



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms A Saffer

**Respondent:** University of Salford

**HELD AT:** Manchester (via CVP, in public) **ON:** 5<sup>th</sup> April 2024

**BEFORE:** Employment Judge Anderson

## REPRESENTATION:

**Claimant:** In Person

**Respondent:** Mr Mitchell (Solicitor)

# PRELIMINARY HEARING RESERVED JUDGMENT

1. The Claimant was entitled to rely upon EC Certificate R179149/22/81 in respect of claim number 2402559/2023.
2. Mr Heyes was not acting in the course of his employment on the 12<sup>th</sup> November 2022. The Respondent was not vicariously liable for the acts of Mr Heyes. The claim of post-employment victimisation is not well founded and is dismissed.

# REASONS

## Introduction

1. This is my Reserved Judgment following the Public Preliminary Hearing that took place on the 5<sup>th</sup> April 2024.
2. The Claimant is Ms. Saffer. The Respondent is her former employer, the University of Salford. She was previously employed by the Respondent as a Customer Service Manager within the library of the University.
3. The Claimant has submitted two claims to the Employment Tribunal. In July 2023 it was ordered that the two claims would be separated and not heard together. This Judgment relates to the second claim, Case Number 2402559/2023.
4. This second claim relates solely to events that occurred post the Claimant's period of employment with the Respondent.
5. The issues for determination before me today were as follows:
  - a. Whether the Respondent was vicariously liable for the actions of Mr. Heyes, including whether what is alleged occurred in the course of employment.
  - b. Whether the Tribunal has jurisdiction to consider the Claimant's claim based on the ACAS EC Certificate provided.

## Procedural Matters

6. The hearing took place by way of CVP.
7. It had been ordered that this hearing be listed for three hours. Due to what I assume were listing pressures, it was listed for two hours. That time was fully used and it was necessary to reserve Judgment.
8. The Claimant was unrepresented before me today. Whilst no specific application was made to me, it is fair to say, based on what I was told by the Claimant that she had lost her representative at some point in December/January and that she shouldn't be expected to deal with these points without a representative. She has been searching for a representative but has not been able to obtain one.
9. In addition, the Claimant did not produce a witness statement for today. She said that she did not realise that she needed to produce one. I was satisfied that the orders were sufficiently clear and that in any event, notwithstanding the absence of representation it was incumbent upon a party to take steps to

progress their own case. It is common for parties to be unrepresented in the Tribunal and the Claimant had been aware of this hearing for around two and a half months.

10. In accordance with the overriding objective, I sought to ensure that the parties were on an equal footing. This second claim already had a degree of delay given the date it was lodged and the previous public preliminary hearing had been postponed because the Claimant appears not to have been told about it by her then representative. That was over two and a half months ago. There was no potential representative in sight and in the circumstances, the case needed progressing.

11. Also having regard to the above factors, I gave the Claimant permission to rely upon her ET 1 as her witness statement. In the circumstances, the Respondent consented to this approach.

### **Brief Facts**

#### **ACAS Early Conciliation**

12. I did not hear any live evidence on this point. I was referred to documents where appropriate.

13. The following points were not in dispute:

- a. that the Claimant resigned on the 3<sup>rd</sup> May 2022, with an effective date of termination of 17<sup>th</sup> June 2022.
- b. ACAS Date A was the 21<sup>st</sup> June 2022 and Date B was the 2<sup>nd</sup> August 2022. This resulted in certificate number R179149/22/81.
- c. The First ET 1 was submitted on the 29<sup>th</sup> August 2022 (Case Number 2406650/2022).
- d. The Second ET 1, (Case Number 2402559/2023) was submitted on 11<sup>th</sup> February 2023.

14. The first claim is a claim of constructive unfair dismissal and disability discrimination in the form of a failure to make reasonable adjustments.

15. The second claim is a claim of post employment victimisation. The relevant events are said to have occurred on the 12<sup>th</sup> November 2022. It follows that the second claim was submitted within three months (i.e. three months less one day) of the events relied upon.

