Case No: 2602118/17

EMPLOYMENT TRIBUNALS

Between:

Mr N Jinks **Claimant**	**and**	1. The Governing Body of the Holy Rosary Catholic Primary School 2. Father John-Paul Leonard 3. Ms Cecilia Emery

At an Open Attended Preliminary Hearing

Heard at: Nottingham **On:** Tuesday 3 July 2018

Before: Employment Judge P Britton (sitting alone)

Representation
For the Claimant: Mr G Cheetham of Counsel
For the Respondents: Ms D Masters of Counsel

JUDGMENT

1. The claim against the Second Respondent; Father John-Paul Leonard is dismissed on withdrawal.

2. The application of the remaining Respondents for strike out is refused. Furthermore, I do not order a deposit having concluded that the claim has more than little reasonable prospect of success.

REASONS

Introduction

1. The primary agenda today flows on from the telephone case management discussion heard by my colleague Employment Judge Ahmed on 6 March 2018. Essentially on the application of the Respondents he ordered that there be this preliminary hearing to determine whether all or part of the claims should be dismissed as having no reasonable prospect of success. In the alternative, that deposit orders on whichever claims survived of up to £1,000 per claim be payable as a condition precedent of proceeding by the Claimant on the basis that the claim or claims had only little reasonable prospect of success. This is of course all pursuant to Rules 37 and 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

2. In coming to my decision, I have considered a bundle of documents put before me; the witness statement of the Claimant; and an additional document which he has placed before me which is to be treated, for my purposes, as the statement of Gordon O Thornhill MBE, a senior trade union official with the NUT; finally the written submissions of both advocate Counsel, for which I am most grateful.

3. I only intend to briefly rehearse the fact pattern in this case. Put at its simplest, the Claimant is a teacher of many years. He had become the Headmaster of the Holy Rosary Catholic Primary School in 2003. He was summarily dismissed on 26 July 2017. Suffice it to say that when I look to the email traffic on that point, it is quite clear (and not a point that I need to otherwise take today) that if the Claimant did not read the dismissal letter which was emailed to him on 26 July 2017, he clearly had by 27 July when he responded to it. He was summarily dismissed for alleged gross misconduct.

4. If I stop there, and looking to the ACAS Code of Practice, I think this case is more about the substance of the investigation that took place, rather than the process up to we come to the appeal. As far as I need to deal with it today, following the report of Dr Eilis Field dated 23 March 2017 the Claimant was suspended. The reasons for his suspension were clearly set out in the letter that he then received.

5. Subsequent thereto, there was an investigation undertaken by an external employment consultant, Julian Woodall of Bacon 6 Ltd, which report was published on 3 April 2017. Essentially the finding was of a case to answer and that accordingly the matter should proceed to a disciplinary hearing.

6. Subsequent thereto, the Claimant received what I would call an ACAS step 1 letter inviting him to a disciplinary hearing. The charges which he was to face were clearly set out; he was supplied with a copy of the investigation report and informed of his right to be accompanied by a trade union official or an employee colleague at the subsequent disciplinary hearing. This occurred in the shape of Mr Thornhill.

7. Subsequently, he was offered the right of an appeal, which he took up. Mr Thornhill again represented him at the appeal.

8. There is one problem with the appeal hearing in the procedural sense in that the Claimant was not provided with the minutes of the disciplinary hearing prior to it or during it, despite the application of his trade union official. It is not for me to further comment other than that he should have received those minutes. That is an issue that can be dealt with at the main hearing.

9. On 11 December 2017, he presented his claim to the Tribunal. First he claimed unfair dismissal which of course would be pursuant to section 98 of the Employment Rights Act 1996. I am no longer asked to consider striking out that claim or ordering a deposit. Accordingly it will go forward to the main hearing. Furthermore there is no longer a time issue in terms of the remaining claims against the remaining two respondents. Allowing for the ACAS EC it is in time against R2. As against R1, which was joined on 2 July 2018, the Respondent no

longer seeks to desist from the import of the jurisprudence[1]. Finally prima facie the concept of "continuing acts" applies.[2]

10. However, he also brought what I see as being a direct discrimination claim pursuant to section 13 of the Equality Act 2010 relying on the fact that he was a married man and that there was within what had happened to him direct discrimination on the basis of his marital status. I am asked by the Respondents to strike out that claim on the basis that it has no reasonable prospect of success. If I do not, then I am asked to order a deposit in relation to it. The second issue is whether in any event the case should be allowed to continue against Cecelia Emery as the Second Respondent given the first Respondent accepts vicarious liability if there was any discrimination, which is denied.

