# EMPLOYMENT TRIBUNALS

**Claimant:** Sharron Woods

**Respondents:** (1)The Governing Body of St. Chad's R C Primary School
(2) Lancashire County Council

**HELD AT:** Manchester **ON:** 13 June 2017

**BEFORE:** Employment Judge Holmes (sitting alone)

**REPRESENTATION:**

**Claimant:** Mr D Bunting, Counsel
**Respondent:** Mr D Tinkler Counsel

## RESERVED JUDGMENT ON PRELIMINARY HEARING

It is the judgment of the Tribunal that :

There are no reasonable prospects of the claimant establishing that the second respondent was her employer, or otherwise liable to her for her dismissal, or any acts of discrimination. Her claims against the second respondent are struck out, and it is dismissed from the proceedings.

## REASONS

1. By a claim form presented on 24 February 2017 the claimant brings claims of unfair dismissal and disability discrimination arising out of the termination of her employment on 28 September 2016. The claimant named the two respondents in her claim form, and in para. 31 of her Grounds of Complaint pleads:

*"As there is currently some ambiguity on* [sic] *who the respondent should be for each claim (and there could be separate claims against both the 1st Respondent and 2nd Respondent) the claims pleaded herein in all cases are made against both Respondents and will be further particularised when the correct respondent or respondents to each claim have been identified."*

2. The response filed on behalf of both respondents on 24 March 2017 pleads that the correct respondent is the first respondent, and , in para.2, there is a prayer that the second respondent be dismissed from the proceedings.

3. A preliminary hearing was held on 28 April 2017 before Employment Judge Franey, who directed that the issue as to whether the second respondent should be dismissed from the proceedings should be determined in a preliminary hearing, and he made case management orders for this hearing.

4. The tribunal has accordingly held this hearing to determine this sole issue. The claimant has been represented by Mr Bunting of Counsel, and the respondent by Mr Tinkler of Counsel. Both have prepared helpful written skeleton arguments/submissions, and have spoken to them in the course of the hearing. There has been an agreed Bundle of documents for the Preliminary Hearing, and references in this judgment to page numbers are to page numbers in that Bundle, unless otherwise stated. Evidence was heard from Glynn Roberts , the Chair of Governors, and from Victor Welch , HR Manager of the second respondent. The claimant also gave evidence. Judgment was reserved, which is now given, with apologies for the slight delay occasioned by the current pressure of judicial work, and some intervening leave.

***The claimant's submissions.***

5. For the claimant, Mr Bunting set out in his skeleton argument at paras. 6 to 17 basic facts which are largely either agreed or are apparent from the documentation. They have been rehearsed above, in relation to the payroll , P60, recruitment and other documentation which bears the name of the second respondent. He refers to the Equal Pay review carried out in 2010 , and the termination and re-employment exercise on 2010 (see pages 107 to 120 of the Bundle). He also refers to the involvement of Victor Welch in the dismissal process, and the claimant's case that he took a major part in the decision making process. It is pointed out that he was the author of the outcome letter sent to the claimant. The claimant also relies upon the evidence , not disputed, that after the claimant's employment ended , her post was advertised on the County Council's vacancy management system.

6. Mr Bunting made the additional point, that the claimant's contract of employment expressly incorporates provisions (page 90 of the Bundle) as to salary which are to be determined in accordance with Parts 2 and 3 of "the Green Book" . The "understanding" (not challenged by the respondents) is that this is a reference to collective agreements made between the relevant unions and various local authorities, the terms of which are embodied in "the Green Book". This, he argues supports the argument that the second respondent was the employer, as the Governing Body of an individual school would not be party to such collective bargaining.

7. Turning to the position under s.36 of the Education Act 2002, he accepts that the respondents would be entitled to rely upon that section, if it applies. He points out, however, that the respondents' position on whether the school was a maintained school at all has changed, the position originally being taken (page 30 of the Bundle, para.2 of the response) that it was not maintained or affiliated to the second respondent in any way.

