



EMPLOYMENT TRIBUNALS

Claimant: Mr L Odain

Respondent: (1) The Secretary of State for Justice
(2) Mr Shing-Lung Chau

PRELIMINARY HEARING

Heard at: Reading **On: 17 October 2022**

Before: Employment Judge Gumbiti-Zimuto

Appearances

For the Claimant: Mr D Stephenson, counsel

For the Respondent: Mr A Line, counsel for the first respondent
Mr Shing-Lung Chau, in person

APPLICATIONS TO AMEND CLAIM AND TO DETERMINE PRELIMINARY ISSUE CASE MANAGEMENT SUMMARY AND ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure 2013

Rulings on preliminary hearing

- (1) It is properly arguable that the second respondent is an agent for the first respondent within the meaning of section 109(2) Equality Act 2010.
- (2) The claimant has permission to amend the grouclaim to include the matters set out in the further information of the claimant's claims.
- (3) The second respondent's correct name is Shing-Lung Chau and is known as Bobby Chau.

Final hearing

- (4) The final hearing will take place at Reading Employment Tribunal, 30/31 Friar Street, Reading, RG1 1DX on **15 April 2024**. The case will be heard by an Employment Judge and two non-legal members. The hearing will start at 10.00 am. You must arrive by 9.30 am. The hearing is listed for **7** days

- (5) Sometimes hearings start late, are moved to a different address or are cancelled at short notice. You will be told if this happens.

Amended response

- (6) The respondent has permission, if so advised, to file an amended response to the claim as it is now understood by **12 December 2022**.

Schedule of loss

- (7) The claimant must by **12 December 2022** send to the respondent and the Tribunal a document setting out how much compensation for lost earnings or other losses he is claiming and how the amount has been calculated. This is called a Schedule of Loss.

Documents

- (8) By **6 February 2023** the claimant and the respondent must send each other a list and copies of all documents they have relevant to the issues in the case. This includes documents relevant to financial losses and injury to feelings.
- (9) Documents includes recordings, emails, text messages, social media and other electronic information. You must list all relevant documents you have in your possession or control even if they do not support your case.

List of issues

- (10)The parties are to agree a list of issues and send a copy of the agreed list to the employment tribunal by **6 February 2023**.

Further case management orders

- (11)The parties are to endeavour to agree directions on the preparation of the trial bundle and exchange of witness statements by **1 June 2023**. If the parties cannot agree the claimant must write to the employment tribunal and request a telephone hearing for further case management.

REASONS

Is the second respondent an agent of the first respondent?

- (12)The claimant commenced work with the National Probation Service in Reading as Probation officer on 12 February 2018 until he resigned on 4 December 2019.
- (13)The first respondent contracted with Red Snapper to supply contractors, Red Snapper contracted with Eden Outsourcing Limited who employed the claimant to perform assignments for the first respondent.

- (14)The second respondent was employed by Ixion. Ixion had a contract with the first respondent under which Ixion provide employment and training advice to offenders situated in the Reading Probationary Office. The second respondent was employed by Ixion to provide this service.
- (15)The second respondent's duties are set out in the Ixion Group Job description for Community Case Manager (p 214).
- (16)A contractual agreement existed between the first respondent and Ixion. A contract of employment exists between Ixion and the second respondent.
- (17)The claimant contends that during the course of his engagement with the first respondent, the second respondent subjected him to several derogatory race specific comments which had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.
- (18)Section 109(2) Equality Act 2010 (EQA) provides that "anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal". Section 109(3) EQA provides that "it does not matter whether that thing is done with the employer's or principal's knowledge or approval."
- (19)The parties have referred me to the cases of MOD v Kemeh [2014] EWCA Civ 91, [2014] ICR 625 and Unite the Union v Nailard [2018] EWCA Civ 1203, [2018] IRLR 730.
- (20)The approach to establishing agency under section 109(2) is guided by the common law approach to the concept. The principal will only be liable if the agent discriminates in the course of carrying out the functions that he was properly authorised to do. There needs to be "cogent evidence to show that the duties which an employee was obliged to do as employee of A were also being performed as an agent of B."
- (21)Bowstead and Reynolds at 1-001 states:"(1) Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his legal relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party. (2) In respect of the acts to which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties. (3) Where such authority results from a manifestation of assent that the agent should represent or act for the principal expressly or impliedly made by the principal to the agent personally, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority. (4) A person may have the same fiduciary relationship with a principal where that person acts on behalf of that principal but has no authority to affect the principal's relations with third parties. Because of the fiduciary relationship such a person may also be called an agent."

