



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Khan

Respondent: Delta Academies Trust – Garforth Academy

Heard at: Leeds (in public) **On:** 23 March 2021

Before: Employment Judge Parkin

Appearances

For the claimant: Mr R Khan, Lay representative (husband)

For the respondent: Mr P Scope, Solicitor

RESERVED JUDGMENT

1 The claimant's harassment claim contrary to section 26 of the Equality Act 2010 (identified as the claim at Paragraph 13.3 in the Case Management Order made on 22 September 2020) was presented out of time and it is not just and equitable to permit it to proceed to final hearing. That claim is dismissed.

2 The claimant's harassment claim and direct discrimination claim relating to her suspension (Paragraphs 13.1 and 13.2 in the Case Management Order made on 22 September 2020) are closely associated with her eventual dismissal and she has an arguable case that they were acts extending over a period. In the alternative, it is just and equitable to allow those claims to proceed to a final hearing alongside the claimant's direct discrimination claims based upon her dismissal and her unfair dismissal claim.

3 The respondent's applications to strike out the harassment claim at Paragraph 13.1, the direct discrimination claims at Paragraphs 13.2 and 13.4 in the Case Management Order made on 22 September 2020 and the unfair dismissal claim as having no reasonable prospects of success or for a deposit as having little reasonable prospect of success are refused.

4 The respondent's application to strike out the claimant's remaining claims on the basis that they are not being actively pursued is refused.

5 The respondent's application to strike out the claimant's remaining claims on the basis that the manner in which they have been conducted has been scandalous or unreasonable is refused.

6 The claimant's application to strike out the response as having no reasonable prospects of success or for a deposit having little reasonable prospects of success is refused.

REASONS

1. This hearing followed that before Employment Judge Parkin on 11 February 2021. The hearing was originally listed to be by CVP video hearing, but was converted on the day with the full consent of both parties first to be held as an MS Teams video hearing and then as a telephone hearing (as denoted by Code A – Audio in the title above) because of the claimant's representative's difficulties in sustaining participation by sound and vision in the video hearing. Although shown in the public cause list for the day, no members of the public sought to observe or listen to the hearing.

2. Preliminary issues

The preliminary hearing was listed to determine out of time issues and applications by both parties. The respondent's applications were:

1) Under Rule 53(b) of the Employment Tribunals Rules of Procedure 2013 and applying sections 123(1)(a) and 140B of the Equality Act 2010, that the claimant's discrimination and harassment claims identified below as 13.1, 13.2 and 13.3 were presented out of time. The Tribunal had directed that it would consider whether they were part of conduct extending over a period (section 123(3)) or whether it was just and equitable to proceed to a final hearing of those claims in any event applying section 123(1)(b);

2) Under Rule 37(1)(a), that the claimant's claims be struck out as having no reasonable prospect of success or in the alternative for a deposit order to be ordered on the basis that the claims have little reasonable prospect of success (Rule 39);

3) Under Rule 37(1)(d), that the claimant's claims be struck out on the basis that the claims are not being actively pursued;

4) Under Rule 37(1)(b), that the claimant's claims be struck out on the grounds that the manner in which the proceedings had been conducted by or on behalf of the claimant has been scandalous, unreasonable and vexatious.

The claimant's applications were:

5) Under Rule 37(1)(a) to strike out the respondent's defence on the grounds that the respondent's defence has no reasonable prospect of success; and

6) Under Rule 39 for a deposit order against the respondent, as a condition of being permitted to continue to take part in the proceedings in relation to this claim and to resist the claims.

3. Documents and written representations

The respondent had provided a bundle of pleadings (Bundle 1, 1-218) and a further bundle of documentary evidence (Bundle 2, 147-238), together with a revised skeleton argument and redacted witness statement for the Principal, AY. The claimant had provided a bundle of documents including a Case Summary and new Witness Statement exhibiting many of the same documents. No oral evidence was heard. The claimant's bundle included a General Practitioner's letter dated 1 October 2020 from Dr T Courtis.

4. The factual background and brief timeline of the proceedings

These facts and dates appear to be common ground between the parties.

