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EMPLOYMENT TRIBUNALS

Claimant: Ms K McKenzie
Respondent: Brampton Manor Trust
Heard at: East London Hearing Centre
On: 11 – 12 October 2017
In Chambers: 23 October 2017
Before: Employment Judge Prichard
Members: Ms L Conwell-Tillotson
Dr J Ukemenam

Representation

Claimant: Ms J Phillips, Solicitor with National Education Union (ATL Section), London WC2
Respondent: Mr M Curtis, Counsel instructed by Judicium Consulting Ltd, Whiteley, Hampshire

RESERVED JUDGMENT

It is the unanimous judgment of the Employment Tribunal that:-

1. The claimant was not wrongfully dismissed. She was paid her full entitlement to notice.
2. The claimant's dismissal was not an act of discrimination under section 15 of the Equality Act 2010.
3. As the claims have not succeeded, there can be no claim for lack of written particulars of employment under section 38 of the Employment Act 2002.

REASONS

1. The claimant, Ms Kate McKenzie, is now 26 years old. She is a primary school teacher. She attended Tonbridge Grammar School, from where she attained 3 A-levels. She then read psychology at Leeds University. She later took PGCE at the Exeter University over a 1-year course. Her first teaching role was at the Barclay Primary School at Leytonstone, where she was for 2 years. She specialised in the younger age range of Key Stage 1, from Reception to Y2. She has particular skills in phonics, of particular use in schools where English is not many children's' first language. She had specialised in early years in her PGCE year. She lists running and travelling as her main interests.
2. The respondent, Brampton Manor Trust, is a large academy consisting of 2 schools. There was Brampton Manor Academy itself, later joined by Langdon School, at a time that the Langdon School (which was a primary school then) was put into special measures. Since then, they have changed the age ranges. Langdon Academy is now an all-through school from ages 4 – 16 years, primary and secondary. Brampton Manor Academy has the same age range, and it also has a 6th form. The Executive Principal and Chief Executive Officer is Dr Dayo Olukoshi, who has had a long career in teaching. In 2016 he was awarded OBE for services to education. Both schools teach some 4,000 pupils. There were 2,100 in primary.
3. The claimant had been employed at the Barclay School as a KS 1 teacher. She saw an advertisement for a vacancy in the next academic year (2016/17) at the Brampton Manor Trust and applied. She filled out the standard application form on 6 February naming there 2 referees, both from the Barclay Primary School. There was Kelly Moss, who was then the Interim Head Teacher, and Ms Lindsey Hall, who was then the Early Years Leader. These referees were described by Dr Olukoshi later as "appropriate". It would normally be considered irregular not to nominate the Head Teacher of the school you were currently at as a referee.
4. Filling out the job application form the claimant gave a long, informative and helpful supporting statement outlining her interests, her current employment and some of her training and experience, and her experience with children.
5. The Barclay Primary School is based in Leytonstone. The claimant was living then in accommodation in Leytonstone, sharing a flat. She later found similar accommodation nearer Brampton Manor, in East Ham.
6. The claimant attended for interview on 12 February 2016, just before the one-week half-term holiday. The interview consisted of an interview with Peter Whittle, the principal of Langdon Academy, and Claire Bolt, who was the head of the primary phase at Langdon Academy. She would be the line manager for the claimant. As well as interviewing, the claimant taught a specimen lesson (observed). She obviously impressed both Ms Bolt and Mr Whittle and it was clear from Mr Whittle's evidence to the tribunal that he was extremely happy to have found her. She was eminently appointable. It was a bonus that she specialised in phonics, because the school had had some disappointing phonics results in 2016 and knew that it was an area they needed to improve. An Ofsted inspection was anticipated.
7. They told the claimant at the interview that they were pleased with the way it had

gone and that she would be appointed. That was later confirmed by an offer letter of 22 February 2016, for the claimant to start on 1 September 2016 (the beginning of the next school year). That meant that she could give proper notice to the Barclay Primary School and all would be well. The claimant was very happy. Her salary with the Barclay Primary School was £27,000 per annum. The role she was appointed for was Head of Year 1 (on a higher pay scale). Also, as she would be Head of Year, she would have a TLR pay supplement (teaching and learning responsibility) and her starting salary with Brampton Manor Trust would be £33,000. So, this represented a promotion as well as approximately 20% more pay. The offer, predictably, was subject to:

- 7.1. Satisfactory references;
- 7.2. Satisfactory completion of the probationary period [which we now know was 6 months];
- 7.3. Satisfactory enhanced DBS;
- 7.4. Providing copies of qualifications;
- 7.5. Satisfactory health checks; and
- 7.6. Satisfactory teacher prohibition checks (the NCTL Register).