8. Be that as it may, Mr Bunting seeks to argue that s.36(2) does not, or may not, apply in this case because of the potential exclusion provided for if regulations made under s.36(4) of the Act expressly provide to the contrary.

9. He cites the Education (Modifications of Enactments Relating to Employment)(England) 2003 Order (S.I 2003/1964) , referred to hereafter as "the 2003 regulations", as regulations made pursuant to s.36(4) of the 2002 Act. Those regulations, however, he accepts may support the respondents' case, as they largely provide that in any school with a delegated budget, the governing body is to be considered as the employer, and as liable for any employment tribunal claims.

10. He refers the tribunal, however, to another set of regulations , made in 2009, the School Staffing (England) Regulations 2009 (S.I. 2009/2680), "hereafter the 2009 regulations" . These were made pursuant to the power under s.36(4) of the 2002 Act to make such regulations. He draws attention to reg.4, which empowers a governing body to delegate its power to appoint or dismiss any member of staff.

11. Additionally, reg. 29 provides that the governing body is responsible for the appointment of support staff (of which the claimant was one) unless the governing body and the authority agree that the authority will make such appointments.

12. The claimant's submission is that if the second respondent became responsible for appointments under reg.29, it must follow that this entity becomes the employer. The tribunal is invited to conclude there is, or may be, and hence the matter should be left for the final hearing, an agreement between the Governing Body and the second respondent that the second respondent would appoint support staff.

13. This matter has been ventilated in correspondence, and the respondents have informed the claimant's solicitors that there is no such agreement . This is contained in a letter dated 24 April 2017 at pages 232 to 233 of the Bundle. As, however, the respondents' stance on whether the school was maintained school was conceded to have been incorrect (in the same letter, in fact) , Mr Bunting invites the tribunal not to accept this assertion, saying it is not supported by the evidence. He refers to the involvement of the second respondent in recruitment , pointing to the claimant's offer letter , which came from the second respondent (page 94 of the Bundle) and the other matters referred to above in relation to payroll, the P60, Equal Pay Review and other HR services provided to the first respondent. He submits therefore that the first and second respondent had an agreement , which need not be in writing, that the second respondent would appoint support staff and hence was the employer of the claimant.

14. Mr Bunting refers the tribunal to caselaw in support of his contentions. He cites ***Greenwood v Cornwall and anor UKEAT 0530/13/0606*** and ***Jones v Neath Port Talbot County Council [2011] EWCA Civ 92*** as authority for the proposition that there are circumstances where a claim can be maintained against a local education authority and a governing body, i.e concurrent liability. He relies upon a passage from the judgment of Carnwath LJ in that regard..

15. ***Davies v Haringey London Borough Council [2014] EWHC 3393*** is also cited , to demonstrate that in certain situations there can be an express or implied

variation of contracts of employment, including the identity of the employer. In that case, whilst the employee was, it was accepted , originally employed by the governing body, her original contract of employment was expressly or impliedly varied by express agreement or impliedly by the conduct of the parties. The tribunal is invited to find that such a variation has, or may have, occurred in this case.

16. Finally, Mr Bunting contends that the claimant may be an employee of the first respondent for the purposes of her unfair dismissal claim under the ERA, but fall within the wider definition of employee for the purposes of the Equality Act 2010, and hence be an employee of the second respondent for those purposes.

***The submissions – the respondents' case.***

17. As this is effectively an application by the second respondent , supported by the first , that it be dismissed from the proceedings, the logical starting point is the second respondent's contention that it has no potential liability as the claimant's employer , which the first respondent accepts that it at all material times was. The legal position, it was submitted, is that the Primary School at which the claimant was employed is a "voluntary aided school", and hence, pursuant to s.36(2) of the Education Act 2002 any teacher or other member of staff who is appointed under a contract of employment is to be employed by the governing body of the school.

18. As there is no issue but that the school is a voluntary aided school, this is default position, submits the second respondent. In addition , however, the point is made that the claimant's contract of employment (pages 88 to 92 of the Bundle) is between the Governing Body of the school and the claimant, and clause 1 provides that the claimant was "appointed by the governing body".