4.1 The respondent is co-educational secondary school and sixth form in the Leeds area. The claimant was employed as a term-time Teaching Assistant from 3 February 2016 until September 2019 and her children also attended the school. The key dates are as follows:

4.2 Alleged incident at claimant's home involving student OW: 29 April 2019.

4.3 Suspension of claimant by Principal: 2 May 2019.

4.4 Investigation meeting and alleged remark by Vice-Principal: 20 May 2019.

4.5 Disciplinary meeting: 10 September 2019 (claimant not in attendance).

4.6 Letter of dismissal: 16 September 2019, sent by post.

4.7 Claimant's letter of appeal: 14 November 2019.

4.8 Appeal hearing: 16 December 2019 (claimant not in attendance).

4.9 Appeal outcome letter: 18 December 2019.

4.10 Early Conciliation notification: 10 December 2019; EC certificate issued 13 January 2020.

4.11 ET1 claim: 11 February 2020, claiming unfair dismissal, race and religious discrimination.

4.12 Case management hearing, EJ Shepherd: 6 April 2020.

5. At the Preliminary Hearing on 22 September, EJ Maidment summarised the Tribunal's approach to the unfair dismissal claim and the claimant's criticism of the reason given and process of dismissal at paragraphs 10 to 11, and her complaints of unlawful discrimination and harassment at paragraphs 12 and 13, in particular identifying those complaints based upon the protected characteristics of the claimant's race, as a British Pakistani, and religious belief as a Muslim at 13.1 to 13.4 (with dates added):

13.1 a complaint of harassment relating to race/religion arising out of the manner of the claimant's suspension (on 2 May 2019) when she was escorted out of the building and on have been barred from then entering the school grounds;

13.2 a complaint of less favourable treatment because of race (direct discrimination) in that the student OW unlike the claimant was not suspended;

13.3 harassment related to religion in that the claimant maintains she was mocked by RE (on 20 May 2019) when she said to the claimant that it would be "Easier for you to fast now" since the claimant was home on suspension; and

13.4 a complaint of direct discrimination because of race/religion in her dismissal (which took place when the claimant received the letter of dismissal dated 16 September 2019).

6. By letter dated 17 October 2020, the Tribunal wrote to the parties:

"The claimant's email dated 6 October 2020 has been referred to Employment Judge Maidment, who comments as follows: the preliminary hearing to consider the respondent's strike-out application and, in the alternative, the ordering of the claimant to pay a deposit as a precondition to her complaints continuing, shall be re-listed as a video hearing with a time estimate of 3 hours.

The claimant's complaints of discrimination are limited to those identified by EJ Maidment on 22 September 2020 at paragraphs 13.1 to 13.4, it being understood that the claimant has provided some further information about her complaints in her submission of 6 October 2020."

7. In my earlier Case Management Order, I set out at paragraph 8:

"8. On 6 October 2010, the claimant sent 3 documents to the Tribunal with a copy to the respondent: her response to the Tribunal's orders dated 22 September 2020, her Particulars of Claim, as ordered by EJ Shepherd at the hearing on 6 April 2020, and a letter from her GP regarding her absence from the hearing on 22 September 2020. The response and particulars of claim especially from paragraphs 7 to 16 explain the claimant's case in relation to the claims of unfair and wrongful dismissal as well as those of race and religious discrimination and harassment more fully. In respect of 13.2, she included an actual comparator in respect of the less favourable treatment of suspension, her ex-colleague KB, whom she contends was not suspended despite being guilty of gross misconduct. In respect of 13.3, the claimant alleged that the comment she said was made by RE was both religious harassment and direct religious discrimination. Although the claimant has not named a comparator, actual or hypothetical, in respect of this as a direct discrimination claim (and such a claim may add nothing to the harassment claim), it seems clear that she is relying upon a hypothetical comparator, effectively saying: "I was less favourably treated because the offensive comment would not have been made to a non-Muslim Teaching Assistant". In respect of 13.4, the claimant alleges that in being dismissed she was treated less favourably again than the white student OW (although this does not appear to be a comparison with no material difference in circumstances, applying section 23(1) of the Equality Act 2010) and her white ex-colleague KB

(which may or may not be a proper comparison). It is clear from the particulars of claim at paragraphs 14 and 15 that she contends the decision to dismiss her was both direct race and religious discrimination.”

