



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: S/4100786/2017**

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**Held in Glasgow on 8 and 9 October 2018**

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**Employment Judge: Lucy Wiseman  
Members: Ian MacFarlane  
Andrew Ross**

**Pink Lotus Ltd**

**Claimant  
Represented by:  
Ms Docherty**

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**Parity Professionals Ltd**

**Respondent  
Represented by:  
Mr E Smith -  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

25 The Employment Tribunal decided:

- (a) that under section 120 Equality Act, the Tribunal does not have jurisdiction to determine the claimant's complaint of discrimination brought under section 13 Equality Act and
- (b) under section 37(1)(a) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to strike out the claim brought under section 30 112 Equality Act because it has no reasonable prospect of success.

**REASONS**

1. Ms Docherty presented a claim form (S/4100786/2017) in her name against 35 the respondent. It was subsequently clarified, and the respondent accepted,

**E.T. Z4 (WR)**

that the claimant in this case was in fact Pink Lotus Ltd. Ms Docherty set out in the claim form that Pink Lotus Ltd had entered into a contract with the respondent for the supply of consultancy services. Ms Docherty had been provided by Pink Lotus Ltd as a Consultant. Ms Docherty asserted she informed the Client (Scottish Ministers) of her pregnancy in December 2016 and, in January 2017, the respondent had terminated the contract with Pink Lotus Ltd. Ms Docherty asserted the respondent's relationship with Pink Lotus Ltd was covered by section 56(2)(d) Equality Act and that therefore the termination of the contract with Pink Lotus Ltd was contrary to section 55(2) Equality Act. Ms Docherty further asserted the respondent had aided its Client in discriminating against Pink Lotus Ltd by failing to attempt any validation of the claims made in support of the Client's request to terminate the contract, contrary to section 112 Equality Act. Ms Docherty is the sole shareholder and director of the claimant.

2. The respondent entered a response confirming the respondent had entered into a contract for services with the claimant, in terms of which the claimant agreed to supply the services of Ms Docherty to work on behalf of the claimant as a PMO Analyst assigned to the Scottish Government's Superfast Broadband team. The respondent asserted that during November and early December 2016, representatives of the Client contacted the respondent to express their dissatisfaction with Ms Docherty's performance. There were criticisms of her level of attendance, her availability and the quality of her work. On the 7 December 2016, the respondent's point of contact with the Client, contacted the respondent to advise she intended to terminate Ms Docherty's engagement and that a replacement worker would be required. The respondent was not aware at this point that Ms Docherty was pregnant. Later the same day, the Client contacted the respondent again to advise that following a meeting with Ms Docherty they had decided not to terminate the engagement.
3. The Client contacted the respondent again on the 13 January 2017 to again express dissatisfaction with Ms Docherty's performance and to notify the

respondent that they had decided to terminate the engagement. The respondent, acting in terms of the contract, emailed Ms Docherty, in her capacity as Director of the claimant, to give notice of termination of the contract between the respondent and the claimant.

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4. The respondent denied the claim and in particular raised jurisdictional issues regarding timebar and the claimant's standing to bring the claim.

### Background

5. A number of Preliminary Hearings took place in respect of this case. The first, was on 21 July 2017 (page 43). The Employment Judge noted the case was one in which the claimant, Pink Lotus Ltd, asserted (a) that it had suffered direct discrimination in terms of section 13 Equality Act by association with Ms Docherty; and contrary to the terms of section 55 of that Act and (b) that the respondent had aided a third party (namely the Scottish Ministers) in discriminating against the claimant contrary to section 112 Equality Act.

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6. The Employment Judge also noted Ms Docherty had brought a claim against the Scottish Ministers (case number 4100805/2017). The Employment Judge noted consideration would have to be given to whether the claims should be combined.

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7. The next Preliminary Hearing took place on 14 November 2017 (page 56). The Employment Judge clarified the issues to be determined by a Tribunal, and these are set out below. The Employment Judge also noted a preliminary hearing in the claim brought by Ms Docherty against the Scottish Ministers, had been fixed to determine whether a Tribunal had jurisdiction to determine the claim.

