THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms D Daoud	**v**	**(1) Governing Body of the Holy Family Catholic Primary School** **(2) London Borough of Ealing** **(3) Thomas Doherty**

Heard at: London Central **On**: 27 September 2022

Before: Employment Judge Glennie

Representation:
Claimant: Ms M McGee (Counsel)
Respondent: (1) and (3) Ms K Sheridan (Counsel)
(2) Ms S Gill (Solicitor)

JUDGMENT ON PRELIMINARY HEARING

1. **No part of the claim against the First and Third Respondents is struck out. Deposit orders are made in accordance with the Order of the same date as this judgment.**

2. **The claim against the Second Respondent is struck out on the grounds that it has no reasonable prospect of success.**

REASONS

1. The Claimant has brought complaints of direct discrimination because of race / harassment related to race, and unfair dismissal. This preliminary hearing was listed to determine:

   1.1 The applications by the First and Third Respondents to strike out parts of the discrimination / harassment complaints, or for deposit orders.

1.2 The application by the Second Respondent to be removed from the proceedings, or to strike out the claim against it, or for a deposit order.

2. There was an agreed bundle of documents containing 256 pages, and page numbers in these reasons refer to that bundle. I was also provided with a 2-page witness statement from the Claimant and written submissions on behalf of the Second Respondent.

3. The hearing was listed for 3 hours. I was grateful for the way in which all three representatives made good use of the available time so as to ensure that all the issues were addressed. Time did not permit an oral judgment and reasons, and so I reserved my judgment.

4. The full hearing, for 5 days, is due to commence on 28 November 2022.

5. The issues in the discrimination / harassment complaint were identified by Employment Judge Grewal at a preliminary hearing on 24 March 2022 (pages 78-82). EJ Grewal identified the basis of the complaint as being an alleged practice of appointing new staff members, who were Irish ethnicity, to permanent full-time contracts, and then defined the issue as follows:

5.1 The Claimant describes herself as being of Egyptian heritage. She claims that she was treated less favourably than 3 individuals [who I will identify in these reasons as Ms F, Ms O'D and Ms S].

5.2 Whether the following acts occurred and, if they did, whether they amounted to direct race discrimination or race-related harassment:

5.2.1 The Respondents failed to offer her a permanent contract or to renew her fixed-term contract.

5.2.2 The Respondents failed to offer her the new Teaching Assistant role on or around 22 April 2021 (of which she was made aware on 1 July 2021) which was offered to Ms F despite her not having the same level of childcare experience or tracing qualifications as the Claimant.

5.2.3 The Respondents decided to employ two further Irish Teaching Assistants [namely, Ms O'D and Ms S] on permanent contracts from September 2021 despite informing the Claimant that her role could not be made permanent due to budget cuts.

5.2.4 The Respondents failed to arrange phonics training for the Claimant which had been requested in writing from the SENCO around February / March 2021, and the subsequent arranging of the same for Ms F and Ms O'D in July 2021.

5.3 Whether the Tribunal has jurisdiction to consider complaints about any acts or omissions that occurred before 8 July 2021.

First and Third Respondents' applications

6. Rule 37 of the Rules of Procedure provides that:

"……a Tribunal may strike out all or any part of a claim or response on any of the following grounds –

(a) That it……..has no reasonable prospect of success."

7. The requirement that there be no reasonable prospect of success does not mean that there must be absolutely no prospect at all of success at one extreme, nor that the claim is more likely to fail than to succeed at the other extreme. It means that there must be no reasonable prospect of success. If the Tribunal concludes that this is the case, striking out does not automatically follow: there is a discretion to exercise.

8. Rule 39 contains the following provision:

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

9. An allegation which has little reasonable prospect of success has greater prospects of success than one which has no reasonable prospect of success. The prospects would, nonetheless, be poor, and somewhat poorer than "more likely to fail than to succeed". Again, if the Tribunal concludes that there is little reasonable prospect of success, there is a discretion to be exercised when deciding whether to make a deposit order.

