provisions that apply to any assessment of whether a binding and legally enforceable contract exists, apply equally to employment contracts. These provisions are as follows: offer, acceptance, certainty, intention to create legal relations, legal consideration. Generally an objective approach is used to interpret contracts, including employment contracts, however where there is an inequality of bargaining position, there is greater emphasis on a factual matrix.

87. Terms and conditions of employment are usually governed by a contractual document but there is no legal requirement to do so. A tribunal can imply terms into a contract of employment under common law.

88. Issues of interpretation or construction of express terms are determined objectively: what would, at the time, objectively have been understood by the parties.

89. Looking at the category of employee, the relevant statutory definitions are set out in section 230 of the Employment Rights Act. Under sub-section (1) an employee is:
"an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment".
90. Section 230(2) defines a contract of employment as:
"a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".
91. The relevant statutory definition of employment is contained in section 83(2) of the Equality Act 2010 which says that it means:
"employment under a contract of employment, a contract of apprenticeship or a contract personally to do work."
92. A useful starting point when considering contracts of employment are the line of authorities that deal with whether or not a person an employee or worker. The leading case is *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, which held that three conditions must be met for a contract of employment to exist:
- 92.1.1. the employee agrees, in consideration for a wage or other remuneration, to provide their own work and skill in the performance of some service for the employer;
 - 92.1.2. the employee agrees, expressly or impliedly, to be subject, in the way they perform that service, to a sufficient degree of control by the employer for the relationship to be one of employer and employee; and
 - 92.1.3. the other provisions of the contract are consistent with it being a contract of employment.
93. The Supreme Court confirmed in *Autoclenz v Belcher* [2011] IRLR 823 that the summary in *Ready Mixed Concrete* remains 'the classic description of a contract of employment'. In *Autoclenz v Belcher*, the Supreme Court also emphasised the importance of considering the 'true agreement between the parties', which might mean looking beyond what is set out in a written contract: 'the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.'
94. The description in *Ready Mixed Concrete* has been developed in subsequent cases. There 'irreducible minimum' constituents of a contract of employment were summarised by Langstaff J in *Dakin v Brighton Marina Residential Management Company Ltd* EAT 0380/12 as follows:
"First there must be a contract between the employee and the employer. Secondly, that contract must contain mutual obligations which are related to work... Thirdly, the employee must be subject to the control of the employer at least insofar as there is room for such control... Fourthly, the employee must be obliged to perform his work personally for the employer... Finally and fifthly, the contract must not contain terms which are inconsistent with it being a contract of employment."
95. In *James v Redcats (Brands) Ltd* [2007] ICR 1006, Elias J summarised the distinction between employees, workers and the self-employed:
'in a general sense the degree of dependence is in large part what one is seeking to identify – if employees are integrated into the business, workers may be described as semi-detached and those conducting a business undertaking as detached ...'.

96. A range of other factors may be relevant to the question of whether a contract of employment exists, but the courts have cautioned against a 'checklist approach'. What is required is consideration of all the factors that are relevant, and an evaluation of the whole.

97. An incorporated company is a separate legal entity to any individual, person or other legal entity. It is distinct from its shareholders and directors. There are separate corporate laws that apply to whether one can "go behind" the "corporate veil", usually referred to as "piercing the corporate veil". There are very strict and limited conditions in which a Court or Tribunal might go behind the corporate veil, limited to situations where there is fraud, abuse or deliberate evasion or examples provided for under the Companies Acts of England and Wales, such as under the Data Protection Act 2018 and the Enterprise Act 2002.

Disability of the second claimant

98. The burden of proof is on the claimant to establish that he has a disability within the meaning of the Equality Act 2010.

99. The definition of disability is contained in section 6 of the Equality Act:

"(1) A person (P) has a disability if:

- a) P has a physical or mental impairment; and
- b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

100. Schedule 1 to the Equality Act sets out additional detail concerning the determination of disability. In relation to long-term effects, paragraph 2 of schedule 1 provides:

"(1) The effect of an impairment is long-term if –

- a) it has lasted for at least 12 months,
- b) it is likely to last for at least 12 months, or
- c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if the effect is likely to recur."