19. Responding to arguments relied upon by the claimant to the contrary , the second respondent's submissions are as follows. Firstly, Mr Tinkler urged the tribunal to resolve the issue, and not to leave the second respondent as a party for the final hearing, on, as it were, the off – chance that the evidence may then justify a finding that the second respondent was liable. This preliminary hearing was convened to determine this issue, this was the parties' opportunity to put all relevant evidence and argument before the tribunal. Allowing either party to leave the matter to the final hearing , on the basis that there may be "something more", would frustrate the purpose of this hearing.

20. The fact that the claimant's payslips and P60 refer to the second respondent is irrelevant, as the first respondent utilises payroll and HR services from the second respondent, and this does not displace the statutory position, or the express contractual terms.

21. The fact that the claimant was written to by the second respondent in 2008 in connection with an Equal Pay Review is similarly of no weight. It was accepted that thereafter, following the review, the second respondent did send out notice of termination of the claimant's previous contract (pages 107 to 108 of the Bundle) , and an offer of a new contract, which the claimant accepted, and which led to the issue of a new Statement of Particulars (pages 109 to 120 of the Bundle). Whilst the letter of 27 April 2010 does speak of "your ... employment with the County Council", the ensuing Statement of Particulars , for the purposes of s.1 of the ERA 1996,

expressly states, under section 3 “Place of Work” that the claimant , or whoever else was referred to, for this is a generic document, that in the case of a voluntary aided school the employee was employed by the Governing Body of the school (page 112 of the Bundle).

22. The third fact relied upon by the claimant, that Victor Welsh , principal HR manager of the second respondent led the meetings which resulted in the claimant’s dismissal, is disputed. His was an advisory role, no more. He took no decisions. In any event, even if accepted as fact, that cannot alter the position in relation to the central issue of whether the second respondent was the claimant’s employer, which it never was, whatever the role taken by Mr Welsh.

23. Finally, Mr Tinkler sought to distinguish caselaw relied upon by the claimant in correspondence, and in her submissions before this hearing. The first is ***Greenwood v Cornwall Council and another [2014] UKEAT/0530/13DM*** . He points to the facts of this case, and in particular the finding that the claimant’s contract of employment in that case was originally with the Council, and it was only after resignation of the school’s governing body that an interim governing body was appointed, and then an interim executive board was appointed in July 2012. All that the EAT decided in that case was that the Council may have some liability for claims that pre-dated July 2012, and that it should therefore remain a party until the facts had been established. That is a very different situation to that which pertains in the instant case, and the decision does not support the claimant’s argument.

24. The second case is ***Jones v Neath Port Talbot County Borough Council [2011] EWCA Civ 92*** . It was submitted that this case did not assist the claimant either, as in that case it was the Local Authority which had dismissed the claimant without any notification from the Governing Body, acting alone. That was not the allegation in this case, and the employer had been the local authority, not the governing body..

25. In answer to the claimant’s submissions as to the effect of the 2003 regulations, he firstly submitted that there was no such agreement to bring them into play, and secondly, in any event, even if there was agreement to the local authority “appointing” staff , that was not necessarily the same as “employing”.

26. The claimant’s “Green Book” argument added nothing . An employer may well choose to make reference to terms collectively agreed between other parties as terms of an agreement with his own employees, that does not make any third party the employer.

27. In short, there was no good reason for retaining the second respondent in these proceedings. No basis for doing so had been established, and there was no possibility of anything “turning up” in the facts that were likely to be found in the final hearing which could affect the simple position that the second respondent was not the claimant’s employer, and has no potential liability to her.

28. In conclusion Mr Tinkler submitted that , in what was the mirror image of the cases relied upon by the clamant , the claimant’s contractual documents always said the Governing Body was the employer, which accorded with the legislative scheme of s.36 of the 2002 Act.

***The Law.***

29. The tribunal's power to strike out is to be found in rule 37 of the 2013 rules of procedure as follows:

**37 Striking out**

(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).

