



EMPLOYMENT TRIBUNALS

Claimants

Rebecca Chan
Jennifer Chan

v

Respondent

Rapid Personnel Limited (1)
William Abbey (2)

Heard at: Reading Employment Tribunal
Before: Employment Judge Anderson

On: 27 and 28 November 2023

Appearances

For the Claimant: D Hallstrom (legal officer)

For the Respondent: SJ Wood (solicitor)

JUDGMENT

1. The claim against the second respondent has no reasonable prospects of success and is struck out.
2. The claims against the first respondent are not struck out.

REASONS

Background

1. The claimants were employed by the first respondent, an agency providing staff to factories, as factory workers. The claimants bring a claim of sex discrimination and sexual orientation discrimination against the respondents. The second respondent was, until January 2023 an employee of the first respondent and was named in the claimant's claim form as the perpetrator of harassment against them during the period 20 July 2022 and 23 August 2022. It is the claimants' case that the perpetrator told them his name was William Abbey. During disclosure, when a photograph of William Abbey was disclosed, it came to light that the William Abbey employed by the first respondent until January 2023 was not the perpetrator of the harassment.
2. The first respondent filed a response on behalf of both respondents. In April 2023, William Abbey having left its employment, the first respondent amended its response to rely on the statutory defence ('the reasonable

steps defence') at s109(4) of the Equality Act 2010. William Abbey has played no part in these proceedings since the statutory defence was raised.

3. On 24 October 2023 the first respondent applied for a strike out of the claimants' claim against both respondents on the ground that the claim has no reasonable prospects of success where the perpetrator of alleged harassment cannot be identified by the claimants at all, or as an employee of the first respondent. The claimants oppose the strike out application.

The Hearing

4. The final merits hearing of the claim was listed for four days commencing 27 November 2023. The parties requested that the first day of the hearing be converted to a preliminary hearing to consider the strike out application and other matters. That request was granted. The strike out was heard over two days, 27 and 28 November 2023 and the final merits hearing was postponed.
5. As the final hearing had been due to commence on 27 November 2023 the parties had prepared a final hearing bundle and witness statements, all of which were before me when hearing the strike out application. The bundle included a copy of the strike out application and the claimants' written response to that application dated 9 November 2023. In addition, Mr Hallstrom filed written submissions opposing the strike out application on behalf of the claimants, for the purpose of the hearing. At the hearing Adam Stratton, director of the first respondent, attended and gave evidence on oath. Both parties made submissions.
6. The strike out application was in respect of both respondents and covered the entire claim of discrimination which had been brought under the heads of harassment, victimisation and direct discrimination. I considered the strike out application against the second respondent in its entirety, and against the first respondent in relation to direct discrimination and victimisation on the first day of the hearing. The claimants were then given an opportunity to apply to amend the remaining claims, which they did. I allowed that amendment and then went on to make a decision on the strike out application of the claim against the first respondent in relation to the harassment claim.

Law

7.

S 109 Equality Act 2010 (EqA) Liability of employers and principals

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

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

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b)from doing anything of that description.

...

The Employment Tribunals (Constitution and Rules of Procedure)
Regulations 2013

Striking out

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a)that it is scandalous or vexatious or has no reasonable prospect of success;

(b)that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c)for non-compliance with any of these Rules or with an order of the Tribunal;

(d)that it has not been actively pursued;

(e)that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

...

Relevant Findings of Fact

8. The claimants were employed by the first respondent from 20 July 2022 (first respondent) and 22 July 2022 (second respondent). The last days that they worked for the first respondent were 17 and 19 August 2022 respectively.
9. William Abbey (named as the second respondent) was employed by the first respondent during the period 20 July 2022 to 19 August 2022.
10. The William Abbey employed by first respondent during the relevant time is not the person whom the claimants allege harassed them on bus journeys to and from the factory at which they were working. This was agreed by both parties.