101. When considering whether an effect is long-term, the question is whether there had been 12 months of adverse effect as at the date that the alleged discriminatory acts occurred (Tesco Stores Ltd v Tennant [2020] IRLR 363 EAT).

102. Paragraph 5 of schedule 1 deals with the effect of medical treatment. It says:

"(1) An impairment is to be treated as having a substantial effect on the ability of the person concerned to carry out normal day-to-day activities if –

- a) measures are being taken to correct it, and,
- b) but for that, it would be likely to have that effect.

(2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid."

103. This requires the tribunal to consider what the effect on the claimant's abilities would have been but for the medical treatment (sometimes referred to as the 'deduced effect').

104. Considering the deduced effect in *J v DLA Piper* [2010] IRLR 936, Underhill P (as he then was) held at paragraph 57:

“There is nothing particularly surprising in the proposition that a person diagnosed as suffering from depression who is taking a high dose of anti-depressants would suffer a serious effect on her ability to carry out normal day-to-day activities if treatment were stopped: the proposition could of course be challenged, but in the absence of such challenge ... it is unclear what elaboration was required.”

105. Paragraph 8 of schedule 1 deals with progressive conditions. It provides:

“(1) This paragraph applies to a person (P) if –

- a) P has a progressive condition,
- b) as a result of that condition P has an impairment which has (or had) an effect on P’s ability to carry out normal day-to-day activities, but
- c) the effect is not (or was not) a substantial adverse effect.

(2) P is taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment.”

106. Section 6 (5) of the Equality Act provides that a minister may issue guidance about matters to be taken into account in deciding any question for the purposes of section 6(1). Guidance on matters to be taken into account in determining questions relating to the definition of disability was issued in 2011 (the ‘Guidance’). Paragraph 12 of schedule 1 of the Equality Act requires employment tribunals to take account of any aspect of the Guidance which it thinks is relevant.

107. Section A of the Guidance deals with the ‘impairment’ element of the definition. It includes at A5 a non-exhaustive list of different types of impairment. The list includes impairments with fluctuating or recurring effects.

108. Section B of the Guidance deals with what is a substantial adverse effect: a substantial effect is one that is more than a minor or trivial effect (paragraph B1), as set out in the definitions clause in section 212 of the Equality Act.

109. Section B also deals with the cumulative effects of an impairment. It is important to consider whether the effects of an impairment on more than one activity taken together could result in an overall substantial effect (paragraph B4).

110. Paragraph B6 explains that where someone has more than one impairment, account should be taken of whether the impairments together have a substantial effect overall.

111. Section C of the Guidance deals with long term effects. Paragraph C2 provides that the cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect.

112. Paragraph C3 of the Guidance explains that the meaning of ‘likely’ is relevant to a number of different elements of the definition of disability, including when used in paragraph 2(1) of schedule 1 (whether an impairment is ‘likely to recur’) and paragraph 8 of schedule 1 (whether a progressive condition is likely to result in an impairment which has a substantial adverse effect). The Guidance provides that in these contexts, ‘likely’ should be interpreted as meaning that ‘it could well happen’. This is a lower hurdle than the test of whether something is ‘more likely than not’ to happen.

113. Section D of the Guidance deals with the meaning of normal day-to-day activities. They are 'things that people do on a regular or daily basis'. Paragraph D3 gives examples of day to day activities, including shopping, reading and writing, having a conversation, preparing and eating food, walking and taking part in social activities. It continues:
114. "Normal day to day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents and keeping to a timetable or shift pattern."

