EMPLOYMENT TRIBUNALS

Claimant: Mrs A Ellis

Respondent: For Under Fives Limited

Heard at: **Nottingham by cloud Video Platform** **On:** **7 December 2020**

Before: **Employment Judge Brewer**

Representation
Claimant: Mr N Malcolmson, lay representative
Respondent: Mr Z Malik, Solicitor

JUDGMENT having been sent to the parties on 15 December 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This matter came before me to consider two issues: the first was the employment status of the claimant, the second was an application to strike out, or in the alternative to impose a deposit on the claimant in respect of her claim for race discrimination. I had an agreed bundle. I heard evidence from the claimant and from Mr Lampard for the respondent. Both gave evidence on oath.

Issues

2. The issues were as follows:
    a. Was the claimant an employee of the respondent?
    b. Does the claimant's claim for direct race discrimination have little or no reasonable prospect of success?
    c. If the claim for direct race discrimination has little reasonable prospect of success should the claimant be required to pay a deposit as a condition of continuing the claim?
    d. If the claim for direct race discrimination has no reasonable prospect of success should the claim be struck out?

Law

Employment status

3. In looking at the test for employment I have taken as the starting point the judgment of Mr Justice MacKenna in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD.** He stated:

> *'A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.'*

4. The continuing relevance of this passage was confirmed by the Supreme Court in **Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC,** where Lord Clarke called it the 'the classic description of a contract of employment'. In essence, the Ready Mixed formulation of the multiple test can be boiled down to three questions:
    a. did the worker agree to provide his or her own work and skill in return for remuneration?
    b. did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee?
    c. were the other provisions of the contract consistent with its being a contract of service?

5. Following the **Ready Mixed Concrete** decision, the courts have established that there is an 'irreducible minimum' without which it will be all but impossible for a contract of service to exist. It is now widely recognised that this entails three elements:
    a. Control
    b. personal performance, and
    c. mutuality of obligation.

6. The starting point for this formulation of the test was the judgment of Lord Justice Stephenson in **Nethermere (St Neots) Ltd v Gardiner and anor 1984 ICR 612** where he said 'there must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service'.

7. The **Nethermere** decision was cited with approval by Lord Irvine in **Carmichael and anor v National Power plc 1999 ICR 1226, HL,** when he said that a lack of obligations on one party to provide work and the other to accept work would result in 'an absence of that irreducible minimum of mutual obligation necessary to create a contract of service'.

Race discrimination

8. In relation to the race discrimination claim the following is noteworthy.

9. The starting point are the words of S.13(1) of the Equality Act 2010 (EqA) which provide that *'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others'.*

10. In short, an employer directly discriminates against a person if:
    a. it treats that person less favourably than it treats or would treat others, and
    b. the difference in treatment is because of a protected characteristic.

11. The burden of proof is on the claimant to prove facts from which the tribunal could conclude, in the absence of any other explanation, that an employer has committed an act of direct discrimination. If she does, the tribunal is obliged to uphold the claim unless the employer can show that it did not discriminate — see S.136 EqA.

12. In relation to the necessary comparison of treatment of others, in order to claim direct discrimination under S.13, the claimant must have been treated less favourably than a comparator who was in the same, or not materially different, circumstances as the claimant.

13. In relation to less favourable treatment, the test is objective although the claimant's perception is not without some significance. In **Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, HL,** Lord Scott stressed that a claimant who simply shows that he or she was treated differently from how others in a comparable situation were, or would have been, treated will not, without more, succeed with a complaint of unlawful direct discrimination. The EqA outlaws less favourable, not different, treatment, and the two are not synonymous.

14. I consider that the best approach to deciding whether allegedly discriminatory treatment was 'because of' a protected characteristic is to focus on the reason why, in factual terms, the employer acted as it did.

15. Finally I refer to the relevant tribunal rules:

Striking out

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

Deposit orders

39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

Findings of fact

16. I make the following findings of fact.

Employment status

17. The respondent runs a nursery for children under the age of 5. Some of those children have special needs. The respondent engages staff to work at the nursery. There is a staffing hierarchy as one would expect. The respondent's staff who work directly with the children are managed by a Nursing Manager who is then managed by the General Manager who is, in turn answerable to the Directors. The respondent operates a number of policies. The respondent is busiest during term times and has fewer children during school holidays. The respondent has a mix of employees and ad hoc or 'bank' staff. The respondent says that the claimant was a member of the bank and not an employee. In her evidence the claimant agreed that she was initially a member of bank staff, and not an employee. However, she says that at the point she was offered and accepted a 1:1 role with child A, she became an employee.

18. There is a worker appointment letter in the bundle (P.226) which the respondent says the claimant was engaged under. The claimant says she was not issued with this. I accept the claimant's evidence about that, but I also accept the evidence of Mr Lampard that nevertheless this document represents the terms on which bank staff are engaged by the respondent, and on the claimant's evidence it is clear that the way she worked was, in general, in line with the terms of the worker appointment letter.