(22)HHJ Auerbach in Hoppe v Revenue and Customs & Others [2021] UKEAT 2020 “It is not essential, to establish a common law agency, that the putative agent have the power to affect the putative principal’s relationships with third parties. However, neither is it sufficient, if it be the case, that the putative agent is providing services to the putative principal under a contract with it. The putative principal must, in fact, be the source of the authority under which the putative agent acts.”

The claimant’s submissions

(23)The claimant contends that the first respondent has a statutory core function pursuant to section 2(1) of the Offender Management Act 2007 (OMA) which provides that: “It is the function of the Secretary of State to ensure that sufficient provision is made through out England and Wales- (a) for the probation purposes; (b) for enabling functions conferred by any enactment (whenever passed or made) on providers of probation services, or on officers of a provider of probation services, to be performed and (c) for the performance of any function of the Secretary of State under any enactment (whenever passed or made) which is expressed to be a function to which this paragraph applies: and any provision which the Secretary of State considers should be made for a purpose mentioned above is referred to in this part as “probation provision”.” The Secretary of State in the exercise of his functions under subsection 1 and 2, must have regard to aims mentioned in subsection 4, including “the reduction of re-offending” and “the rehabilitation of offenders”.

(24)To discharge his function in relation to any probation provision the Secretary of State may make contractual or other arrangements with any other person for the making of probation provision. The claimant states that the “contractual or other arrangements” require or authorise Ixion and their employees, such as the second respondent, to co-operate with other providers of probation services such as the claimant and members of the first respondent’s staff. The contractual arrangements which the first respondent makes with service providers concern the core functions which remain the responsibility of the claimant.

(25)The contractual arrangements authorise Ixion and the second respondent to carry out his role exercising authority conferred by the contractual arrangements invoked under section 3 of OMA. Pursuant to the contractual arrangements the first respondent authorised the second respondent to carry out statutory functions.

(26)The claimant states that in order for the second respondent to be able to do his job he acted at all material times with authority conferred by the first respondent.

The respondent’s submissions

(27)The respondent contends that the approach to establish agency under section 109(2) is guided by the common law approach to establish agency. The claimant was not an employee of the first respondent, he was employed by Ixion. It is denied that any relevant level of control was exerted by the first respondent over the second respondent. The second respondent was referred work by NPS, but he then enjoyed relative autonomy as to the work he accepted and how he carried out his work with offenders. The work he did was not necessary HMPPS function. Mr

Ennis confirms that he did not have managerial responsibility for the second respondent.

- (28) The contractual agreement between the first respondent and Ixion is clear that there is no relationship of agency between those parties, which is inclusive of Ixion's personnel (including the second respondent). It is also notable that the agreement expressly provides that Ixion will be responsible for the actions of its personnel under the EA 2010. The express intention of those arrangements, therefore, was to not create a relationship of agency between the first and second respondents and/or Ixion.
- (29) The second respondent was working for Ixion to deliver its contractual commitment to the first respondent. He was not carrying out work for the first respondent.
- (30) The test that will be applied to the question of whether the second respondent was an agent in those circumstances is akin to *tan* in the course of employment test. This is not satisfied the second respondent was therefore not an agent for the first respondent.

Conclusions on agency point

- (31) I am satisfied that the second respondent is capable of being an agent of the first respondent within the meaning of section 109(2) EQA which in my view is the critical issue has not been resolved by this preliminary hearing.
- (32) There is an area of dispute between the parties in respect of one specific area which in my view needs to be determined to decide whether the work of the second respondent was done as an agent for the first respondent. The claimant says that there is an agency relationship because first respondent has a statutory core function pursuant to section 2(1) OMA and the contractual arrangements in which the first respondent makes with service providers concern the core functions. The first respondent says that the work of Ixion was not a necessary HMPPS function.
- (33) The first respondent works with a number of agencies and organisations, such as Ixion, commissioned by the first respondent to provide employment training and education to offenders. In my view if the contractual arrangement between the first respondent and Ixion is in respect of the first respondent's statutory core function requiring Ixion to carry out such core functions, then they do so as an agent for the first respondent.
- (34) The second respondent was employed by Ixion. The work that the first respondent did was done in carrying out that which the first respondent had contracted with Ixion to provide. If this work was carrying out the statutory function of the first respondent identified in the OMA then in my view the second respondent in carrying out his work did so as an agent for the first respondent. The first respondent in contracting with Ixion expressly manifests assent that the Ixion should act on its behalf in respect of the education and training of offenders, and Ixion assents so to act. The first respondent is the principal and Ixion is the agent. The actions of the second respondent are done for and on behalf of Ixion. The

claimant as an employee of Ixion is in carrying out the duties of his employment an agent for the first respondent.