Amendment application of the first claimant

115. The principles relevant to the granting of an amendment are set out in particular in Selkent Bus Co Ltd v Moore [1996] ICR 386. As confirmed and expanded by subsequent cases, these essentially are as follows. In exercising its discretion whether to allow an amendment, the employment tribunal should take into account all the circumstances and balance the injustice / hardship to each party of allowing or refusing the amendment. The relevant circumstances include:
- 115.1. The nature of amendment, i.e. whether it is a minor relabeling or, on other hand, new facts and a new cause of action are involved.
- 115.2. The timing of application and why it was not made earlier, particularly if the claimant knew all the relevant facts.
- 115.3. Where a new complaint or cause of action is proposed, the tribunal must consider whether the complaint is out of time and if so, whether the time-limit should be extended under the applicable statutory provisions. This is not the only consideration, but it is important in respect of a new cause of action. It is far less important where only a minor relabeling is involved.
- 115.4. The balance of hardship from the viewpoint of the respondents could entail, for example, more costs, especially if these are unlikely to be recovered; witnesses having disappeared or documents disposed of; faded memories and concessions made on the basis of the case as previously pleaded.
116. In Abercrombie and others v AGA Rangemaster Ltd [2013] IRLR 953, the Court of Appeal said:
'... the approach of both the EAT and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted.'
117. In the case of Vaughan v Modality Partnership UKEAT/0147/20/BA the EAT reminded parties and Tribunals that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The exercise starts with the parties making submissions on the specific practical consequences of allowing or refusing the

amendment. That balancing exercise is fundamental. The Selkent factors should not be treated as if they are a list to be checked off.

118. If a new claim is out of time, it is possible to decide the amendment request subject to the time issue. The amendment takes effect on the date permission is granted. The time-limit issue can be decided subsequently, including at the full merits hearing itself (Gillett v Bridge 86 Ltd UKEAT/0051/17).

First claimant's sexual harassment claim

119. The definition of sexual harassment is set out in section 26 of the Equality Act 2010, as follows:

- (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if—
 - (a) A engages in unwanted conduct of a sexual nature, and
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—
 - (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
 - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.
- (5) The relevant protected characteristics are—
 - age;
 - disability;
 - gender reassignment;
 - race;
 - religion or belief;
 - sex;
 - sexual orientation.

120. There are three different types of harassment and in this case the complaint raises the issues of sexual harassment which is defined as follows, unwanted conduct of a sexual nature, where this has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant, or violating the complainant's dignity.

121. Under section 109 of the Equality Act 2010, an employer is vicariously liable for acts of discrimination, including harassment, committed by its employees in the course of employment. This is so whether or not the acts were done with the employer's knowledge or approval.

122. There is no specific duty on an employer to protect an employee against harassment by third parties. Nor is an employer vicariously liable for third party harassment.
123. There were provisions in law between 2008 until 2013 where employers were liable for persistent harassment of employees by third parties (subject to certain conditions being met). However, these were repealed from 1st October 2013.
124. Previous to 2008, case law suggested that an employer could, in certain circumstances, be directly liable for third-party harassment if the harassment was allowed to continue without being challenged (*Gravell v London Borough of Bexley* EAT 0587/06). In *Conteh v Parking Partners Ltd* [2011] ICR 341, EAT, the EAT held that an employer could only be liable for harassment carried out by a third party if the employer's failure to take action to safeguard the employee itself was related to the relevant protected characteristic and had the purpose or effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. The case of *Unite the Union v Nailard* [2019] ICR 28 was heard in the Court of Appeal and the case confirmed that the Equality Act 2010 no longer contains any provision making employers liable for failing to protect employees from third-party harassment.
125. An employee may have a claim against an employer for direct discrimination under section 13 of the Equality Act 2010 if the employee can show that, in failing to prevent the harassment by a third party, the employer treated the employee less favourably because of a characteristic protected by the Act.
126. Section 123 of the Equality Act 2010 explains the time limit for complaints of discrimination (including sexual harassment). The starting point is that the claim should be started ('presented') within a three month period.
127. The three month period starts on 'the date of the act to which the complaint relates'. Sometimes the date on which an act takes place is obvious. Section 123 explains how to identify 'the date of the act to which the complaint relates' in less obvious cases, including where the complaint is about a failure to do something. Sub-sections 3 and 4 say:
- “(3) For the purposes of this section—
- (a) conduct extending over a period is to be treated as done at the end of the period;
- (b) failure to do something is to be treated as occurring when the person in question decided on it.
- (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
- (a) when P does an act inconsistent with doing it, or
- (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”

128. The time to bring the claim ends three months less a day from that start date. However, when working out the end of the three month period, the rules relating to Acas early conciliation need to be taken into account. These rules are contained in section 140B of the Equality Act. This says at sub-section (3) that:

“In working out when a time limit ... expires the period beginning with the day after Day A and ending with Day B is not to be counted”.