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8. The Preliminary Hearing in Ms Docherty's claim against the Scottish Ministers was heard on 29 and 30 January 2018 (page 67). The Judgment noted the claim had been brought in terms of section 41 Equality Act with Ms Docherty asserting she was a contract worker and that the respondent in that case had discriminated against her in terms of section 18 Equality Act when her

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engagement was terminated because of pregnancy. An Employment Judge decided there was no contract of employment between Ms Docherty and Pink Lotus Ltd and nor was there any contract to do the work personally. The Employment Judge decided the claimant had failed to satisfy all of the conditions of bringing a claim under section 41 of the Equality Act and concluded a tribunal did not have jurisdiction to hear the claim.

9. The issues for the Tribunal to determine in this case are:

- has the claim been presented within the required timescale;
- can this claimant bring a claim against the respondent in terms of section 55 Equality Act;
- can this claimant bring a claim against the respondent in terms of sections 18 and 112 Equality Act;
- has the respondent discriminated against the claimant in terms of sections 13, 18 and 55 Equality Act;
- to the extent the claimant has suffered unlawful discrimination, has the respondent knowingly helped another party commit that unlawful discrimination, in terms of section 112 Equality Act and
- what loss has the claimant suffered as a result of unlawful discrimination.

10. Mr Smith, at the commencement of the Hearing, noted there were preliminary issues in respect of timebar and the right to bring a claim under sections 18, 55 and 112 Equality Act and he invited the Tribunal to determine those matters.

11. The claimant informed the Tribunal, at this point, that the claim was only in terms of sections 13 and 112 Equality Act. Mr Smith noted this was the first indication of the fact sections 18 and 55 Equality Act were not being pursued.

12. The Tribunal decided it would be appropriate to determine the issue of timebar and agreed to adjourn until the following morning to give the claimant time to prepare.
- 5 13. On the morning of Tuesday 9 October Mr Smith indicated Ms Docherty had confirmed the claim was no longer being pursued in terms of section 55 Equality Act and he submitted this raised an issue whether the claim could proceed. Mr Smith made an application for the Tribunal to hear submissions regarding this jurisdictional matter. He had, the previous evening, given Ms  
10 Docherty notice of the fact he intended to raise this matter.
14. We decided it would be appropriate to hear Mr Smith's submissions because they went to the jurisdiction of the Tribunal to hear the claim.

**Respondent's submissions**

- 15 15. Mr Smith referred to section 120 Equality Act which sets out the jurisdiction of an employment Tribunal to determine complaints of alleged discrimination. Section 120 provides that an employment Tribunal has (subject to section 121 – armed forces cases) jurisdiction to determine a complaint relating to "(1)(a) a contravention of Part 5 (work)".  
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16. Part 5 includes sections 39 – 95 and, by virtue of section 120(1)(a) an employment Tribunal has jurisdiction to hear those claims.
17. The claimant was pursuing a claim under section 55 Equality Act, which  
25 relates to employment service providers. Mr Smith submitted Part 5 of the Equality Act sets out the circumstances in which the definition of, for example, direct discrimination, may be applied. There can be no "free standing" claim of direct discrimination in terms of section 13 Equality Act.
- 30 18. Mr Smith noted the claimant had confirmed she was no longer pursuing a complaint regarding a contravention of Part 5 and, accordingly, the Tribunal had no jurisdiction to determine the section 13 Equality Act claim.

19. Mr Smith next referred to section 120(1)(b) Equality Act which provides that an employment Tribunal has jurisdiction to determine a complaint relating to “a contravention of section 112 that relates to Part 5”. Mr Smith submitted the reference to Part 5 gives the Tribunal jurisdiction to hear this aspect of the claim. However there were three reasons why this aspect of the claim had no reasonable prospect of success.
20. Mr Smith noted this was an unusual case and the claimant relied on the case of **EAD Solicitors LLP and others v Mr Abrams UKEAT/0054/15** as authority for the position that a corporate entity can be a victim of discrimination. The **EAD** case had involved a limited liability partnership. The claimant, Mr Abrams, had initially been engaged as a member of the limited liability partnership, but this had subsequently changed so that his services were provided through a service company. The respondent terminated the claimant’s contract and he brought a claim via his company alleging there had been discrimination by association.
21. Mr Smith submitted the **EAD** case had been brought under section 45 Equality Act which set out a prohibition on limited liability partnerships subjecting members to discrimination, and so there was an anchor to pursue the claim under Part 5. The claimant no longer has this because she withdrew the section 55 claim.
22. Mr Smith referred to the terms of section 112 Equality Act which provide that a person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111. He submitted the key word was “knowingly” and further submitted the respondent would have to know discrimination was a likely outcome.
23. Mr Smith referred to **Allaway v Reilly UKEAT/0054/06** and to paragraph 15 of the Judgment and the reference to the judgments given in the case of **Hallam v Avey 2000 ICR 583** and **Anyanwu v South Bank Student Union and South Bank University 2001 ICR 391**.