19. The key terms of the worker appointment letter were that the claimant was offered but did not have to accept work. When not working for the respondent she was free to work elsewhere, without restriction. The worker appointment letter says that the claimant could be offered work on an hourly, weekly or other basis. The claimant accepted that there was no obligation on the respondent to offer her work and if offered, no obligation on her to

accept the offer. The claimant agreed that there were times when no work was offered to her, for example during half term in February 2020, when there were fewer children in nursery, and in the case of child A, when child A was too sick to attend the nursery. The claimant has always accepted work offered and she has not worked elsewhere during her engagement with the respondent.

20. The claimant supplied her own uniform but otherwise used premises and equipment provided by the respondent. The claimant has a level 5 HND in nursery nursing. All of her work was supervised.

21. The respondent received funding for a specific 13 week period to enable speech and language work to be undertaken with child A. The respondent felt that it would be preferable for one staff member to undertake this piece of work which essentially involved working with child A on speech and language, general routines and play using tools provided by the speech and language team who came to the nursery around every 3 weeks to chick on progress. It is this which the claimant says amounted to an offer and acceptance of employment.

Race discrimination

22. On 13 February 2020 the claimant reported an incident in which she felt that one of the children had exhibited racist behaviour towards another child. The claimant felt that the respondent had not taken her concerns seriously in that she did not fell that she received the same level of support as a former employee (CL) had when she raised a race discrimination issue. The claimant said that CL has "support as to how to take things further".

23. CL had raised a concern about how she felt that BME children were treated differently by staff. The claimant's concern was about how she felt one child had treated another. The claimant says that CL received more support.

24. The position in relation to CL was that concerns about staff are covered by a specific policy at page 58 of the bundle – Policy for an Allegation about a Member of Staff. CL's concerns fell within this policy and although CL resigned, she was nevertheless encouraged to raise a grievance so that her concerns could be further investigated.

25. Concerns about the behaviour of the children are to be reported in the child's notes and discussed with the supervisor or manager. The claimant's concern was noted, and the matter was discussed with the child's parents.

26. The claimant says that the difference in her treatment compared to that of CL amounted to direct race discrimination.

Conclusions

27. Other than the fact that the claimant was offered a discrete piece of work with child A, nothing in her relationship with the respondent altered. She was offered this work not on an hourly or weekly basis, but on another basis, essentially based around the period of funding. The simple fact is that even during the period of the funding when child A did not attend the nursery the

claimant was not offered and did not work. This was exactly the same position as before she was offered the work with child A. The claimant has accepted that throughout her engagement with the respondent there have been offers of work, periods where no work was offered or done by her, and although she has never turned work down, she could. That remained the position even when the claimant was working with child A.

28. I find that there was no mutuality of obligation in the relationship between the claimant and the respondent and that this is fatal to an employment relationship. The claimant was not employed by the respondent.

29. I accept the proposition that special considerations arise where a tribunal is asked to strike out a claim of discrimination on the ground that it has no reasonable prospect of success. I note that in **Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL,** the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination.

30. In relation to this race discrimination claim, I have of course had the benefit of hearing evidence from both parties in determining this question. I note that in essence there are no disputes of around the key facts as I have set them out above. Taking the claimant's case at its highest, she says that the direct discrimination was that CL received more support when she raised her concerns than the claimant did when she raised hers.

31. The difficulty for the claimant is that it is in my view impossible to see the circumstances in which CL found herself as at all comparable with the situation faced by the claimant. The claimant has chosen a comparator in materially different circumstances. CL was concerned about how staff were treating the children in their care, she felt they were discriminating against BME children, no doubt a matter of the most serious concern to the respondent. The claimant was concerned about a comment made by one very young child to another, no doubt a matter of most concern to the child's parents. Those are materially different circumstances. Further, CL's circumstances were covered by a specific policy and on the evidence I had, that policy was followed. The claimant's concern was to be raised with her supervisor/manager, which she did. After that the matter was in the hands of management who raised the concern with the child's parents. In that context it is in my view impossible to see what detriment the claimant in fact suffered. She claims she had 'less support' than CL but when asked what support she wanted she referred to the respondent investigating her concern. But as it was put to her by me, what was there to investigate and in any event how would the respondent have done that – they could hardly cross-examine a 4-year old child. In reality the respondent accepted what the claimant had told them had happened and then raised that with the child's parents. It is in my view impossible to see what else they could reasonably have been expected to do.

32. Finally I turn to the reason why. It seems to me self-evident that the reason the respondent behaved as it did towards CL and her concerns was that they were implementing their policy around concerns about staff. The reason for the way the claimant's concern was dealt with is that the

respondent was acting in accordance with its practice that matters of concern about a child are noted, raised in handover or supervision and then it is up to the supervisor./manager to determine how best to proceed.

33. For those reasons I have concluded that the claim for direct race discrimination will fail on the comparator point, on the issue of detriment and indeed on causation as a result it has no reasonable prospect of success and should be struck out.

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Employment Judge Brewer

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Date: 19 January 2021