129. Day A is the day on which ACAS is notified for early conciliation, and Day B is the date of the early conciliation certificate. This means that time spent in the ACAS early conciliation process is discounted when working out the date on which the three month time period ends.

130. A claim which is started after the expiry of the three month period may still go ahead if the tribunal thinks it has been started within a period which is ‘just and equitable’. This is often called ‘extending the time limit’. This is explained in sub-section 123(1)(b) which says that in the employment context, a complaint:

“may not be brought after the end of—

- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
- (b) such other period as the employment tribunal thinks just and equitable.”

131. There is no presumption that the time limit should be extended, rather it is for the claimant to convince the tribunal that it is just and equitable to do so. Extending time is the exception rather than the rule (*Bexley Community Centre v Francis Robertson* [2013] EWCA Civ 576 at paragraph 25).

132. These rules about time limits concern the date by which a claimant has to start or ‘present’ their claim to the employment tribunal.

Victimisation claim of the second claimant

133. The definition of victimisation is set out in section 27 of the Equality Act 2010 as follows:

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
 - (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act—
 - (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.
- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
- (4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

134. It is not necessary for an employee to have a protected characteristic himself in order to claim protection from victimisation under the Equality Act 2010. The focus in a victimisation claim is not on the protected characteristic of the claimant but on the claimant's actions in alleging a breach or bringing a claim or in assisting in someone else's claim. In the case of *Cornelius v University College of Swansea* 1987 IRLR 141, CA, the Court of Appeal found that anyone whose conduct amounts to a protected act can seek to rely on the statutory protection from victimisation.

135. The wording of section 27 is not considered to be wide enough to cover an individual who claims to have suffered a detriment because *someone else* has done, or may have intended to do, a protected act. However, the case of *Thompson v London Central Bus Co Ltd (UKEAT/0108/15)* held that victimisation 'by association' is covered by the Equality Act 2010 (by referring to the principle established by the European Court of Justice (ECJ) in *Coleman v Attridge Law and anor* 2008 ICR 1128, ECJ, that claims of discrimination based on another person's protected characteristic can be brought in respect of certain types of claims — namely, direct discrimination and harassment). The tribunal's focus must be on the reason for the victimisation and whether the claimant was subjected to a detriment because of a third party's protected act.

Conclusions

136. I have applied these legal principles to the findings of fact I have made above to reach the following conclusions on the issues for determination.

Employment

137. The first question is whether the first claimant was an employee of the first respondent and whether the second claimant was an employee of the second respondent?

138. Based on my findings of facts above, the claimants, albeit with a lesser bargaining power, entered a contract of employment with an individual person. They negotiated on the terms of the employment contract to a degree, through Ms Perry. They did not question the named employer or the contractual terms relating to "employed as a couple".

139. Applying a factual matrix to the situation, and taking an objective approach, I considered the facts above, an offer was made to the claimants and there was a period of discussion on the terms that were then placed into the contract of employment. The main terms were set out in an offer letter but there was no formal acceptance of the offer. The offer letter was to be followed by the terms of employment that were subsequently offered and accepted. The contract of employment brought together the discussions and the licence to occupy the property for the second claimant. The contracts clearly identify the employing individual. During the discussions, the claimants were made aware of the issue of who was to be their correct employers and the issue of the occupation of the cottage was related to the correct employing individual.