10. Additionally, rule 39(2) provides that 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. The consequence of a failure to pay a deposit is that the specific allegation or argument shall be struck out: and so, the Tribunal must take care not to make a deposit order which has the effect of striking out the allegation or argument purely because the Claimant is unable to pay the amount ordered.

11. Ms Sheridan presented the First and Third Respondents' case by reference to the written application dated 19 July 2022 (pages 121-124), refining it in the course of her submissions, and Ms McGee helpfully replied using the same format. I will address the arguments in the same order, giving in the first instance my conclusions on the Claimant's prospects of success with regard to each point. I will then express my findings as to whether any particular part of the claim should be struck out, or made the subject of a deposit order, in relation to each of the issues as set out above. I take this approach because each of the complaints concerned is the subject of more than one of the arguments raised. To avoid repetition, in this part of these

reasons I will use the term "the Respondents" to signify the First and Third Respondents.

12. Ms Sheridan first addressed the three comparators relied on by the Claimant. It was common ground that the complaint of favouring Irish individuals means that the Claimant's relevant protected characteristic is that of not being Irish.

13. The Claimant asserts that the three named comparators are Irish. The Respondents say that Ms F and Ms S are not Irish. There was at page 201 what was said to be a form completed by Ms F in which she selected "English" as her ethnic origin and at page 157 a similar form said to have been completed by Ms S in which she selected "British" ("Irish" being an available option and not selected by either). I have describe these as "said to be" completed by these individuals as Ms McGee submitted that the complete documents had not been provided and that there was nothing specific to link the signature pages which followed to these particular pages. That is true as far as it goes, although I found it implausible that the Respondents might have mixed up, still less deliberately inserted (should that be suggested), pages completed by different individuals. I took the documents at face value.

14. Ms McGee also said that the Claimant was proposing to call witnesses to give evidence that Ms F and Ms S said that they were Irish.

15. The Respondents accept that Ms O'D is Irish, but contend that her circumstances are materially different from the Claimant's in that (as shown on her application at pages 137-140) she is a qualified teacher, which the Claimant is not.

16. Ms Sheridan argued that Ms F and Ms S should be struck out as comparators and that a deposit order should be made in respect of the use of Ms O'D as a comparator.

17. I concluded that:

    17.1 There is little reasonable prospect of the Tribunal finding that Ms F and Ms S are Irish. Leaving aside questions of nationality (there being no suggestion that this arises in the present case), it is very unlikely that a Tribunal will decide that an individual is of Irish ethnic origin if they maintain that they are not. Such a finding is not, however, impossible. For example, a Tribunal might find that such an individual has on other occasions or in other situations identified as Irish and, if there was any favouring of Irish people, benefited from that. I have considered whether the possibility of such a finding is so remote that there is no reasonable prospect of it being made. Given what I have been told about the evidence to be called by the Claimant, I have concluded that this is not the case.

17.2 It is not the case that there is little reasonable prospect of the argument that Ms O'D is an appropriate comparator succeeding. I consider that it is open to argument whether her teaching qualification rendered her circumstances materially different to the Claimant's when the posts in issue were those of Teaching Assistants.

18. Ms Sheridan then addressed paragraphs 16(b)-(d) and 22(b)-(d) of the Particulars of Claim (pages 19 and 20-21). These are in turn reflected in issues 5.2.2 and 5.2.3 above, concerning the roles which were offered in April (to Ms F) and September 2021 (to Ms S and Ms O'D) respectively.

19. It was common ground that roles within the school were usually advertised; that the September roles were advertised; and that the Claimant did not apply for any of the roles. Ms McGee stated that the Claimant did not accept that the April role was advertised and that there was no evidence of that having been done.

20. Ms Sheridan argued that there cannot have been less favourable treatment of the Claimant, nor can there have been any harassing effect on her, given that she did not apply for the roles. She further argued that, in reality, the Claimant was relying on these allegations as evidence in support of her complaint about the non-renewal of her contract (issue 5.2.1). Ms McGee replied that there was no evidence that the Claimant was told the vacancies were available during ongoing discussions about renewal, which I took to mean that the Claimant's case was that she was not told about them.

21. I concluded that, given the dispute about whether the April vacancy had been advertised, I could not say that there was little or no reasonable prospect of the Tribunal finding that this amounted to less favourable treatment of the Claimant.