30. The provisions of the relevant Education Acts, and Regulations have been extensively recited in the arguments , and are set out in Mr Bunting's Skeleton.

***Discussion and Findings.***

30. With all due respect to Employment Judge Franey, it is a little unclear what, precisely, is to be determined in this preliminary hearing. The way in which the issue is worded in his Order of 28 April 2017 is:

"whether the second respondent should be removed from the proceedings because it did not employ the claimant and cannot be liable for any of her complaints."

31. That is slightly ambiguous, in that it may be read as requiring the tribunal to consider striking out the claims against the second respondent, as the claimant has no reasonable prospects of success in her claims against it, because the second respondent did not employ the claimant. The other possibility is that the preliminary hearing was to determine, as a preliminary issue, whether the second respondent was the employer of the claimant, or had any other potential liability to her if it was not. The two are slightly different. The latter would be, in effect, a final determination, where issues of discretion would not arise, the tribunal would be determining an issue in the proceedings, thereby removing it from any further consideration in the final hearing. The former would , however, not have that effect, but would involve the tribunal exercising discretionary powers under rule 37.

32. On balance, and as the claimant, at least, has approached the matter in accordance with a rule 37 approach, for otherwise the alternative plea of leaving the issue for the final hearing could not have been advanced, the tribunal has treated this as a application to strike out the claims against the second respondent under rule 37.

33. Having considered the evidence, which, with respect to the parties has hardly added anything to the position on the documents, the tribunal has decided that it should dismiss the second respondent from these proceedings, on the basis that there is no reasonable prospect of the claimant establishing that the second respondent is liable for any of the claims that she makes.

34. The reasons for this conclusion are, in essence, those advanced by the respondent. The claimant accepts that the default position is that, as a voluntary aided school, the provisions of s.36 of the 2002 Act apply, and the Governing Body of the school is the employer for the purposes of these proceedings. The claimant, therefore , has to rely upon some basis for departing from the default position, and to establish some circumstances in which the default position does not apply. She has, through Mr Bunting, sought to do so, on one basis, by reference to an implied variation of her contract of employment , so that whilst originally employed by the first respondent, at some , unidentified point in time, this was implicitly varied so as to provide that her employer became the second respondent. In support of this, the claimant relies upon various facts, the strongest of which are the role of the second respondent in its payroll and other HR roles, and , although this is contentious , the allegedly pivotal involvement of Victor Welch, HR Manager of the second respondent, in the disciplinary and dismissal process.

35. The problem with all that is that this is all explicable by reference to outsourcing arrangements in place between the first and the second respondents. Whilst some of the terminology used in the Equal Pay Review was misleading, and may have given the understandable impression that the second respondent was indeed the employer of the claimant, and indeed, anyone else in her situation in a number of schools or other establishments, the end product , the Statement of Particulars produced dated 16 August 2010 expressly states:

*"**3. PLACE OF WORK***

***Voluntary Aided/Foundation/ Trust Schools***

*In the case of Voluntary Aided/ Foundation/ Trust schools , you are employed by the Governing Body of the school to work at the school or at any location which forms party of the premises of the school , or as may be reasonably requested by the Headteacher of the school."*

Thus whatever the wording of the correspondence in relation to the Equal Pay review , the end result was that there was no change. The claimant's employer remained the Governing Body.

36. In terms of the alleged variation, there is no basis for implying such a variation. The claimant herself does not appear to have raised the issue of whether she was employed by the first or the second respondent until the end of her

disciplinary process. She may well not have given any thought to the identity of her employer until then, and Victor Welch's involvement, she would say, excessive involvement in the dismissal process may well have prompted that enquiry. Assuming, however, in her favour that he did take a leading role, and he did indeed write the dismissal letter (pages 145 to 146 of the Bundle), he expressly did so on behalf of the Attendance and Dismissal Committee of the Governing Body. Likewise, the appeal outcome letter from Jeanette Whitham, another HR officer of the second respondent (pages 147 to 149 of the Bundle) was similarly written on behalf of the Appeals Committee of the Governing Body. In each instance the decisions were of Committees of the first respondent, not the second respondent.