140. The documentation within the tribunal bundle such as payslips, timesheets and contemporaneous emails dealing with working hours, holidays, the first claimant's queries on working hours and responsibilities indicate that the first claimant was employed by the second respondent and the second claimant was employed by the first respondent.

141. The facts identified above, and taking all the facts as a whole, they support the conclusion that the individual respondents employed their own individual claimant for the

respective roles. The fact that an individual claimant was asked to perform tasks for other family members does not mean that other family members therefore employed them. It was clear to the claimants that any tasks they carried out for another family member who was not their stated employer (on the contract), was cross charged individually to that family member, through the farming partnership business and Ms Perry, and were to be pre-authorized by their own employer.

142. I concluded that the first claimant was employed by the second respondent at the relevant time.

143. The second claimant was employed by the first respondent at the relevant time.

144. Any claims made by the first claimant against the first respondent are struck out. The claims by the first claimant against the first respondent are dismissed.

145. Any claims made by the second claimant against the second respondent are struck out and are dismissed.

Disability

Relevant time

146. The time at which I have to assess whether the second claimant was disabled is at the date of the alleged discriminatory act. In this case, the second claimant alleges that a series of discriminatory acts occurred. The second claimant informed his employer of his anxiety on 13th October 2021. He states that discriminatory acts occurred from 13th October 2021 up to the termination of his employment on 24th February 2022.

147. I have considered whether the second claimant was disabled during the period March 2020 to 24th February 2022.

Impairment

148. Although the second claimant did not provide his medical records, I have concluded that the second claimant's evidence, the GP letter and the contemporaneous e-mail of 13th October 2021 show that the second claimant has a history of anxiety. That is a mental impairment.

149. The second claimant had this condition from at least March 2020 but there was a history of previous mental health issues dating back to 2005. The GP letter of the second claimant explained that the second claimant had been seen and referred for treatment regarding low mood and confidence issues in 2005. The meaning of impairment and mental health conditions under the guidance stated in the law section above, refers to mental health conditions with symptoms such as anxiety, low mood, panic attacks. Since 2005, there were periods of time when the second claimant's mental health symptoms were effectively managed, and other periods when the symptoms were better. I conclude that the second claimant has a mental impairment.

Adverse effect on normal day-to-day activities

150. I next need to consider whether these impairments had an adverse effect on the second claimant's ability to carry out normal day to day activities.

151. Anxiety: I have found that during the relevant period of October 2021 to February 2022, the second claimant's anxiety affected his day-to-day life. The activities which were affected were:

- 151.1. shopping,
- 151.2. looking after and engaging with his children,
- 151.3. taking part in a group activity such as face to face training including interacting with other people,
- 151.4. Going to work and engaging or being with other people,
- 151.5. eating food,
- 151.6. being in a public place,
- 151.7. carrying out household tasks.

152. The second claimant had experienced similar effects since March 2020. He had also experienced similar symptoms since 2005. These were effects on the second claimant's normal day-to-day activities. Carrying out social activities (in a public place), shopping, eating, going to work and engaging with others, study and education related activities such as interacting with colleagues, and carrying out household tasks are given in the guidance as examples of normal day-to-day activities.

153. The effects on the second claimant were adverse. They had a negative effect on his quality of life. Examples of the adverse effect on his ability to carry out normal day-to-day activities such as eating, carrying out household activities and tasks are examples provided in the guidance.

Substantial

154. Next, I need to consider whether the adverse effects on the second claimant's ability to carry out normal day-to-day activities were substantial.

155. I reminded myself that a substantial effect is one that is more than a minor or trivial effect. As well as considering the effect on each activity, I have to consider whether the effects of an impairment on more than one activity taken together could result in an overall substantial effect. Further, I had to take account of how a person can reasonably be expected to modify his behaviour, for example, by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities.

156. I do not consider that any of the adverse effects on the second claimant can be described as minor or trivial. The impact each of them has on the second claimant's daily life is more than minor or trivial and is therefore substantial.

157. The second claimant described the activities that were affected by his mental impairment. When the adverse effect on the different activities is considered together, the cumulative effect is substantial in relation to his mental health condition.