16. To crudely summarise the distinction between the claims, the first claim relates to the Claimant's employment and the fact that she was subject to an investigation. The reasonable adjustments claim relates to potential adjustments that the Claimant says the Respondent should have made to that investigatory process.

17. The second claim relates to events that occurred on the 12<sup>th</sup> November 2022 when the Claimant met with former work colleagues. The Claimant

alleges that things said to her by Mr. Heyes on that date were acts of victimisation.

18. The Respondent points to the time between the 17<sup>th</sup> June and 12<sup>th</sup> November 2022 (nearly five months) as being a key fact as to why a new EC Certificate was required.
19. The Respondent's position is that the two factual situations are unrelated. The Claimant's position is that they are all part of the same thing.
20. The Respondent also relies on the wording used by EJ Allen when he decided that the two claims would not be heard together and in particular the language of *"the claims do not appear to give rise to common issues of fact and law and, whilst the issue may be broadly related, it is not in accordance with the overriding objective for them to be heard together."*
21. It was an agreed fact that the ACAS Early conciliation certificate number used in respect of the first claim was also the same Certificate/Number used in respect of the second claim.

### **Vicarious Liability**

22. I heard live evidence on this point. I made the following findings of fact on the balance of probabilities.
23. On the 12<sup>th</sup> November 2022, the Claimant met a number of ex colleagues for drinks. It was a Saturday and was nearly five months since she had left her employment with the Respondent. The drinks had been arranged by text message and were at a location in Manchester, significantly away from University premises.
24. There was no work purpose behind the meeting and it was a social meet up. All of the individuals knew each other through their employment with the Respondent. There was a general sense that this would be some form of a leaving do and an opportunity to catch up and for people to wish the Claimant well.
25. It is accepted that Alex Heyes spoke to the Claimant at some point on that day and that he discussed the Claimant's case with her. The parties are not in agreement as to what was said.
26. The Claimant's version is that Mr. Heyes said that David Clay & Others had discussed the case with him, that the Respondent had evidence against the Claimant, that the Respondent was going to pursue costs. The Claimant was not able to elaborate with significant detail.
27. Mr. Heyes version as stated in his witness statement was that the Claimant raised her claim with him, that she discussed her case generally and that he "asked her to be careful as things may not turn out the way she expected/wanted."

28. It is fair to say that neither witness was particularly specific in their evidence. There were a number of reasons for this. There was the expiry of time, the fact that this was a social event and people were talking to (or over) each other in a social setting and the risk that individuals construe events in a way more favourable to them.
29. In his oral evidence, Mr. Heyes did to some extent go further than his witness statement. I also note that para 16 of the witness statement is not in any way a quotation or partial quotation from the conversation. My inference from this is that Mr. Heyes did express his opinion to the Claimant in more blunt terms. That is to say that he did offer advice, that he did warn the Claimant to be careful but did so in more stark and blunt terms, likely repeating himself. This would have included referencing the fact that the university would fight hard or something to that effect. He did so out of general concern for the Claimant and most likely a general cynicism of her prospects of succeeding.
30. I accept that Mr. Heyes was saying this from a perspective of one individual seeking to give another some advice. This was Mr. Heyes opinion. It was not informed by any particular knowledge.
31. Whilst I have found that Mr Heyes did go further than his witness statement and have also noted that neither party provided a particularly detailed account, I nonetheless accept Mr Heyes unequivocal evidence that no one in the Respondent or HR effectively 'put him up' to this. He repeated his denial in oral evidence and I accept that. No evidence to the contrary was put before me and the Claimant does not have direct knowledge of anything to the contrary.
32. I also find that Mr. Heyes opinion was something that the Claimant did not welcome. It was telling her something that she did not want to hear.

## **The Law**

### **ACAS Early Conciliation**

33. The Early Conciliation regime is set out in statute and has been subject to a number of cases arising from it.
34. Before instituting 'relevant proceedings relating to any matter, the prospective Claimant must provide prescribed information to ACAS about that matter' (section 18A(1) of the Employment Tribunals Act 1996). Exceptions to this are listed in s.18A(7).
35. Regulations made under this statutory provision are contained within the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014.
36. The Schedule to those Regulations sets out the procedure for 'satisfying the requirement for early conciliation.'