37. On that basis, quite apart from s.36 of the 2002 Act, all the indications are that the Governing Body was, from the outset the employer, and the tribunal finds that there is no basis for finding that there was ever any variation to the contract of employment to change that.

38. The claimant, however, also relies on a potential exception to the application of s.36 of the 2002 Act, by reference to the effect of Regulations, under which the Governing Body may , if it has delegated its powers to appoint or dismiss any member of staff, or has agreed , in the case of support staff (reg. 29 of the 2009 regs.) that the authority will makes such appointments . The respondents' (both of them) case is that there was no such delegation or agreement. Mr Bunting points out that there is no requirement for such an agreement to be in writing, which is correct, but there is simply no evidence of there being any such agreement. The claimant , in para. 40 of Mr Bunting's submissions , does not accept this, partly because of incorrect assertions that had previously been made about the status of the first respondent and its relationship to the second respondent.

39. The respondents have, in correspondence (page 232 of the Bundle) expressly stated that there was no such agreement. Victor Welch was expressly asked whether there was such an agreement in a supplemental question before his cross – examination, and said he was not aware of any. In answer to a question from the Employment Judge he said he was not aware of any such agreement between the second respondent and any voluntary aided school.

40. To some extent, in the absence of any evidence of an actual agreement, the claimant's case comes , somewhat circularly, back to the alleged implied variation argument dismissed above.

41. The tribunal has therefore concluded that there is no reasonable prospect of the claimant establishing that the second respondent was her employer, and hence liable for her claims. A reasonable prospect is a more than fanciful one, and to accept Mr Bunting's invitation to keep the second respondent in the proceedings, on the basis that there may emerge evidence of a relevant agreement between the school and the second respondent, would be to indulge a fanciful claim.

42. In terms of potential "concurrent" liability, which has been advanced in the alternative, the tribunal has struggled to see how there could be such a concurrent liability in this case. The basis for Mr Bunting's proposition is derived from the judgment of Carnwath in ***Jones v Neath Port Talbot County Borough Council [2011] EWCA Civ 92*** , where at para. 68 he says this:

*"If it were abundantly clear from the Regulations that any direct liability of the Authority was excluded, I agree that there would be advantage in us saying so without more ado. However, with respect to Elias LJ's careful analysis , I am not in that position. The tenor of the Regulations is to provide that the governing body is to be "treated as if it were an employer" for the purposes of the Employment Tribunals Act (see e.g. art. 6(1) of the 2006 Order referred to by Elias LJ at para.8) but not necessarily to exclude concurrent liability of the Authority itself."*

43. To understand what Carnwath LJ meant by the term "concurrent liability" , it is necessary to examine the factual and legal matrix with which ***Jones v Neath Port Talbot County Borough Council*** was concerned . The starting point was that the school in question was a maintained school, falling under s.35(1)(d) of the Education Act 2002. The provisions of s.35(2) therefore applied, whereby any teacher who was appointed (as the claimant in that case was) under a contract of employment was employed by the local authority.

44. That is, of course, the converse of the position in this case to which the provisions of s.36,(2) not s.35(2) , of the same Act apply, whereby the mirror provisions in respect of voluntary aided schools is that any teacher or other member of staff is to be employed by the governing body of the school, the defauklt posiiotn accepted by the claimant in this case.

45. In ***Jones v Neath Port Talbot County Borough Council*** the starting point was that the claimant was employed by the local authority. Indeed, Schedule 1 to the Act expressly denies governing bodies (of this type of school) to enter into contracts of employment. The effect, however, of the 2006 Order and 2006 Regulations which pertained in that case was , for the purposes of employment tribunal claims, to treat a governing body exercising its employment powers (defined as powers of appointment, suspension, conduct and discipline and dismissal of staff) as if that governing body had at all material times been such an employer. In other words the scheme of the legislation is , in cases where the governing body is not the employer, to create a liability in claims before employment tribunals, where there would not otherwise be any.