158. The second claimant described having to remove himself from the situation so that he can calm himself and complete his breathing techniques. This impacts on the time taken to carry out an activity but also impacts on the way in which an activity is carried out. If it has to be done with other people, account has to be taken of the fact that the second claimant avoids doing things which may lead to an embarrassment, in this case, attempting further face to face training on a group basis.

159. The second claimant gave an account that his coping strategy of taking himself to a place where he is alone and practising his breathing techniques would not work if he had to stay in a public place. This has to be taken into account when considering the definition of substantial adverse effect.

160. I have concluded that the effect on the second claimant's ability to carry out normal day-to-day activities based on his anxiety was substantial. The second claimant has sought treatment through counselling, and I therefore considered the effect of such treatment. Without the treatment of counselling, the claimant's ability to carry out normal day-to-day activities due to anxiety would have been more substantial.

Long-term

161. The remaining part of the section 6 definition is that the substantial adverse effect must also be 'long-term'. It is the effect which must be long-term, not the impairment or its symptoms.

162. I need to consider whether the substantial adverse effect had lasted at least 12 months at the time of the alleged discriminatory act (*Tesco Stores v Tennant*). As explained in the 'material time' section above, I have considered the period from March 2020 to February 2022, which was the longer period suggested by the second claimant, although I have not made any findings about whether or when alleged discriminatory acts happened.

163. For the second claimant to have been disabled at the time of events which occurred in October 2021, I need to consider whether this substantial adverse effect lasted from October 2020 to October 2021. For events which occurred in February 2022, I need to consider whether the substantial adverse effect lasted from February 2021 to February 2022. The whole period I need to consider is therefore October 2020 to February 2022.

164. I have found that there were times when the second claimant's symptoms of anxiety were worse than other times. Given the considerable history of anxiety and low mood and the fact that the claimant was seen and referred for treatment as far back as 2005, along with the fact that he was seeing his "friend" Mr Alan Levi, in a professional capacity for alternative anxiety therapies since August 2020 and, in July 2021, the second claimant had already referred himself for a well-being counselling service, I have concluded that during any times between October 2020 to February 2022 when the effects arising from anxiety reduced or ceased, substantial adverse effects were likely to recur in the sense that this could well happen.

165. Therefore, the substantial effects of the claimant's anxiety are treated as continuing throughout the period October 2020 to February 2022. This means that from October 2020 to February 2022, the substantial adverse effect of anxiety on the claimant had lasted at least 12 months and were therefore long term.

166. In summary, I have concluded that:

166.1. the second claimant has a mental impairment, namely anxiety.

166.2. anxiety adversely affects the second claimant's ability to carry out six normal day-to-day activities.

166.3. the adverse effect is substantial (for each activity and overall).

166.4. the substantial adverse effects were long term in October 2020 to February 2022 as they began before October 2020 and were continuing in February 2022 or are treated as continuing during this period because they were likely to recur.

167. For these reasons, I conclude that the second claimant was disabled for the purpose of section 6 of the Equality Act 2010 by virtue of anxiety during the period October 2020 to February 2022. The complaint of disability discrimination can therefore proceed.

168. If so, did the respondents know, or ought they to have known, that the second claimant was disabled at the relevant time?

169. With respect to this question, the second claimant notified the first respondent on 13th October 2021 of his anxiety (in this case, exhibited by a panic attack). The first respondent could not have known prior to 13th October 2021 of the second claimant's disability. On that date, the first respondent, via Ms Perry, was notified that the second claimant had experienced a panic attack and that his anxiety caused him to leave the group training session. On that date, they were further informed that he had experienced such feelings for a period of 18 months, albeit that his condition was fluctuating, as he expressly stated that he had not experienced similar symptoms between the commencement of his employment and 13th October 2021. (I have dealt with fluctuating conditions above.) Following the e-mail on 13th October 2021, the first respondent ought to have known that the second claimant was disabled.