8. The claimant promptly accepted saying "I look forward to joining the team and thank you very much for giving me this wonderful opportunity". References came back. We saw 1 reference from Kelly Moss dated 12 February 2016, coincidentally the same date as the interview, and another from Lindsey Hall dated 5 April 2016. For some reason, the claimant's DBS did not come back. That may have been because there was an issue with addresses as the claimant had moved a bit. The claimant had 2 addresses in London and now, more recently, has used her parent's address near Tonbridge.

9. The claimant started work on 1 September. The job seemed to be going well. At this time no one had checked the references that had come in for her. According to Mr Whittle the respondent seemed to operate a system whereby until everything had been received, nothing would be checked. Dr Olukoshi, however, did not agree with that view, as a matter of practice or principle. It seems here that the lack of a DBS after many, many months meant that nobody checked the references had been received. As one of the respondent's witnesses said, they needed to wait for all the buckets to be full before they would carry out a check, or, importantly, issue a written contract.

10. This is where the claimant's (valid) s 38 Employment Act 2002 claim for failure to provide written terms and conditions comes from. Because there was no DBS, no one checked the references, and no contract was issued.

11. Had the respondent checked these references, they would have had little doubt that these were not satisfactory references (neither of them). In particular, it was the last the last 2 questions which read as follows:

"If you had a similar post would you appoint this applicant?..."

"Would you recommend this applicant for the post in question?..."

There are 4 possible answers. Dr Olukoshi explain that it was deliberately done that

way. When you provide 3 options, it is customary for referees to default to the middle option. The responses were as follows:

- 11.1. Yes without reservation;
- 11.2. Yes with some reservation;
- 11.3. Undecided; and
- 11.4. No.

It is a fact that both referees put “No” to both questions. We accept Dr Olukoshi’s evidence to the tribunal that such categorical negatives are rare in references.

12. Switching from the narrative of the recruitment, we need to deal with the claimant’s disability. At this hearing, it is in dispute whether the claimant has, or does not have, a qualifying disability for the purpose of section 6 of the Equality Act 2010. It is disputed on the basis of its duration. There is little doubt that it does have a substantial adverse effect on the claimant’s ability to carry out normal day to day activities. The disability that the claimant relies upon is anorexia nervosa.

13. The claimant has disclosed her full medical records from the Kent surgery, local to where her parents live. In fact, her first referral to a specialist eating disorder unit was made by the practice that she attended in Leyton when she was living there. We have not seen those records. However, the claimant has been extremely straightforward and cooperative with the tribunal and the respondent. We do not consider for a minute that she was trying to keep anything from us. There is clear evidence in emails in the bundle that she was in contact with a counsellor, having been referred from an eating disorder unit.

14. The claimant describes her eating disorder as having started at age 18 (that is in 2009). However, she was not formally diagnosed until the referral from the Leyton medical practice in April 2015, while she was still at the Barclay Primary School.

15. When she underwent a health screening questionnaire for the respondent, Fit4Jobs, none of this came out. She had a good score giving a 93% absence predictor, i.e. good. Further, the report stated that the claimant was unlikely to be covered by the terms of the disability discrimination legislation. In fact, the tribunal can see from the notes that there were concerns about the patient’s weight sometime back in the past, for instance, 14 April 2014:

“Problem	Abnormal weight loss (First)
	History doing masters at Exeter has gradually lost weight while at university parents concerned. No periods since 2010. [That is amenorrhoea, which is commonly associated with anorexia.] ... Does not think she is thin ...has some issues around appearance ... eats healthily but quite limited diet due to time pressures”

16. In December 2011 the doctor recorded:

“...mum concerned re [weight] .. she doesn’t make time to eat ... at uni studying psychology... lives in house with other girls split from boyfriend 2 weeks ago been thin ages...slowly put on 2 kg and has now lost it... aware needs to eat denies any food

issues or conflict ... no vom no bingeing no laxatives meds or illicit drugs ... very happy no depressive ideas...happy to eat sort of veggie and eats at home but not otherwise ... does gym 3x a week..."