37. It is settled law that if the Claimant had applied to amend her first claim, it would not be necessary for her to have obtained a new ACAS Certificate. Any application to amend would still be subject to the normal position regarding amendment and the need for the permission of the Tribunal.

38. The Respondent relies upon **Science Warehouse Limited v Mills (2015) UKEAT/0224/15** which is a case relating to amendments. It relies in particular on the Tribunal's ability to refuse amendments in circumstances where "the new claim is sufficiently different or unrelated to the existing claim to require the claimant to undergo EC again before presenting that claim."

39. The Respondent further relies upon **Akhigbe v St Edwards Homes Limited (2019) UKEAT/0110/18/JOJ**. This authority bears a more detailed analysis.

40. At para 49 Kerr J provides the following example:

*"Claimants quite often bring a discrimination claim followed a little later by a victimisation claim; the latter claim founded on the protected act of bringing proceedings in the former claim. Does the victimisation claim relate to the same matter as the original discrimination claim? It is a question of fact and degree but the probable answer is yes; the "matter" is the dispute arising out of the employment relationship and the alleged discrimination and subsequent alleged victimisation."*

41. He then provides a further examples and goes on to state at para 50:

*"In both examples, it should not in principle make any difference whether the second claim is made by amending the ET 1 presented in the first claim or by presenting a second claim in a separate ET 1."*

42. Kerr J goes on to provide examples of cases that 'fall the other side of the line'. He identifies cases where the connection between the first and second claims is merely that the parties happen to be the same e.g. a whistleblowing claim followed by a claim for unpaid wages.

43. Kerr J (para 53) considered the true principle to be that identified by Simler P (as she then was) in **Compass Group UK & Ireland Limited v Morgan [2017] ICR 73** at para 23

*"... it will be a question of fact and degree in every case where there is a challenge ... to be determined by the good common sense of tribunals whether proceedings instituted by an individual are proceedings relating to any matter in respect of which the individual has provided the requisite information to Acas...."*

### **Vicarious Liability**

44. At the outset, I begin by noting that the Tribunal is concerned with the concept of vicarious liability under the Equality Act 2010. That is to say, this is a

statutory tort and not a question of common law vicarious liability. The relevant legislation is as follows:

**Section 109 Equality Act 2010 - 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.
- (5) This section does not apply to offences under this Act (other than offences under Part 12 (disabled persons: transport)).

45. In terms of case law, the starting point is **Jones v Tower Boot Co Limited [1997] IRLR 168** which provides that 'in the course of employment' is to be given its ordinary, every day meaning.

46. The EHRC Code of Practice on Employment (2011) refers to 'in the course of employment' as having a wide meaning. It can extend to work-related social functions.

47. The Respondent relies upon **Chief Constable of Lincolnshire v Stubbs [1999] IRLR 81** and draws my attention to the following factors:

- a. Whether the incident took place on the employer's premises.
- b. Whether the victim and/or discriminator were on duty.
- c. Whether the gathering included employees' partners, customers or unrelated third parties.
- d. Whether the event took place immediately after work.

48. In **Sidhu v Aerospace Composite Technology Limited [2000] EWCA Civ 183** factors indicating that there may be liability were outweighed by other factors including the location of the social event, the fact it was outside hours and the fact that many who participated were friends and family rather than employees. The common thread throughout this and other decisions is that when it comes to 'social gatherings' cases, the Tribunal must weigh up all of the factors rather than treat one factor as conclusive.