Amendment application of the first claimant

170. Whether the first claimant should be permitted to amend her claim to include direct sex discrimination?

171. I have concluded that the facts relied on by the first claimant are known to the second respondent and that it is a mere minor relabelling of the claim to refer to this as direct sex discrimination. The first claimant is not a legally qualified individual, but she set out the facts of her complaints and these are known to the second respondent. The claim form in this case did not need to include detailed information of the specific legal labels the first claimant was attaching to her complaint. The facts of her complaint were clear to the second respondent from all of the facts contained in the claim form.

172. I am required to balance the injustice and hardship to the Parties, including any time limit issues. The law being set out above.

173. In doing so, I concluded that the hardship to the first claimant of not being permitted to pursue a direct sex discrimination claim outweighs the injustice to the second respondent.

174. The time limit issue is in dispute between the Parties and that issue may be dealt with by the full tribunal panel at the final hearing. These are the same time limit issues on the facts available to the parties and will be governed by section 123 of the Equality Act 2010. As I have concluded that this is a mere minor relabelling of the claim, the time limit issue is not deemed to be of significant importance. Relying on the legal principles stated above, I will not determine the time limit issue because the factual issues were raised on the original claim form and are intrinsically tied to the other time limit issues. Therefore, the full tribunal panel at the final hearing will determine those issues.

175. The first claimant is permitted to amend her claim to include direct sex discrimination.

First claimant's sexual harassment claim

176. Whether in relation to the first claimant's sexual harassment claim, it is third party harassment and therefore not actionable.

177. The second respondent, an individual, states that they did not employ those responsible for making the comments to the first claimant.

178. I do not find that this is an action whereby I am permitted to look behind the corporate veil. The second respondent has chosen to use a corporate entity to employ butchers at Smith and Clay Limited. She employed the first claimant on an individual basis.
179. The claimant did not choose to add Smith and Clay as a respondent in this case.
180. In such circumstances, the two separate employments cannot be merged. I have already found that the claimant was employed by the second respondent only. The first claimant has not claimed she was employed by Smith and Clay Limited. I have concluded that the two butchers are employed by Smith and Clay Limited.
181. Applying the law above, the second respondent cannot be held liable for harassment by third parties, in this case, the employees of Smith and Clay Limited.
182. Therefore, the claim of sexual harassment by the first claimant is struck out under Employment Tribunal Rule 37(1)(a) because it has no reasonable prospect of success.
183. The claim is dismissed.
184. Is the act of harassment on 18 December 2021 out of time having been made after the limitation period expired? Due to my conclusions above, I do not need to consider this time limit issue further.

Victimisation claim of the second claimant

185. In relation to the victimisation claim, whether or not this has reasonable prospects of success given the protected act relied upon by the second claimant is the first claimant's allegations of sexual harassment.
186. The provisions of the Equality Act 2010 are widely drawn with regard to victimisation. I concluded that the second claimant was relying on an associated victimisation claim. There is a clear association between the first claimant and the second claimant and it is the protected characteristic of the alleged victimised first claimant that is relied upon. Therefore, with regard to the victimisation cases referred to in the law section above, the scope of protection available to the second claimant applies even if they have not carried out the alleged protected act themselves. On this basis, I concluded that the second claimant's victimisation claim could proceed.
187. The scope of the victimisation provisions permit the second claimant to pursue a victimisation claim against the first respondent even though the alleged protected act relied on is an alleged protected act by the first claimant in relation to her own employer, the second respondent, and not the second claimant's own employer, the first respondent.
188. I have therefore concluded that the second claimant is entitled to pursue a complaint of victimisation under the Equality Act 2010. There are reasonable prospects of success and therefore it is not appropriate to strike out this claim. The strike out application under Tribunal Rule 37(1)(a) is dismissed.

Next steps

189. A second Case Management Preliminary Hearing will be listed (as above) to determine the case management orders for the remaining claims. The notice of hearing will be sent separately.

District Tribunal Judge Shields

Date: 19 December 2023

Judgment and Reasons

Sent to the parties on: 21 December 2023

For the Tribunal Office

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