My decision

11. I have considered a great deal of information today very carefully indeed. I must of course take the Claimant's case at its highest and let it go forward unless it is untenable, so to speak, on the face of the paperwork. An example was given to me by Mr Cheetham would be where somebody maintains that they have an alibi, for instance in a gross misconduct case, which is torn to shreds by, for instance, CCTV footage showing that they were at the material time at a different place. But this case has more sophistications to it than that. In regards to Father Leonard, he has been withdrawn from the claim as a player, so to speak, because I observed early on, given a point taken by the Claimant and his Counsel, that on the face of the papers before me I could see no evidence that he himself was actively instrumental in the Claimant's downfall and in particular in relation to himself, even if on the evidence before me at its highest he was possibly subconsciously motivated because of the Claimant's marital status. That does not mean the evidence of what was occurring when he was involved as the Chair of Governors up to the end of April 2017, cannot be deployed in terms of the overall mainstream case.

12. What to me shines out of the case is that certainly in terms of the suspension letter to the Claimant dated 30 March 2017 (Bp75-78)[3], it was made plain that a reason for his suspension under the sub heading "Complaints in respect of inappropriate relationships" was:

> "*There have been a number of complaints in respect of a relationship it is alleged that you are having with another member of staff which could impact upon your own decision making but also upon your relations with other staff and with parents who have raised concerns.*
>
> *As a minimum, the matter is causing the school to be potentially brought into disrepute and may have a significant bearing on parent and staff relations.*
>
> *…*"

13. Under the next sub heading, "Leadership":

[1] See Para 6 of the case management summary of Employment Judge Ahmed published on 10 April following the TCMPH which he held on 6 March 2018.
[2] Hendricks v Commissioner of Police for the Metropolis (2003) IRLR 96 CA.
[3] Bp=bundle page.

> "*As a result of all of the issues referred to, the governors have expressed to Ellis that they have no confidence in your leadership of the school as headmaster and, at the governors' request, the visiting inspector passed this information on to you.*[4]*"*
>
> *The concern here is that, on this issue alone, the governors have lost trust and confidence in you and in you carrying out the role as headteacher of Holy Rosary …*"

14. I have not got statements from any of the Respondents' potential witnesses. The inference to be drawn from that second paragraph (which the Claimant makes in his statement for me and made in his internal submissions including at his appeal) is that this is a clear link to the issue of the alleged inappropriate relationship.

15. That issue of inappropriate relationships had been flagged up in the report[5] to which I have referred to of Dr Eilis Field and was also taken up by the investigator, Julian Woodall of Bacon 6 Ltd.

16. Having set out the evidence in relation to the topic, he said (as to which see his recommendations):-

> "*I am unsure as to whether to recommend action with regard to Mr Jinks's relationship with another member of staff. It depends on the status of the Code of Conduct that Dr Field refers to in her report. Alternatively the issue could be considered under the* ***wider generic leadership heading***"[6].

17. The step 1 disciplinary letter, to which I have already referred, dated 11 July 2017 which is extensive, now had no heading or specific reference to the relationship issue.

18. Stopping there, the Claimant has never denied (him by then going through a painful divorce) that he was in a relationship with a female member of staff who was in fact divorced. There had been an issue raised in 2016 by an anonymous individual that this was incompatible with the tenets of the Catholic faith and the position which he held. When the issue began to be looked at, so to speak, back in 2016, Father Leonard, to me saw himself in a dilemma. He clearly had a considerable friendship with the Claimant. They exchanged prayerful texts on the said topic. It may be that there was an informal warning given to the Claimant about the relationship; it might have been along the lines of 'be careful', I do not know for certain, but what I can safely conclude is that Father Leonard did not escalate the issue.

19. However, at the beginning of 2007, and particularly via Peter Giorgio who is the Director of Education for the Diocesan Education Service which overarches supervision of this School for the Roman Catholic Church (the acronym for the service being NRCDES) the point was clearly being flagged up.

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[4] That of course in itself would also refer to the other allegations being put to the Claimant in that letter starting under the heading Safeguarding, as to which see page 2.
[5] Bp111-139.
[6] My emphasis

20. It then becomes part of the overarching audit investigation by Dr Field because, as I already made clear, she refers to it. She also uncovered various shortcomings in the school, inter alia flagging up possible inappropriate behavior by the Headmaster in appointing his son as a teacher; a possible issue of safeguarding viz pupils being transported unaccompanied by taxi, and other issues relating to a sloppy regime in the school including possibly serious neglect on the issue of a water tank. However, she also made somewhat harsh criticisms of the poor governance regime of the school's governors. I have noted that there does not seem to have been much support during the period in terms of training or refreshers or appraisals or thus any performance improvement plan because of any capability issues, ever coming up in relation to the Claimant.