8. The parties' submissions

8.1 Both parties relied upon their written representations. Whilst acknowledging that the claim of unfair dismissal and discrimination based upon the dismissal was in time, the respondent contended that allegations 13.1, 13.2, 13.3 were all out of time by about 3 months and were not continuing acts. The four claims were discreet and the harassment claims were separate in any event from the discrimination claims. There was no express application to extend time although the claimant had been threatening legal action even since May 2019. In terms of her suspension, the claimant had changed her comparator to employee KB as an actual comparator; the student OW was plainly never an appropriate comparator, but nor was KB who had never been disciplined. The decision to suspend was by AY, whereas the alleged harassment at 13.3 was by RE, and was described by the claimant as a “one-off” action (B1,119 &195).

8.2 On the claimant's prospects of success, the respondent contended that there was an allegation of the student smoking cannabis in the claimant presence, raising a significant safeguarding concern; how could suspension and subsequent dismissal be said to be discrimination or harassment? The claimant had identified comparators who were in materially different circumstances; Her discrimination claims had no reasonable prospect of success or at least a deposit should be ordered as they had little reasonable prospect of success. The dismissal claim of race or religious discrimination was based on no more than the assertion that the disciplinary panel was all-white. The number of witnesses grew considerably, potentially 5 witnesses instead of 2, if discrimination claims were heard alongside unfair dismissal which only needed the decision-maker and appeal-taker,

8.3 The respondent did not argue that the claimant was not now pursuing her claims actively. Finally, it contended that the claimant had conducted the proceedings in a manner which was scandalous and unreasonable. The claimant had failed to provide further particulars when ordered, appealing the order unsuccessfully and making incredibly inappropriate comments about the Employment Judge. She had then provided repetitive documents including about ungrounded civil claims and then alleged bias against another Judge who was case managing and she even purported to appeal against the orders made on 11 February 2021 when EJ Parkin have done what she wanted in postponing the Preliminary Hearing. Most recently, the claimant had sought to add a claim that she was dismissed for whistleblowing. She constantly referred to “illegal, immoral and unethical acts” by the respondent and its solicitors and most recently to those solicitors “using the tribunals procedures to advance an ulterior motive” without explaining this. The claimant was therefore guilty of extremely serious scandalous and unreasonable behaviour in conducting the proceedings and they should be struck out.

8.4 Replying to the respondent's out of time contentions, the claimant contended that she had held off presenting a claim because she had not expected to be disciplined at the disciplinary hearing but to repudiate the allegations against her and be reinstated. She relied also upon the GP's medical evidence showing stress, anxiety and insomnia. The claimant contended that she had expected the claim of harassment she raised at

the outset in respect of her suspension to be properly investigated by the respondent, which had not happened.

8.5 When dealing with the merits or prospects of success of her claims, the claimant's representative was pressed by the Judge whether "whistleblowing" was asserted, that is a claim relying upon her having made protected public interest disclosures,. Her representative confirmed that no separate whistleblowing claim, such as an unfair dismissal claim for the inadmissible reason that the claimant had made protected disclosures, was being pursued; however, she did seek to refer to her disclosures to set the context and background to her unfair dismissal, since the actions of the respondent's senior management showed that they held matters against her because she had been critical of their previous appointment and reappointment processes which lacked transparency and competition.

8.6 The claimant maintained that the weakness of the respondent's investigation was shown by further statements made by OW and his mother since her dismissal to her, establishing that his first statement was made under pressure and clearly fabricated. The Teachers Regulatory Authority had exonerated her. The claimant pointed to the lack of independent investigation; she questioned the use of handwritten statements, the integrity of the statements and signatures relied upon, the handwritten additions on statements and the fact that a statement had been taken from her daughter (aged under age 16) without permission which then was not used in the disciplinary procedure. She believed the final disciplinary hearing was chaired by a colleague of the Principal AY, who made the decision on paper evidence which was simply read out and recorded, but without genuine decision-making. Far from her own claims being struck out as having no reasonable prospect of success or deposits being ordered against her, the claimant contended that the whole response to the claim should itself be struck out as it was based upon a flawed investigation and procedure by senior management, in circumstances where the profile of the staff and especially the senior management was lacking equal opportunity and BAME diversity, with only one senior Asian employee. In respect of the respondent complaining that she had made reference to the civil defamation action she sought to make, she contended that she always knew it was irrelevant for the purposes of the Tribunal claim but that the respondent's solicitor had raised the defamation claim at the first case management hearing and the Judge had then continued the discussion.