Her BMI at that time was 15.62 (a satisfactory BMI is 20 upward). Later her BMI was 12.6. She was 6 stone then.

17. In her application for work, on 6 February she said she did not need any reasonable adjustments and she did not declare any disability. She told us that she managed at Barclay Primary, but she often had to work harder than others in order to overcome the disadvantages presented by her condition.

18. Having started well at the school the claimant saw a good deal of Claire Bolt. They got on well. Claire was pleased about how she had started. But the claimant at this time was seeing an eating disorders consultant on Friday afternoons after school, and at a meeting about 1 month into the term the consultant advised her that she would have to take time off work because of her weight loss. She had not raised this with any of her colleagues, although it was noticed that the claimant always declined the cakes, and went to the gym often.

19. The claimant wisely took the consultant's advice. On Monday 10 October she approached Claire Bolt and told her that she had to have some time off and that she had been seeing a consultant for many months because she had anorexia and that she would present a fit note soon. Apparently Ms Bolt was very supportive and it helped her. She also said that she would never have known about the anorexia. That encouraged the claimant and made her think that perhaps she was not in such bad shape as it turns out she was. There was a fit note dated 11 October signing the claimant off 3 weeks until 4 November. The diagnosis was stated to be anorexia. It stated she was unfit for work, not conditionally fit. Ms Bolt followed the standard sickness absence monitoring. A telephone consultation was arranged for 21 October 2016.

20. On 19 October Ms Crivello (then of the ATL) was asking for copies of the sickness absence procedure and also asked how long the probationary period was, (because the offer letter had not stated). There was still no contract – and that was. She took up some correspondence on the claimant's behalf, writing to Pat Bridge, who was the HR officer at the school.

21. (The HR officer at the time of the recruitment interview was Sunitha Ullas-Kumar. She left soon after the claimant's interview in February 2016. Rather than being replaced, her recruitment duties were transferred to Ms Pat Bridge, who was, and still is, the PA to Peter Whittle, the principal of Langdon. The respondent suggested this could explain how responsibilities around the claimant's recruitment may have fallen between two stools).

22. By 28 October, the claimant had a medical report dating from an examination of 14 October. It is from the Community Eating Disorder Services based in Dagenham, Essex. Dr Krish Nandy, who is a psychiatrist (North East London Foundation Trust) reported that the claimant was losing more weight and continued to restrict her intake, saying:

"Miss McKenzie was too keen to return to work and we have advised her not to do so as

she is extremely underweight. We have encouraged rest at home.

Miss McKenzie is staying with her mother in Kent. I gather that she has attended an A&E and has had blood tests and ECG. ...

Miss McKenzie reported that she feels tired all the time. ...”

He describes her medications, including strong vitamin B compound. At that time her weight was 34kg (less than 5½ stone) and her BMI was 13.28.

23. Following the initial 3 week fit note, the claimant’s father spoke to Ms Bolt at the school and informed her that Kate’s illness had got worse and she was in danger of being admitted to hospital. He stated openly that she was unlikely to return to work before January, if not April. Also in the conversation, the claimant’s father made this proposal:

“Her dad has requested that we write Kate a reference based on the 6 weeks that she was here and when they receive it then Kate will resign from her position.”

24. The claimant and her parents were both sensing it would be wrong for her to go back to work, that she really could not cope, and that she really was very ill. There was a fit note after the expiry of the first fit note, which was this time a 3 month fit note – from 4 November 2016 until 31 January 2017.

25. The tribunal considered this medical evidence in some detail. It is our duty to make finding one way or the other on whether the claimant had a qualifying disability. In this case, we have little hesitation in finding that the claimant did have, and had had, a qualifying disability for at least a year prior to the development of this episode with the respondent. It is well known that eating disorders start more subtly. It is not a label which professionals lightly put upon a patient until they feel they have no choice. There is a certain amount of stigma. The formal diagnosis of anorexia happened sometime in 2016 but the medical records that we have quoted go as far back as 2011 when she was at Leeds and then again particularly when she was at Exeter. So, there was real concern about her weight loss.

26. The claimant was referred to the respondent’s occupational health service, not surprisingly. That was done by Husna Haque on 10 November 2016. She is the school business manager at Langdon Academy. Events moved fast from there. This was where the crisis over the references came to a head.

27. The system within the academy is that Langdon, (Mr Whittle), had full authority to recruit a new teacher without reference to Dr Olukoshi as chief executive of the overall trust of the 2 schools. On the other hand, Dr Olukoshi was the only person who had the authority to terminate a teacher’s contract.