- (35) There appears to me to be an issue that is not resolved which is whether the contract between Ixion and the first respondent covers the performance of statutory core functions of the first respondent.

Application to amend the claim

The respondent's position

- (36) The respondent contends that paragraphs 14-19 of the "further information of the claimant's claims" introduce claims of direct discrimination and harassment in relation to the alleged conduct of the first respondent's employees.
- (37) The respondent refers to Selkent Bus Company Limited -v- Moore [1996] IRLR 661. The Tribunal must take into account all circumstances and balance the injustice and hardship of allowing the amendment against that which would apply if the amendment was refused.
- (38) The respondent says that the claimant has in the further information expanded the claim beyond the original pleadings and so an application to amend the claim is required.
- (39) By an order made at the hearing on 11 May 2021 the claimant was to provide clarification of claims set out in the grounds of claim at paragraphs 5, 6, 8, 9, 10 and 11. The respondent says that the allegations are in effect new claims of direct discrimination and harassment.
- (40) The respondent says that the further information expands the nature of the claim in that it is no longer limited to the actions of the second respondent but brings into question the actions of four additional individuals.
- (41) The claimant's application has been made late in the proceedings the relevant events occurred in late 2019.

The claimant's position

- (42) The claimant contends that paragraphs 14-19 merely particularise his existing complaints.
- (43) Alternatively the claimant says the tribunal should exercise its discretion in accordance with the principles set out in the Selkent Bus Company Limited v Moore case and allow the amendment. The claimant also refers to the case of Vaughn -v- Modality Partnership UKEAT/0147/20.
- (44) The claimant says the amendment is merely a relabelling of the requisite statutory gateways to the allegations identified in the claimant's grounds of complaint.

- (45) In respect of the suggestion that the claimant makes his application very late the claimant asks that I take into account the fact that the claimant was a litigant in person and received pro-bono representation at the hearing on 11 May 2021. Additionally, there are many months before the final hearing is to take place.
- (46) The claimant contends that there is greater prejudice to the claimant in refusing him permission to amend the claim in contrast to the respondent who suffers little or no prejudice.

Conclusions

- (47) I am of the view that properly considered the claimant's further information provides a combination of what amounts to particularisation of existing claims and also in parts expands the nature of the claims introducing new complaints arising out of the same basic factual background.
- (48) In paragraph 15a there is in my view no expansion of the claim. Paragraph 15a provides particulars of matters that appear in the grounds of complaint.
- (49) In paragraph 15b the claimant is making a complaint that expands the claim. The grounds of complaint do not make a claim that involves an allegation of failure to investigate. The claimant refers to the investigation but does not articulate a complaint as set out in 15b.
- (50) I am satisfied it is in the interests of justice to allow the claimant to amend the claim to include the matters in 15b. While there is no complaint in the claim form as articulated in 15b the claimant makes a clear reference to the investigation carried out by the respondent. It is not clear whether the claimant complains about these matters as specific complaints of discrimination/harassment.
- (51) 15c concerns an alleged failure to acknowledge the claimant's complaint as a complaint of race discrimination. In the grounds of complaint the claimant does make reference in paragraph 21 to the first respondent failing to properly acknowledge the racism of the second respondent.
- (52) I am of the view there is no prejudice to the respondent in allowing the amendment to the claim. There is in my view no reason why the scope of the matters addressed by the parties matters should be significantly expanded. No new area of enquiry is involved.
- (53) 15d set out matters that are not referred to as a complaint in the grounds of complaint. The claimant has not set out the failure to exclude the claimant as a complaint of discrimination. The claimant refers to the return of respondent as a reason for his resignation.
- (54) While the complaint as set out in 15d was not made clear in the grounds of complaint, the factual basis of such a claim is set out. In my view there is no significantly different factual enquiry that the respondent will have to make to defend the case. Allowing the amendment causes no prejudice to the respondent.

- (55) In paragraph 17 the claimant makes a new claim of direct race discrimination however this is attaching a different label, a new cause of action, to the same facts which give rise to the complaint of harassment. I am satisfied this presents no significant prejudice by allowing the amendment.
- (56) In paragraphs 18 and 19 the claimant does not make any new complaints.
- (57) I am of the view that to the extent that there are new claims the balance of prejudice lies in such a way that the amendments should be allowed. The respondent does not suffer any significant prejudice because the factual context of this case is not significantly altered by the further information provided by the claimant. The claimant would suffer greater prejudice in losing the ability to articulate what are in the main all matters arising out of the same factual matrix that the tribunal will in any event be considering.



Employment Judge Gumbiti-Zimuto

Dated: 25 October 2022

Sent to the parties on:

13 November 2022

For the Tribunal:

GDJ