22. The complaint about the September appointments seems to me to add little, if anything, to the complaint that not renewing the Claimant's contract was an act of less favourable treatment, as demonstrated by Ms McGee's explanation of the Claimant's case as set out above. I do not, however, consider that there is no reasonable prospect of it succeeding, in the terms described by Ms McGee. I find, however, that there is little reasonable prospect of this succeeding as a separate allegation from that of not renewing the Claimant's contract. Such a finding would involve the Tribunal concluding that, separately from not renewing the Claimant's contract, the Respondents decided not to consider her for the new roles when she had not applied for them; and that they treated or would have treated differently an Irish comparator whose contract had not been renewed and who also had not applied. I consider that, while not impossible, this is an inherently unlikely finding.

23. I have reached a separate conclusion about the alternative allegations of harassment, which I shall set out below.

24. Ms Sheridan then addressed the issue of time limits, again seeking deposit orders. Ms Sheridan contended, and Ms McGee did not dispute, that the complaints in paragraphs 16(b)-(e) and 22(b)-(e) of the Particulars of Claim (issues 5.2.2, 5.2.3 and 5.2.4 above) were prima facie out of time, the relevant date for this purpose being 8 July 2021. The issue for me to decide was whether there was little reasonable prospect of the Tribunal finding that there was conduct extending over a period including the non-renewal of the Claimant's contract, such as to bring the earlier complaints within time, or of the Tribunal finding that it was just and equitable to extend time.

25. Ms McGee relied on ongoing conversations from September 2020 about whether the Claimant would be given a permanent contract. I concluded that, if the Tribunal were to find that the non-renewal of the Claimant's contract was an act of discrimination, it might also find that there was conduct extending over a period such as to bring within time any earlier decisions about Teaching Assistant roles that were also found to be discriminatory. I did not consider that there was little reasonable prospect of this.

26. That conclusion applies to issues 5.2.2 and 5.2.3. I found the position to be different with regard to issue 5.2.4. The subject matter of this (phonics training) is different, and it was not disputed that it involved a different decision maker (Ms Troughton as opposed to Mr Doherty). I concluded that there was little reasonable prospect of the Tribunal finding that this was part of conduct extending over a period. So far as a just and equitable extension of time is concerned, this would be for the Tribunal to decide, but the Claimant has advanced no grounds on which this might be granted. I therefore find that there is little reasonable prospect of an extension of time being granted.

27. Finally, Ms Sheridan sought deposit orders in respect of paragraphs 22(a) and (e) of the Particulars of Claim (issues 5.2.1 and 5.2.4) as allegations of harassment. Ms Sheridan contended that there was little reasonable prospect of the Tribunal finding that either the failure to renew the Claimant's contract, or the failure to arrange phonics training had the effect of harassing her, taking into account the need to consider the objective reasonableness of any the Claimant's perception. Ultimately I was not convinced by this: it would be a matter for the Tribunal to decide on the evidence.

28. I considered that the stronger argument was that, by virtue of section 212 of the Equality Act, conduct cannot amount to both direct discrimination and harassment; and that if the complaint about non-renewal of the contract is to succeed, it will succeed on the basis that it was done because the Claimant is not Irish. Ms Sheridan submitted, and I agreed, that no other way in which the decision might have been "related to" the Claimant's ethnic origin had been identified. I considered whether this meant that there was no reasonable prospect of the allegations succeeding as complaints of harassment and concluded that this was not quite so, as

there was a possibility that ultimately the evidence might support that finding rather than direct discrimination. I concluded, however, that there was little reasonable prospect of issues 5.2.1 or 5.2.4 succeeding as allegations of harassment.

29. The effect of my findings with regard to the issues in the case is as follows:

29.1 None should be struck out.

29.2 Issue 5.2.1: there is little reasonable prospect of this succeeding as an allegation of harassment.

29.3 Issue 5.2.2 (paragraphs 16(b) and (c) and 22(b) and (c) of the Particulars of Claim): there is little reasonable prospect of the Tribunal finding that Ms F is Irish.