8.7 The respondent's representative explained that his instructions were that the disciplinary decision-maker was an Associate Executive Principal from within the multi-academy trust but external to the school. He referred to the claimant's Agenda document, lodged for the first case management preliminary hearing, showing the claimant had herself first raised the matter of a defamation action, a letter of claim and pre-action protocol at boxes 2.2 and 2.3.

9. The Law

9.1 The statutory provisions relating to the claims are found mainly at section 98 within part X of the Employment Rights Act 1996 for unfair dismissal. Essentially for an unfair dismissal claim where the respondent admits dismissal contending that its reason for dismissing the claimant related to her conduct, the Tribunal will consider whether the respondent proves that potentially fair reason and if so, with no burden of proof on either side, whether it acted reasonably in treating belief in misconduct as a sufficient reason

to dismiss in all the circumstances such as considering whether the respondent carried out a reasonable investigation and reasonably believed in the guilt of the claimant as a result and acted reasonably in determining upon the sanction of dismissal, with the range of reasonable responses approach likely to be appropriate.

9.2 The protected characteristics of race and religion or belief are set out at sections 9 and 10 respectively of the Equality Act 2010 with the type of unlawful act of direct discrimination provided for at section 13 and of harassment at section 26. The provisions relating to employment are at part 5, particularly at section 39, which includes that:

... “(2) An employer (A) must not discriminate an employee of A’s (B) - (c) by dismissing B; or (d) by subjecting B to any other detriment...”.

The important burden of proof provisions are at section 136(2):

“If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.”

9.3 The Tribunal applied the procedural provisions in the Employment Tribunals Rules of Procedure 2013 at rules 37, on striking out, and 39, on deposits:

“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.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above...

39.(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”)

to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.”

9.4 Rule 37 affords the Tribunal the power to order a strike-out of claims (or responses) in whole or in part in exceptional circumstances but only in the clearest of cases where there is no reasonable prospect of success, stressing the word “reasonable”, for instance where the claim is “hopeless”. It can be difficult to differentiate between no reasonable prospect and little reasonable prospect (or a “really weak” case), the threshold for considering making a deposit. Very often neither order is appropriate where there is a substantial factual dispute on many aspects which needs to be resolved following the hearing of oral evidence. Indeed, the higher courts have often cautioned first instance tribunals against determining discrimination claims on paper or incomplete oral evidence, especially where a fair hearing remains possible; the power to strike out at a preliminary hearing has often been described as “draconian”. Likewise, the terms empowering strike-out because of a party’s manner of conducting the proceedings: scandalous, unreasonable or vexatious are each strong terms denoting a high threshold; unless the conduct disapproved of has been wilful or deliberate, it will generally still be necessary to consider whether a fair hearing is possible and whether a lesser sanction than striking out will suffice. The Tribunal also had regard to its overriding objective at rule 2 of the 2013 Rules of Procedure.

10. Conclusions

10.1 Contrary to the respondent's argument, the Tribunal concluded that the claimant's claim of direct race or religious discrimination in respect of the fact of her dismissal went very much further than merely alleging she was dismissed by an all-white disciplinary panel. Although in her further particulars she had substituted a new actual comparator, the employee KB, for the inappropriate comparator she had first named (the student OW), the essence of her direct race and religious discrimination claim was that she was treated less favourably because of her race or religion i.e. she would not have been (unfairly) dismissed as she was had she not been a British Pakistani or a Muslim. Moreover, it found it impossible to separate off the starting point of the claimant's suspension and barring from the school premises by the Principal on 2 May 2019 from the eventual gross misconduct dismissal put into effect by the letter of 16 September 2019. Although a claim of unlawful act of harassment contrary to section 26, rather than direct discrimination contrary to section 13, allegation 13.1 directed against the Principal cannot sensibly be separated from 13.2 and there is an arguable case that there was an act extending over a period or "continuing act" culminating with the eventual dismissal. In the alternative, in circumstances where the claimant waited until the outcome of the disciplinary hearing, the Tribunal considered it to be just and equitable to permit allegations 13.1 and 13.2 to proceed to a full hearing alongside the unfair dismissal and direct discrimination based upon the dismissal claims.