46. What was being addressed in ***Jones v Neath Port Talbot County Borough Council*** was whether the imposition upon the governing body of that liability that it would not otherwise have had, thereby excluded any ongoing liability that the local authority would have had as the employer. Carnwath LJ and Picthford LJ concluded that this was not clear, and on that basis upheld the employment tribunal's ruling that the local authority should remain in the proceedings for this to be determined.

47. In terms, however, of what the "concurrent" liability referred to was, it is clear that it refers to the liability of the local authority as the employer, what could be termed the "original" liability , as the employer, pursuant to s..35(2), and the second, "deemed" liability of the governing body , which arose pursuant to the effect of the 2006 Order and the 2006 Regulations. Thus the local authority's liability in ***Jones v Neath Port Talbot County Borough Council*** was one which it would always have had as the employer. Onto that, however, for the purposes of employment tribunal proceedings was grafted the additional, and , of course, concurrent, liability of the governing body for employment decisions, that it would not otherwise have had.

Whether that thereby extinguished the local authority's liability as the "original" employer was the issue that the majority of the Court of Appeal considered was unclear.

48. All that, however, is of no application to this case. The first reason is the obvious one that ***Jones v Neath Port Talbot County Borough Council*** was concerned with a different type of school, to which s.35, and not s.36 applied. The local authority was the employer, under s.35,, whereas under s.36 the governing body was. Whereas the governing body in the former situation is expressly deemed to be the employer for certain purposes , possibly in addition to, if not in the place of, the local authority, the tribunal in this case has been taken to no such similar deeming provisions which provide that in the mirror image of s.35 situations, the local authority is deemed to be the employer for similar purposes, even though the actual employer is the governing body.

49. Thus the potential concurrent liability of which Carnwath LJ speaks is one that could only arise in s.35 situations, and to the extent that the judgment of the EAT in ***Greenwood v Cornwall Council*** referred to by Mr Bunting rightly recognises that there are situations where a claim can be maintained against a local education authority and a governing body , it does identify what those circumstances are. This tribunal does not consider that the circumstances of this case are such that this is one such instance. There is no basis for acceding o Mr Bunting's invitation to reach an "analogous" outcome in this case, as the two cases are not analogous.

50. Finally, Mr Bunting seeks to advance an argument that the claimant may meet the wider definition of employment under s. 83 of the Equality Act 2010. He also seeks to argue, by analogy with the employment status cases such as ***Autoglaze Ltd. v Belcher*** , that the tribunal can effectively re-write what may be the express terms of the contract of employment. This come back again , in effect , to the variation argument. In short, there is only one issue here. It is not what was the nature of the contractual relationship, but between which parties was that relationship. Statute dictates that it was between the claimant and governing body, and nothing produced on behalf of the claimant persuades , or has any reasonable prospect of persuading , the tribunal that there was ever any variation to that position, indeed, it may be questionable whether there could a contractual variation when statute imposes the terms in this way.

***Conclusion.***

51. Ultimately, the tribunal has, of course a discretion whether or not to strike out a claim, even if satisfied that it has no reasonable prospects of success. There may be other reasons not to strike out. In this instance, however, it is difficult to see what benefit the claimant loses if the second respondent is dismissed from the proceedings. The first respondent accepts that it was the employer for all the claims made in the proceedings. It is a school, funded, no doubt, in immediate terms by the second respondent, but ultimately , by the State as a whole. There is no risk, one would think, that any award made against the first respondent will not be satisfied. Quite why the claimant has been so keen to retain the second respondent in the proceedings (as well as, not instead of, the first respondent) is unclear. The lack of any obvious prejudice to her in dismissing the second respondent in these

circumstances removes any scintilla of doubt that the tribunal could possibly have had that this is the correct order to make.

52. As case management orders have already been made, and a final hearing listed, it is not anticipated that any variations are necessary. If, however, this is not the case, the parties are to notify the tribunal in writing within 7 days of receipt of this judgment , and to specify what variations to the current orders, or further orders, they require.

Employment Judge Holmes

Dated: 11 August 2017

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

17 August 2017

FOR THE TRIBUNAL OFFICE