29.4 Issue 5.2.3 (paragraphs 16(d) and 22(d) of the Particulars of Claim: there is little reasonable prospect of this succeeding as a separate complaint from issue 5.2.1; and little reasonable prospect of the Tribunal finding that Ms S is Irish.

29.5 Issue 5.2.4 (paragraphs 16(e) and 22(e) of the Particulars of Claim: there is little reasonable prospect of the Tribunal finding that it has jurisdiction to hear this complaint, given the applicable time limits and additionally little reasonable prospect of this complaint succeeding as an allegation of harassment.

30. I considered whether I should, as a matter of discretion, make deposit orders where I have found that there is little prospect of success. I concluded that I should do so. The Claimant should consider whether she should continue with these aspects of her claim given my assessment of them. No matter other than the prospects of success has been canvassed as a reason why I should not make deposit orders.

31. Rule 39(2) provides that:

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.

32. The Claimant had not provided any evidence about her ability to pay. When I enquired about this, Ms McGee, on instructions, said that the Claimant had no income but received money from her family, and could afford a total of around £200 - £300. Ms Sheridan observed, understandably, that the Claimant was in receipt of legal advice and should have provided information about her ability to pay if she wanted that to be taken into account.

33. In the absence of any information beyond what has been said on the Claimant's behalf, I took the view that it was unlikely that she was over-

stating her ability to pay. I also took into account Ms Sheridan's submission that, in order to be effective, the amount of a deposit order should be sufficient to make a difference. I also reminded myself that imposing an order that the Claimant could not pay would be tantamount to striking out the relevant parts of the claim. With all of this is in mind, I made deposit orders in the total sum of £375. The details are set out in the separate deposit order sent with this judgment.

Second Respondent's application

34. Turning to the Second Respondent's application, rule 34 includes provision for the removal of a party "apparently wrongly included". I understand this as applying to a party who has been included in the proceedings by mistake, or to similar situations, rather than to a situation where, as here, it is contended that the claim against that party is bound to fail. That seems to me to fall within rule 37(1)(a) as being a claim that has no reasonable prospect of success. I therefore considered the Second Respondent's application under this alternative ground.

35. Ms Gill stated that the Second Respondent provided an HR function to the First Respondent and was named on documents such as the Claimant's payslips and her P45 for that reason and, in the case of the P45, because it uses the same tax reference as the First Respondent. Ms Gill further stated that nothing had happened in practice to suggest that the Second Respondent was the employer.

36. Ms McGee confirmed that only the complaint of unfair dismissal was made against the Second Respondent. She relied on the P45 and other documents and submitted (rightly in my judgment) that there was no evidence of the stated HR function.

37. I have no difficulty in seeing why a Claimant would join the London Borough of Ealing as a Respondent when they have received a P45 which gives the employer's name and address as "London Borough of Ealing", etc. The matter does not, however, end there. Section 36(2) of the Education Act 2002 provides in respect of voluntary aided schools, of which the First Respondent is one, that:

> "…….any teacher or other member of staff who is appointed to work under a contract of employment at a school to which this section applies is to be employed by the governing body of the school."

38. Ms McGee could offer no real answer to this point. The Claimant's particulars of employment showed the First Respondent as her employer. I considered whether there might be some way of interpreting section 36(2) such that if a member of staff entered into a contract of employment with some entity other than the governing body of the school, there might then be a valid contract of employment with that entity, albeit in breach of section 36(2). I concluded that, whatever the answer to that question might be, this was not what had happened here. I found that, in practical terms,

the only possible outcome of the decision as to who was the Claimant's employer was that it was the First, and not the Second, Respondent. Section 36(2) does not allow for any other outcome.

39. I therefore concluded that the claim against the Second Respondent has no reasonable prospect of success. Again, I had to consider as a matter of discretion whether the claim should be struck out. Nothing additional as to why it should not has been raised. I have not been told of any other reason why the Second Respondent should be retained as a party. I concluded that I should strike out the claim.

Employment Judge Glennie

Dated: ……..……13 October 2022…..……..

Judgment sent to the parties on:

13/10/2022

For the Tribunal Office