10.2 The Tribunal took a different view in respect of the harassment claim at allegation 13.3. Whether this was an allegation of harassment only or also one of religious discrimination (as put forward in the claimant's response i.e. further particulars and particulars of claim, dated 6 October 2020), the Tribunal accepted the respondent's argument that this was genuinely an allegation of a one-off act separate from the claimant's other allegations and indeed was expressly described by her in that way at pages B119 and B195. The alleged act took place on 20 May 2019 with no further continuation and on that basis Early Conciliation should have commenced by 19 August 2019. Whilst acknowledging and accepting the claimant's medical evidence, the conditions of low mood, anxiety and depression have continued through from May 2019, with anti-depressant medication prescribed from July 2019 and sleeping pills also prescribed; the claimant nonetheless commenced Early Conciliation in December 2019 and presented her claim in February 2020 with those conditions continuing. This claim is well out of time and the claimant has therefore not established that it is just and equitable to permit it to proceed to a final hearing; it is therefore dismissed.

10.3 At the hearing, with the claimant being represented and participating, the respondent did not pursue the initial application that the claimant had not actively pursued her claims but did still contend that she or her representative had conducted the proceedings scandalously or unreasonably. The Tribunal deprecated the manner in which the claimant's representative had conducted the claim on her behalf at various stages, including as recently as the content of the Case Summary and witness statement provided on the morning of this hearing. There have been repeated suggestions by her of bias by earlier Employment Judges, of bias or deliberately poor administration by the Tribunal administration staff and of misconduct by the respondent's solicitors in circumstances where the Tribunal could only see that those solicitors had acted vigorously to defend serious claims made against their client in

emotive circumstances. Likewise, the Tribunal disapproved of the claimant's apparent deliberate non-engagement or absence from hearings when she did not like the outcome of earlier hearings or the way the way the proceedings were going. Whilst the Tribunal is not easily scandalised by parties' conduct, and thus did not find scandalous conduct, it did conclude that the claimant had conducted the proceedings unreasonably. On the other hand, when providing her particulars of claim and statement of case in October 2020 and in preparing for and in particular participating in this hearing, the claimant's representative was much more attentive and responsible in his approach even if the simultaneous multiple presentation of written documents and statements was not always helpful and some of the language and content was still over-blown. Wherever possible, the Tribunal seeks to determine claims, especially those alleging unlawful discrimination, following a full hearing involving oral evidence. In circumstances where the bulk of the claimant's claims could otherwise proceed without great difficulty or interference to a final hearing at which a fair trial remains entirely feasible, the Tribunal concluded it would be grossly disproportionate to strike out the claims under rule 37(1)(b) and indeed that no further sanction was necessary at this stage.

10.4 That leaves the respondent and the claimant's respective applications to strike out claims and the response as having no reasonable prospect of success or in the alternative to order a deposit as a condition of the respective claims or response being proceeded with. These applications can all be dealt with swiftly and summarily. Notwithstanding the vigour with which the parties made their applications, these claims involve careful determination of primary facts by the Tribunal, sensitive finding of secondary facts and drawing of inferences and, if appropriate, the application of the transfer of burden proof provision at Section 136 of the Equality Act 2010. Put shortly, the Tribunal needs to consider how the respondent treated the claimant including dismissing her and why it did so. It is wholly inappropriate to strike out either claims or response as being effectively hopeless at this stage and nor is it appropriate to order either party to pay a deposit as a condition of continuing with a claim or the response to it on the basis of little more than the respective pleaded cases and assertions of the parties.

10.5 Notice of a further case management preliminary hearing to list the final hearing and make case management orders for the parties to comply with will be issued separately.

Employment Judge Parkin

Dated: 29 March 2021