21. Going back to the letter[7] inviting him to the disciplinary hearing, however albeit otherwise no mention of the relationship issue, suffice it to say that I note under paragraph 5 sub paragraph 3 that :

> "*Therefore, aside from the specific issues referred to, there is now a serious concern as to whether there has been a breakdown in trust and confidence between you and members of the Senior Management Team and a number of governors based on the overwhelming weight of the issues arising.*"

22. What does that mean? Does that in fact mean that causatively Cecilia Emery, by now Chair of Governors, and who was going to Chair the disciplinary hearing, either actively (and because of course she had knowledge of the preceding report) or subconsciously was in part motivated (and that is primarily an objective test) inter alia because of the relationship issue and the problems it had caused, and was still continuing to cause, for the school?

23. The Claimant certainly thinks that it was. What he flags up before me in his detailed statement (cross-referenced as he has to shortcomings in the investigations) is glaring inconsistencies if he be correct. I will give but three examples.

23.1 **The taxi issue**

There was a practice within the school that some children were transported by taxi. This experienced Judge is well aware that with many schools that form of transportation is used. It is dealt with by generic standards and amongst other things obviously the taxi drivers being used would have been approved. As to whether or not the children were at risk on the day in question, he pointed out that he was in the car ahead and the children were under his watch throughout; he never lost sight of them. Did the Respondents check that out? Did they make enquiries of the relevant taxi driver? Was he approved?

23.2 **The son**

According to the Claimant he did not appoint his son without the approval of the governors. It is quite clear that in the internal proceedings he vigorously maintained that he delegated the task to the

[7] Bp143-146.

relevant governors and specifically excluded himself from the selection exercise. As to the second requirement, namely obtaining a second genuine and satisfactory reference, he maintained that the Headmistress who said she was never asked for a reference has got the wrong person – was that checked out? Most fundamental of all where is the evidence that the Emery panel went off and interviewed, the governors who were engaged in appointing teachers at the material time? Currently it is not there.

23.3 **The water tank**

According to the Claimant a circular sent out to many schools in his area by Staffordshire County Council's ("Staffs") appropriate body. It might have said "urgent" but then he gets many emails of that nature; but it did not flag up within the content that this was a critical situation. Furthermore he had discussions in the past with a health and safety officer for Staffs, who had told him there were no concerns about the tank. There were no visits in the period that we are concerned with by way of a follow up from Staffs if this was a critical issue or such as the taking of waters samples. There is no evidence before me at present that the tank did pose a health risk.

24. When the Headmaster raised these points and for instance that he had had no follow up despite telephoning Staffs to enquire whether this was so to speak a red alert, it was on the face of it never checked. Why?

25. What the Claimant says is that the panel and Cecilia Emery in particular deliberately (very serious issue this one) failed to obtain the source data that would support him or may even have allowed it to disappear. He has made those points in the clearest possible way. Is there an inference to be drawn (no more than that) that Cecilia Emery may have been motivated, at least in part, to conduct a lopsided and sanitized hearing because of the problems created by the affair? Those are triable issues. They require findings of fact, which is not my province at this preliminary stage. It is not therefore so far a case where I could conclude that just looking at the paperwork, which otherwise would look quite strong for the Respondents, that it can show that the claim has no prospect of success because so much is going to determine on the exploration of the very serious issues that the Claimant raises and which were raised at the time.

26. That leads me to the appeal. Ms Masters raises what on the face of it are prima facie very strong points indeed. They are as follows:

26.1 The panel that was appointed to hear this appeal was external to the Governing Body of the school. The Headmaster from another School appointed to Chair and one other member at least of the three person panel was not a Catholic. So, she says, where is the possible motivation viz a religious ethos that would have led them to want to find against the Claimant?

26.2 The second point dealing with the Emery issues are the letters that were sent out once the Claimant was dismissed. This was to Governors and the parents of the School. These made abundantly clear (158a and b) that:

> *"The governing body is aware that there have been some rumours and speculation as to the issues in involved and whilst we are not, out of respect for all involved, going to enter into details, we do wish it to be known and clear that the issues relating to Mr Jinks' dismissal are not connected to Mr Jinks' private life and do not involve inappropriate relationships with children either at the school or elsewhere.*
>
> *…*"

27. But first as to the latter part viz children, on an aside, why say it if it was never an issue? As to the first part, obviously prima facie it would suggest no animus. Those letters were sent out on 28 July. But I have noted that the Claimant had already raised firmly that he did see a link. So, Mr Cheetham counters that given they were using solicitors throughout (ie Cummins who represent them in this claim) the Governors would be covering themselves. That is a point I therefore conclude will need to be considered at the tribunal hearing as it requires findings of fact.