28. We accept the respondent’s evidence that safeguarding was paramount. Safeguarding issues were one of the reasons why Langdon School had been put into special measures. It is a sensitive area. As an educationalist it seems to be the number one priority for Dr Olukoshi.

29. Despite the fact that the claimant started teaching with no DBS and with unchecked references, and this continued for 2 months, they had to investigate this.

30. Dr Olukoshi (chief executive) and Ms Kit Lam (director of operations at the Brampton Manor Trust), together drive the administration. The Langdon School is relatively independent with Peter Whittle and his PA (Pat Bridge) dealing with most of their Langdon administration. However, during a meeting on 9 November 2016 between Kit Lam and Dr Olukoshi it emerged there was an outstanding employment contract that had not been issued because there was an outstanding DBS which had not been received.

31. Mr Lam identified the employee as the claimant working at the Langdon Academy. So, Dr Olukoshi made contact with Pat Bridge who informed him that she had been chasing the outstanding DBS more than once. That was why the other information they had, had not been uploaded onto the trust's main database and was not visible to Dr Olukoshi, (although it could always have been seen by Mr Whittle). So, Dr Olukoshi requested that Pat Bridge please upload what they had, even if the DBS was still outstanding.

32. Then he was able to see the application form, the 2 references, the educational qualifications, ID documents, the health screening and their own internal form for suitability declarations, asking job applicants not only about their own history but also the history of people who also lived in their household. All of these were positive. But he was immediately struck by the 2 negative references which he states were strikingly categorical. Neither referee would have appointed the claimant to a Head of Year role.

33. He reviewed this on 10 November and immediately contacted Mr Whittle, who simply informed him that the references had not been there at the time of the interview, (which might well have been the case).

34. Dr Olukoshi made no secret of the fact that he was cross with Mr Whittle. Mr Whittle had fallen down badly on this, and Dr Olukoshi let him know so. Whether the fault lay with the now departed Sunitha Ullas-Kumar or with Pat Bridge, who took over her duty, who knows? The school as a whole had failed, and Mr Whittle was in charge. At that stage the evidence was not quite clear. He told Mr Whittle that the claimant would need to be dismissed. Apparently, he did not have any hesitation over this decision. It was a safeguarding imperative. They could not take on someone who was not suitable for the role to which they were appointed even though they had passed in all other respects.

35. The references were not uniformly bad, as to the claimant's ability. Lindsey Hall's reference was much more generous than Kelly Moss's. Lindsey Hall was the one who worked closest to the claimant and therefore might have been in a better position to judge directly, but then again she may have been more loyal. Barclay Primary School was a large primary and the larger the school, the less the head teacher can be aware of the details of every member of their staff.

36. There was discrepancy between the evidence of Dr Olukoshi and that of Mr Whittle as to which point of time Mr Whittle informed him of the claimant's absence from work. He said that the claimant was absent and had presented a long sick note with a diagnosis of anorexia. We were not sure exactly when he said that.

37. Our overall conclusion is that we have no doubt that the respondent's reason for

dismissing the claimant, and specifically Dr Olukoshi's reason, as the decision maker, was that the references were unsatisfactory. The fact that she was on a period of sick leave, even a long period of sick leave, was not in any way to the point. It was a simple case of 2 obviously unsatisfactory references and the claimant having failed to satisfy a threshold condition of her employment with them. She might have been suitably qualified to act as a normal teacher without the TLR supplement in year 1 but that was not to the point in his mind. She had been specifically appointed for phonic skills and made Head of Year and, ironically, was performing well.

38. It seems on 10 November he emailed a cursory and peremptory template of a dismissal letter addressed to the claimant at an old address (actually in Capworth Street, London, E10 - in Leyton). A lot of it was copying and pasting the conditions of the job offer from the offer letter earlier quoted in this judgment, which states:

"We have undertaken the necessary pre-employment checks and it has this week come to my attention that the references received for you are not satisfactory.

On this basis, it is my decision to terminate your employment with Langdon Academy. Because you are still within the probationary period, I am giving you 1 week's paid notice of my decision to terminate your employment. Your last day of service with the Trust will be 18th November 2016. You will receive your P45 from the pay roll provider. Please will you arrange for any school property in your possession to be returned to the school without unreasonable delay and no later than Wednesday 16th November 2016."