24. Mr Smith invited the Tribunal to have regard to the Judgment in the case brought by Ms Docherty against the Scottish Ministers (page 67). The Tribunal concluded it did not have jurisdiction to hear the claim brought by the claimant under section 41 Equality Act, because the claimant was not a contract worker. Mr Smith referred to paragraph 125 of the Judgment where the Employment Judge set out her conclusions that there was no contract of employment between Ms Docherty and Pink Lotus Ltd and no contract to do work personally.
25. Mr Smith submitted the Judgment made clear that no act of discrimination had taken place. He submitted the respondent could not, therefore, have had knowledge that discrimination was a probable or likely outcome, and on this basis the claim brought by the claimant in terms of section 112 Equality Act must fail.
26. Mr Smith also referred the Tribunal to the Code of Practice at paragraph 9.2 which deals with section 112 and the word “knowingly”. The paragraph provides that help does not have to be substantial but must be more than negligible and that the party concerned must know discrimination is a likely outcome.
27. Mr Smith invited the Tribunal to have regard to the **Hallam** and **Anyanwu** cases referred to above.
28. Mr Smith referred to the claim form (page 7) where the claimant had, in the penultimate paragraph, stated “Parity Professionals Ltd aided its Client, The Scottish Government, in discriminating against Pink Lotus Ltd by failing to attempt any validation of the claims made in support of the Client’s request to terminate the contract”.
29. The claimant had provided further information at page 24 where it was stated “by not sharing the information she [the Regional Manager] said she had, the accuracy of the spreadsheet could not be verified.”

30. Mr Smith submitted this was the full extent of the allegation made in respect of the section 112 claim, and that it was not sufficient in terms of “active assistance” to meet the standard required to succeed.

5 31. In conclusion, Mr Smith submitted the Tribunal had no jurisdiction to determine the complaint under section 13 Equality Act. He further submitted the claim under section 112 Equality Act had no prospect of success.

### **Claimant’s submissions**

10 32. Ms Docherty confirmed she understood and agreed there required to be a Part 5 anchor for the section 13 Equality Act claim. Ms Docherty submitted she had meant to withdraw section 55 in relation to the section 18 claim.

15 33. Ms Docherty submitted her claim against the Scottish Ministers was a separate claim and should remain so. The findings and conclusion in that case were not binding on this Tribunal.

20 34. Ms Docherty referred to the Framework Agreement and the fact there was a contractual obligation on the respondent’s part not to discriminate. She had raised this with the respondent and they had done nothing. The Manager had spoken to the respondent regarding how best to proceed to terminate her services.

### **Discussion and Decision**

25 35. We firstly had regard to the legal provisions referred to in the above case. Section 120 Equality Act is found within Chapter 3 of the Act which is entitled Employment Tribunals. The section provides that an employment Tribunal has jurisdiction to determine a complaint relating to “(a) a contravention of Part 5 (work); (b) a contravention of section ... 112 that relates to Part 5”.

30 36. Section 55 Equality Act sets out provisions in relation to employment service-providers. The section provides (broadly) that an employment service-provider must not discriminate against a person in terms of offering them



work, or the terms upon which work is offered, or by terminating the service or subjecting the person to any other detriment or harassment.

5 37. Section 18 Equality Act sets out provisions in relation to pregnancy and maternity discrimination and section 13 Equality Act sets out provisions in relation to direct discrimination.

10 38. We noted there was no dispute regarding the fact that prior to the commencement of this hearing, the claim brought by the claimant was in terms of sections 13, 18, 55 and 112 Equality Act.

15 39. We next turned to consider Mr Smith's submission that the Tribunal had no jurisdiction to hear the claim brought under section 13 Equality Act. We accepted the submission the jurisdiction of an employment Tribunal is as set out in section 120 Equality Act. We further accepted, and we noted Ms Docherty agreed, that, in terms of section 120 Equality Act, an employment Tribunal has jurisdiction to determine a complaint relating to a contravention of Part 5 (work).