### **Conclusion – ACAS Early Conciliation**

49. The position of the Claimant was that she was previously represented and at no point was it raised that a second certificate was required. She sought to rely on the certificate in respect of the second claim. No wider submission was made.
50. The position of the Respondent was addressed in its skeleton argument supplemented by oral submissions.
51. The position with regard to amendments as elucidated in **Science Warehouse** (above) is relevant but only takes us so far in that it restates a trite position in law. It identifies a factor that may well lead (looking at matters in the round) to an application to amend being refused.
52. I agree that distinctions can be drawn between the two ET 1's. The first claim of constructive dismissal and disability discrimination in the form of a failure to make reasonable adjustments is distinct from a set of facts about a set of facts nearly five months post-employment that are said to amount to victimisation. I accept that there can be said to be a distinction between a reasonable adjustments claim and a victimisation claim. I do not regard that distinction as conclusive.
53. In my view this case falls within the first example provided by Kerr J in **Akhigbe**. This is a claim of victimisation founded on the protected act of bringing proceedings in the former claim, that former claim being a claim of discrimination.
54. I am also clear that this case falls outside the examples given by Kerr J as being on the other side of the line. It is not a coincidence that the parties are the same. The two claims are not unrelated.
55. Given that Kerr J uses phrases such as 'probable' and identifies the point as one of 'fact and degree' the mere fact that this case falls within the example is not the complete answer to the point, I must still form a view on the point.
56. In my view, as a question of fact and degree, the claims relate to the same matter.
57. The second claim relies upon the protected act of the first claim. There is a period of time between the last event of the first claim and the event of the second claim and that period goes beyond minor, but it isn't sufficient for me to conclude that this is a separate 'matter'. Whilst Kerr J's example doesn't provide a mandatory obligation to apply his example, weighing all matters up, I cannot find sufficient reason to depart from it.
58. I therefore find that the Claimant was entitled to rely on the Early Conciliation Certificate in respect of the second claim.



### **Conclusion – Vicarious Liability**

59. In submissions, I raised with both parties how the case was being put. Putting the Claimant's case at its highest, was she alleging that the actions of Mr. Heyes were at the direction of the Respondent and/or its HR department? If the case was put this high, it could be said that the case against the Respondent is that a directing mind deliberately caused Mr. Heyes to make remarks to the Claimant. The Claimant confirmed that this was not the allegation. Rather, her case was that Mr. Heyes was somehow aware of the at least some information regarding her case and had chosen to make the remarks himself. Given how high the case was pleaded (e.g. paras 5 & 6 of the Particulars of Claim), I double checked this point with the Claimant and she confirmed that this was her position.
60. In any event, disclosure has taken place for the purposes of this hearing. I checked with the Respondent that they had discharged their civil disclosure obligations with regard to the vicarious liability point and I was told that they had. There was simply no evidential basis beyond assertion for the suggestion with reference to Mr. Heyes that 'He was passing on a message' or "that the Respondent asked Mr. Heyes to warn the Claimant in an attempt to force her to withdraw."
61. Having noted the above, I also note that the result is that the core facts for the purposes of addressing the vicarious liability question are largely undisputed. Once the issue of a directing mind within HR is not pursued, the core facts are there. I have resolved the dispute of fact in terms of competing versions of events as to what was said above, but it is the undisputed facts which lead to the conclusion in respect of vicarious liability.
62. I turn now to the nature of the event on the 12<sup>th</sup> November 2022. The Claimant was no longer employed and this was nearly five months post-employment. This meet up was arranged by the Claimant and not the Respondent. It was not on the Respondent's premises. It was outside the work hours of those who remained employed by the Respondent. However, the Claimant did invite the individuals because they were former work colleagues of hers.
63. Tying these points in, it is only the factors of the identity of the people present and the purpose of the social gathering being tangentially work related which are in favour of establishing vicarious liability. All of the other factors which I have identified are indicative of vicarious liability not being established.
64. In light of this, it is clear that in attending social drinks with the Claimant and providing his opinion on her case, Mr. Heyes was not acting in the course of his employment.
65. I therefore find that the Respondent was not vicariously liable for the actions of Mr. Heyes on the basis that what occurred was not in the course of

employment. It follows that the Claimant's claim of victimisation in claim number 2402559/2023 is not well founded and is dismissed.

66. Dismissal is appropriate because the whole claim rested upon the application of vicarious liability. No other Respondent was named.

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Employment Judge Anderson

22 April 2024

JUDGMENT SENT TO THE PARTIES ON  
26 April 2024

FOR THE TRIBUNAL OFFICE