39. There was no mention of an appeal. As the claimant was subsequently informed, under its procedures the school was not going to offer an appeal. The template contained the signature strip of Peter Whittle, (notably "on behalf of Brampton Manor Trust" - the main trust - rather than the Langdon Academy).

40. The tribunal and Ms Phillips expressed real disappointment to Mr Whittle that he had not in some way mitigated this harsh and stark dismissal letter which would come as a total shock in the middle of an occupational health referral. Mr Whittle stated, as he was sitting here in the tribunal that he felt massive regret at his failure to put some personal note at the bottom about regret and a wish for the claimant's future, and a hope that she would recover soon from this anorexia episode. There was not even a hint of it in the letter. The letter was peremptory and cold.

41. That should be a learning point about people management. However, as a matter of contract, the respondent was within its rights to dismiss in the way they did. The claimant wrote to Pat Bridge to ask about the status of her occupational health appointment. Mr Whittle should have added to the letter, to explain how all this was going to mesh in with a sickness absence review that was already underway. It was not good management to leave it up to the claimant to find out.

42. Subsequently, on 16 November the claimant wrote to Pat Bridge, cc Claire Bolt asking again for a copy of the appeal procedures and, in addition, a copy of her personal file, under the Data Protection Act. Mr Whittle responded by letter of 24 November. Once more he expressed no sympathy or regret. It was just matter of fact, and coldly formal:

"As you are aware, the offer of employment at Langdon was conditional upon receipt of satisfactory references. I appreciate that this decision may be disappointing to you but I can confirm that there are no appeal procedures applicable, or right to appeal against

this decision in these circumstances.”

It was also uninformative. The “circumstances” he did not explain were that she was in her probationary period. He might have said so. He also asked her for a cheque for £10 as the standard statutory charge for providing copies of all the documentation in her personal file, under the Data Protection Act.

43. On this evidence we are asked to find:

43.1. Whether the claimant’s dismissal was an act of discrimination?

43.2. Was it wrongful? In other words was she paid her proper notice entitlement; and

43.3. Is she entitled to any remedy for not having been sent written terms and conditions?

Section 38 Employment Act 2002

44. It will be obvious from the narrative why the claimant was not sent written terms and conditions. A section 38 Employment Act 2002 claim is parasitic and dependent upon some success in some other claim, which, unfortunately for the claimant, she has not attained. Because she had been working for the respondent more than 2 months, from 1 September to when she dismissed on 11 November. The deadline for a set of written particulars is 2 months.

Disability Discrimination

45. Unfortunately for the claimant, the tribunal has no hesitation in finding that the unsatisfactory references were the sole cause for dismissal operating upon the mind of the decision maker, who was Dr Olukoshi. The presence of something that was likely to be a disability (anorexia), even if he knew it before the point of decision, made no difference, and would have made no difference, however harrowing and sad the circumstances were.

46. The tribunal were struck by what a sad case this is. It was sad and unnecessary that the dismissal letter was so cold and so uninformative, as was the follow up letter too. It left a bad taste in the mouth.

Breach of Contract

47. Mainstream teaching jobs in mainstream state schools are subject to Burgundy Book rules. Academies are exempt from that, we find.

48. Although the academy’s sick pay procedure mirrored the Burgundy Book, the notice provisions did not, if termination occurs during the probationary period. The claimant was not given a written contract. We were referred to a blank template contract where the probationary period is a variable period. We know from another document that Pat Bridge sent Lisa Crivello, it was 6 months for teachers.

49. What we also know is it is standard that in the probation period “either party may

terminate your employment at any time on [one week's] notice or payment in lieu of notice". That was clause 11 in the multipurpose employment contract. (We are assuming that this template would also apply to support staff as well as teachers). Therefore the claim for breach of contract cannot succeed.

50. For all of the above reasons, the tribunal has had to dismiss her claims.

51. We have to comment, the claimant presented her case extraordinarily well, and she was also excellently represented by Ms Phillips from the union (changed from the ATL to the NEU (a fusion of 2 education unions).

52. We wish the claimant a recovery from this episode and a return to what was a highly promising career in teaching, sadly interrupted in this way.

53. Our misgivings with the respondent are process criticisms. There was a marked lack of compassion. Claire Bolt was very supportive as a manager, however she was not handling the process. Mr Whittle was.

Employment Judge Prichard

4 December 2017