20 40. The contravention relied upon by the claimant was (up to this hearing) a breach of section 55 Equality Act. Mr Smith invited the Tribunal to accept Ms Docherty, representing the claimant, had withdrawn part of the claim and indicated the claim was restricted to sections 13 and 112 Equality Act. Ms Docherty invited the Tribunal to accept that that was not what she had  
25 intended.

30 41. We, in considering this matter, had regard to the context in which the withdrawal occurred. We noted Mr Smith had been identifying preliminary issues for the Tribunal and indicated there was a jurisdictional issue regarding the right to bring a claim under sections 18, 55 and 112 Equality Act. The claimant, without question or prompt, volunteered that the claim was only being brought in terms of sections 13 and 112 Equality Act. Mr Smith asked the Tribunal to note that this was the first indication he had had that sections 18 and 55 Equality Act were not being pursued.

42. We, in addition to the above points, noted there was further discussion regarding whether the Tribunal should determine the issue of timebar as a preliminary matter, and the Tribunal adjourned to consider this. The claimant,  
5 at no time, indicated she may have been mistaken or asked for time to consider: she did not seek to qualify her position in any way.
43. We also had regard to the fact the claim form referred to section 55(2) Equality Act. This section of the Act was discussed during the preliminary hearings and  
10 featured on the list of issues to be determined by the Tribunal.
44. Ms Docherty also made reference to having had the benefit of legal advice regarding the claims brought.
- 15 45. We were satisfied, having had regard to the above matters, that the claimant clearly indicated she was not proceeding with a claim under sections 18 and 55 Equality Act: the claim was restricted to sections 13 and 112 Equality Act. We were further satisfied the claimant volunteered that information without being put under any pressure to do so. Ms Docherty was not confused when  
20 volunteering the information.
46. We did have regard to the fact Ms Docherty is a litigant in person and the Tribunal hearing is not a familiar environment. However, we balanced those factors by having regard to the fact Ms Docherty has attended several  
25 preliminary hearings to clarify the basis of the claim and has given evidence and made submissions in her case against The Scottish Ministers. Ms Docherty is a very able claimant/representative.
47. We concluded Ms Docherty's withdrawal of part of the claim under sections  
30 18 and 55 Equality Act was clear and unequivocal, and Mr Smith is entitled to rely on that withdrawal.
48. The effect of withdrawing the claim under section 55 Equality Act is that there is no longer an alleged contravention of Part 5 (work), as required by section  
35 120 Equality Act. There is no free standing right to pursue a claim of direct

discrimination under section 13 Equality Act: there must a contravention of Part 5 (sections 39 – 95) to which to anchor the claim.

5 49. We decided for these reasons that following the withdrawal of the claim in terms of section 55 Equality Act, this Tribunal had no jurisdiction to determine the claim of direct discrimination.

10 50. We next turned to consider the second aspect of Mr Smith’s submission which focussed on the claim brought in terms of section 112 Equality Act. Section 120 provides that an Employment Tribunal has jurisdiction to determine a complaint relating to a contravention of section 112 that relates to Part 5. Mr Smith accepted the reference “relating to” Part 5 gave the Tribunal jurisdiction to hear the claim. Mr Smith’s position was that this aspect of the claim had no reasonable prospect of success for three reasons.

15 51. Firstly, Ms Docherty, in bringing the claim, relied on the **EAD** case (above) as authority for a corporate entity being able to pursue a complaint of discrimination. We accepted Mr Smith’s submission to the effect the claim in the **EAD** case had been brought under section 45 Equality Act, and this provided the Part 5 anchor for the complaint of age discrimination. The claimant no longer had a Part 5 anchor. However, this point has already been considered above.

20 52. Secondly, Mr Smith submitted that having regard to the interpretation to be placed on the word “knowingly”, it could not be said the respondent knew discrimination was a likely or probable outcome. Section 112 provides that a person must not “knowingly help another to do anything which contravenes Part 3, 4, 5, 6 or 7 ...”.