Submissions

11. The first respondent's case, as set out in its application of 24 October 2023, is that the claim against William Abbey should be struck out where it is agreed that he was not the harasser and that as all of the claims flow from his alleged acts, all should be struck out. Furthermore, its view is that early conciliation was not correctly complied with as the second respondent was incorrectly identified. At the hearing Ms Wood, for the first respondent, said that the claimants had not discharged the burden on them to prove a prima facie case that the harasser was employed by the first respondent. Ms Wood relied on the case of *Barclays Bank plc v Various Claimants 2020*

UKSC 13, which, she said, concerned employment status. Specifically in reference to the harassment claim she said that there was ample evidence in the bundle that the tribunal could look at and from which it could conclude that the alleged harasser, whom the claimants had now named as Nimoh Johnson Baffour, was not employed by the first respondent.

12. The claimants' case, as set out by Mr Hallstrom on 9 November 2023 and in written submissions today is that for the purposes of s109 EqA the claimants need only show that on the balance of probabilities the harasser was an employee of the first respondent, and that the decision on whether they were able to show that, was one to be made by a tribunal at a full hearing with all evidence before it, and not by a tribunal conducting a mini-trial at a preliminary hearing. Mr Hallstrom did not make any specific submission about why the claim against the second respondent should not be struck out.

Decision

Claim against the second respondent – William Abbey

13. Both parties agreed that William Abbey was not the person who it is alleged harassed the claimants. This is set out in the witness statement of Mr Stratton, director of the first respondent, and by Mr Hallstrom, for the claimants, in his written submissions filed prior to the commencement of the hearing. As this is accepted by the claimants, the claim against the second respondent, which was one of harassment, has no prospect of success and it is struck out.

Claim against the first respondent of direct discrimination and victimisation

14. The claims of direct discrimination and victimisation are brought against the first respondent in relation to the conduct by it of the grievance process and the actions it took, or did not take, once allegations of discrimination against the harasser had been brought to its attention. I do not accept the first respondent's argument that because the harasser was wrongly identified in the claim, that the claims against it about what happened after the harassment, must fail. These claims are about a process carried out by the first respondent. I have not considered whether the allegations have merit, as this was not a ground raised by the first respondent either in its written application, or in submission, until I asked for an explanation of the ground for striking out this particular aspect of the claim. I did not see any reason why I should investigate that of my own volition. I do not accept either, that the early conciliation rules were not complied with by the claimants in respect of the first respondent. Though Ms Wood had raised this in the written application, she did not pursue it with any vigour at the hearing. The claim against the first respondent of direct discrimination and victimisation is not struck out.

Claim against the first respondent of vicarious liability for harassment.

15. The first respondent seeks strike out of the harassment claim on the basis that the harasser was not its employee. The claimants say that the harasser was likely an employee and they can adduce evidence which would enable the tribunal to make a decision, on the balance of probabilities, that the

harasser was an employee, and the evidence on this matter should be heard fully at a final hearing.

16. In reaching my decision in this case I have had regard to the guidance set out by the EAT in *Cox v Adecco Group UK & Ireland and ors 2021 ICR 1307, EAT*, which includes the advice that where factual issues are disputed, it is highly unlikely that strike out will be appropriate. The first respondent is correct that if the harasser is not an employee then s109 does not apply and it is not responsible for the harasser's actions. However, I agree with Mr Hallstrom that where the matter of whether or not the harasser was an employee of the first respondent is in dispute, this is a matter for the tribunal to decide on hearing all of the evidence at the final hearing. There have been forays into the evidence on this matter by both sides over the last two days, which I have tried to limit, whilst I was also urged not to conduct a mini trial by Mr Hallstrom. I note that there are documents throughout the bundle on this issue, the parties discussed in front of me further documents sent to the respondent by the claimants during the course of the hearing, the matter was referred to by Mr Stratton in oral evidence and clearly before any decision could be made on the matter, oral evidence would need to be heard from the claimants.
17. In my view a proper determination of this issue is required at the final hearing, and I cannot find that the claim has no reasonable prospects of success on the limited evidence I have heard in the last two days. The strike out application is refused.
18. I have also considered whether a deposit order is warranted. Although, on the evidence I have considered, and the submissions made, I do not think the prospects of the harassment claim succeeding are high, I do not feel that I could definitively conclude that there is little reasonable prospect of success without there having been a consideration of whether the harasser was an employee and also where I have not seen the respondent's evidence on the reasonable steps defence. The deposit order application is refused.

Employment Judge Anderson

Date: 12 December 2023

Sent to the parties on: 10/1/2024

N Gotecha
For the Tribunal Office