28. However, what about the appeal panel? As I said at first blush a very attractive argument by Ms Masters. However, Mr Cheetham counters what about the minutes issue? That is hardly indicative of a panel wanting to ensure that they act scrupulously fairly with the Claimant. I do not know why the appeal panel did not make sure he had the minutes beforehand and I do not know why they did not stop in their tracks when they found out that he had not got them. Also I do not know what further investigations they undertook in relation to the issues where the Claimant had raised alleged serious failures to further investigate and which I have now rehearsed.

29. To turn it around another way, if the dismissal and matters prior thereto is potentially possibly such that there is an inference to be drawn that will require rebuttal by the Respondents, then have we got here the fruit of the poisoned tree? The advocates have not referred me to the authority but I am sure they know it – it is ***Taylor-v- OCS Group Ltd***.[8] An appeal is an intrinsic part of the overall process. So, if there was a failure to revisit matters and by that I mean undertake further lines of enquiry, coupled with the minutes issue, then is it that they may not have wanted to enquire into issues that the Claimant was raising and in particular because of this linkage to his affair? Again this is a matter for the panel presiding at the main Tribunal hearing.

Conclusion

30. I am not going to strike out this claim. There are so many issues that require evidence to be given and findings of fact.

The deposit issue

31. In terms of the approach that I take, this is now clear from the judgment of Her Honour Judge Eady QC sitting alone in ***Mrs B Tree -v- Southeast Coastal Ambulance Service NHS Foundation Trust [UKEAT/0043/17/LA***. I pick it up at page 7 of the judgment under the

[8] (2006) IRLR 613 CA,

heading "The Relevant Legal Principles". I do not intend to recite Rule 39 of the Tribunal's 2013 Rules of Procedure ("the Rules"); it is there for the parties to see. There is a distinction between the approach one takes to strike out and deposits. Obviously there is, otherwise why would there be the distinction? As to what the approach is, it remains clear as per Mr Justice Elias (as he then was) in ***Jansen van Rensberg -v- Royal London Borough of Kingston-upon-Thames [UKEAT/0096/07]***:

> "*27… the test of little prospect of success … is plainly not as rigorous as the test that the claim has no reasonable prospect of success … It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.*"

32. Having so referred to, HHJ Eady QC then undertakes a thorough review of the jurisprudence and inter alia at her paragraph 19 refers to the judgment of Simler J in ***Hemdan v Ishmail [2017] ICR 486 EAT*** and thence that of Mr Justice Wilkie in ***Sharma v New College Nottingham UKEAT/0287/11***. Of course we must bear in mind not to order a deposit order if it is of such an amount given the means of an individual that in effect it shuts him out from the justice seat. That of course can be dealt with by adjusting the amount of a deposit order according to the individual's means. What she then does is to therefore reaffirm at paragraph 23:

> "*23. Moreover, the broader scope for a Deposit Order – as compared to the striking out of a claim – gives the ET a wide discretion not restricted to considering purely legal questions: it is entitled to have regard to the likelihood of the party establishing the facts essential to their claim, not just the legal argument that would need to underpin it; see at paragraph 34.*"[9]

33. Adopting that dicta, I have rehearsed the situation as I currently see it to be when considering whether to strike out. So much of it will depend upon findings of fact having heard the relevant evidence deployed. Thus In a finely balanced decision I have concluded that there is at least a likelihood that the Claimant might succeed. Accordingly I have decided not to make a deposit order.

DIRECTIONS

1. The Claimant having signified his willingness to enter into Judicial Mediation, the Respondents will inform the tribunal as to their position within 7 days of today's date.

2. Should the Respondents not wish to enter into Judicial Mediation (and of course they are under no obligation so to do), then the parties will agree, within 21 days of that notification agreed directions for the main hearing. For the avoidance of doubt, they must set out the following:

   2.1 Their estimate of the time that the tribunal panel will need to read in.

[9] ***Wright v Nipponkoa Insurance (Europe) Ltd [UKEAT/0113/14]***

2.2 Proposal for the discovery process timetable.
2.3 The same for exchange of witness statements.
2.4 If not done so already, as a precursor the sending of a schedule of loss.
2.5 The tribunal panel for the hearing will need an agreed chronology and cast list.
2.6 Their realistic time estimate for the hearing, first to undertake the liability determination and thence if the Claimant is successful on any front, the award of remedy. The time estimate should factor in deliberation time for the tribunal on the liability issue.

3. When sending in those directions therefore the parties should provide dates to avoid bearing in mind that at present this case is most unlikely to be relisted for a lengthy hearing for at least 12 months from now.

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Employment Judge P Britton

Date: 17 July 2018

JUDGMENT SENT TO THE PARTIES ON

24 July 2018

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