25 53. We, in considering this submission, had regard to the authorities to which we were referred regarding the meaning to be attached to the word “knowingly”. We were referred to **Allaway v Reilly UKEAT/0054/06** a case brought under section 42 of the Sex Discrimination Act, which was the previous format of

section 112 Equality Act. We had regard to paragraph 15 of the Judgment where it was stated:

5           *“As ever, it is best to have resort to the words of the statute. Thus, if a  
fellow employee does an act in the course of his employment which has  
the effect of discriminating against the claimant employee on grounds of  
sex and that is a result which can be concluded to have been within his  
knowledge at the time he carried out the act in question, the requirements  
of the subsection are met. Discrimination does not have to be what he  
10           intended nor does it have to have been his motive. It is enough that, on  
the evidence, the conclusion can be drawn that discrimination as the  
probable outcome was within the scope of his knowledge at the time. It  
would not need to be at the forefront of his mind nor would he need to  
have specifically addressed his mind to it. It must be that it would be  
15           enough if, in all the circumstances, that it can properly be concluded that  
it was within the knowledge that was possessed by the alleged  
discriminator. Inevitably, whether or not it can be concluded that the  
alleged discriminator did an act “knowingly” is going to depend on the  
facts and circumstances of each particular case and care should be taken  
20           not to exclude from proof any case in which it is arguable that, on the  
available material, that is something that can be established ..”*

54.       The EAT in that case also had regard to the **Anyanwu** case and noted the  
central issue in that case was whether or not the university respondent had  
25           “aided” the student union respondent in expelling the claimants from  
University, and the focus of the discussion was on the issue of the  
interpretation to be given to the word “aiding”. The EAT had regard to the fact  
mention was made of the “knowingly” requirement in the speech of Lord Hope  
at paragraph 41 where it was said: “The critical words in section 33(1) are  
30           contained in the phrase “who knowingly aids another person to do an act  
made unlawful by this Act”. The state of mind that is referred to here is actual  
knowledge, in contrast to that referred to in section 33(4) which uses the  
phrase “knowingly or recklessly”. Lord Hope concluded, with regard to the

interpretation of the word “aids” that all that is needed is an act of some kind, done knowingly, which helps the other person to do the unlawful act.

55. The EAT also referred to the case of **Hallam v Avery** where the issue was whether or not the respondents had aided another person to do an unlawful act of discrimination. The EAT referred to paragraphs 9 – 11 of the Judgment where it was said that knowledge was the essential requirement and that mere provision of information would not be enough.
56. We were also referred to the Equality and Human Rights Commission Employment Code where it provides that the word “help” should be given its ordinary meaning, and that help given to someone to discriminate will be unlawful “even if it is not substantial or productive, so long as it is not negligible”.
57. We concluded, having had regard to the above guidance, that if the claimant is to be successful with this aspect of the claim, it would have to show the respondent knew discrimination was the likely or probable outcome of their actions.
58. The claimant asserted in the claim form that the respondent had aided the Client by “failing to attempt any validation of the claims made in support of the Client’s request to terminate the contract”. We accepted Mr Smith’s submission that there was no allegation of active assistance: there was no act of any kind.
59. We also accepted Mr Smith’s submission that, having regard to the Judgment of the Employment Tribunal in Ms Docherty’s case against the Scottish Ministers, this Tribunal knows, somewhat unusually, that there was no act of discrimination. Ms Docherty brought a claim against the Scottish Ministers in terms of section 41 Equality Act (being a contract worker). The Tribunal decided it had no jurisdiction to determine Ms Docherty’s complaint of discrimination because, at the relevant time, there was no contract of

employment between Ms Docherty and Pink Lotus Ltd, nor was there any contract to do the work personally.

5 60. We concluded that if there was no act of discrimination, it could not be said the respondent knowingly aided any discrimination.

61. We concluded, for the reasons set out above, that the claim brought under section 112 Equality Act had no reasonable prospect of success because there was no allegation of active assistance against the respondent and there was no act of discrimination which the respondent could have aided.  
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62. We, in summary, decided (a) the Tribunal does not have jurisdiction to determine the claim brought under section 13 Equality Act and (b) to strike out the claim brought under section 112 Equality Act because it does not have a reasonable prospect of success.  
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63. We noted the respondent intends to seek expenses, and we confirmed any such application should be made in writing.  
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25 Employment Judge: Lucy Wiseman  
Date of Judgment: 26 October 2018  
Entered in register: 1 November 2018  
and copied to parties

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