EMPLOYMENT TRIBUNALS

Claimant: Mr S Cogan

Respondent: Sir Robert Pattinson Academy

Heard via Cloud Video Platform **On:** 5 March 2021

Before: Employment Judge Brewer

Representation:

Claimant: Ms L Amartey, Counsel
Respondent: Mr A Sugarman, Counsel

JUDGMENT

1. The application to strike out the complaint of victimisation is allowed and that claim is struck out.
2. The application to strike out the complaint of direct sex discrimination fails.
3. The application for a deposit order in respect of the complaint of direct sex discrimination fails.

REASONS

Introduction

1. This case has already produced a number of preliminary issues which I do not need to rehearse here in any detail. Suffice it to say that following those preliminary issues being dealt with, on 25 January 2021, Judge Hutchinson determined that the case be listed for a preliminary hearing to consider the respondent's application to strike out the claimant's claims for sex discrimination and victimization under Rule 37 of the 2013 Rules of Procedure or, in the alternative, for a deposit in respect of those claims under Rule 39. That is the hearing which came before me.

The hearing

2. At the hearing I had a bundle of documents which was not agreed (a matter of significance which I shall return to below). I had written skeleton

arguments from both counsel and I heard their oral submissions all of which I have taken into account in reaching my decision.

Background

3. Obviously, there is a lot of detail in the substantive case, but the material background for the purposes of this hearing is as follows (references are to page numbers in the bundle).

4. On 5 April 2020, the claimant emailed Rebecca Gilbert, Head of Sixth Form/Assistant Headteacher, and Emma Williams, Assistant Headteacher, requesting a meeting at the school with a pupil, referred to as M, a vulnerable student, and M's mother [44]. Given the Covid 19 restrictions a meeting at the school that was not possible.

5. On 7 April 2020 the claimant again emailed Rebecca Gilbert and Emma Williams [45] and forwarded a series of emails between himself and M [46-48]. The respondent says that the emails caused serious safeguarding concerns. The email of 7 April 2020, which is central to the victimisation claim is in the following terms:

> *"Afternoon both,*
>
> *I've still not gotten back directly to [M] or her mum yet.*
>
> *In the meantime I have received the below, mum will be aware or (sic) the 'news' or 'reaction'. But I will make sure mum is aware of this latest email.*
>
> *However, I am becoming increasingly concerned that we're simply not doing all that we could do, or would be doing if schools were operating as normal under the usual duty of care for any vulnerable student.*
>
> *Sorry to load this onto you both but I genuinely feel stuck between a rock and a hard place."*

6. The respondent says that the emails attached to the above email indicated that the claimant may have overstepped professional boundaries in his relationship with M. As a result, the claimant was invited to a meeting with Rebecca Gilbert and Emma Williams on 9 April 2020 to discuss the emails and the claimant's relationship with M.

7. The respondent says that at the meeting the claimant revealed that he and M had spent a lot of time together, had developed a close relationship and that M had said that she wanted the claimant to adopt her. For his part, the claimant did not and does not accept that his conduct had been inappropriate or unprofessional.

8. Following the 9 April meeting, the respondent reviewed the claimant's email account. The respondent says it discovered that the claimant had sent what they say is a large number of emails to M and her mother. The respondent

says that this including repeated unprompted emails to M. The respondent believed that the claimant's emails to M were inappropriate and were evidence that proper professional boundaries had not been maintained.

9. The respondent also alleges that the claimant's emails revealed that he had sent the attendance record of another student to M's mother in error [76-77]. It is alleged that the claimant did not report this to the respondent.

10. In the event, the respondent undertook an investigation. The investigation report prepared by Emma Williams recommended that the matter proceed to a disciplinary hearing [38-43] and on 21 April 2020, the claimant was invited to attend a disciplinary hearing to discuss the following allegations:

11. The disciplinary hearing took place on 1 May 2020. It was chaired by Helen Spoors, Deputy Head Teacher. The original allegations relating to professional boundaries were added to with a further allegation relating to the claimant illicitly recording an investigation meeting.

12. The claimant was notified on 4 May 2020 that all of the allegations had been upheld and that they amounted to gross misconduct [101]. As a result, the claimant was summarily dismissed.

13. The claimant appealed against his dismissal [104]. The appeal hearing took place on 16 June 2020 and the appeal was dismissed [104-108].

14. The claimant says that his email of 7 April 2020 was a protected act following which he was victimised by use of the investigation and disciplinary procedure. He says that he suffered direct sex discrimination on the basis that a hypothetical female teacher with a similar relationship with M would not have been disciplined and dismissed.

Law

15. The material parts of the Tribunal Rules are as follows:

> ***"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…*
>
> ***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…"*

16. In relation to **direct sex discrimination**, for present purposes the following are the key principles.

17. Under section 13 Equality Act 2010 (EqA), there are two issues: (a) less favourable treatment and (b) the reason for that less favourable treatment. These questions need not be answered strictly sequentially (**Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337).

18. Given the treatment must be "less favourablr" a comparison is required, and a comparator must "be in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class" (**Shamoon** above).

19. The burden of proof is set out in section 136 EqA. The leading cases on the burden of proof pre-date the Equa;lity Act (**Igen Ltd v Wong** 2005 EWCA Civ 142 and **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, [2007] IRLR 246) but in **Hewage v Grampian Health Board** 2012 the Supreme Court approved the guidance given in **Igen** and **Madarassy**.

20. By virtue of section 136, it is for a claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, absent any explanation from the respondent, that the respondent has discriminated against the claimant. If the claimant does that, the burden of proof shifts to the respondent to show it did not discriminate as alleged.

19. In **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. This merely gives rise to the possibility of discrimination. Something more is needed.

20. Any inference about subconscious motivation has to be based on solid evidence (**South Wales Police Authority v Johnson** 2014 EWCA Civ 73).

21. In relation to victimisation, since the only issue before me was whether the claimant's email of 7 April 2020 was a protected act under section 27 EqA, the following will suffice.

22. Section 27(2) EqA defines a "protected act":

> "…(a) 'Bringing proceedings under this Act;
>
> (b) Giving evidence or information in connection with proceedings under this Act;
>
> (c) Doing any other thing for the purposes of or in connection with this Act;
>
> (d) Making an allegation (whether or not express) that A or another person has contravened this Act…"

23. It is necessary to do more than make an allegation that amounts to a criticism, grievance or complaint. The allegation has to suggest that "the

criticism, grievance or complaint was in some sense an allegation of discrimination or otherwise a contravention of the legislation." (**Beneviste v Kingston University**, EAT 0393/05).

24. Finally, turning to the strike out provisions of the Rules, I note that claims of discrimination are rarely struck out where there is a factual dispute between the parties (**Anyanwu v South Bank Student Union** 2001 UKHL 14, and also see **Mechkraov v Citibank NA** 2006 ICR 1121). However, the test is of course whether there is no reasonable prospect of success, even if there are factual disputes.

25. Having said that, I note that I should, when considering strike out, take the claimant's pleaded case at its highest however, I do not lose sight of the fact that in many, indeed almost certainly in most claims of discrimination the Tribunal will need to draw inferences from disputed findings of fact which I am not in a position to, and indeed nor should I, do. Those inference may be critical in many cases.

Discussion and conclusion

26. I shall deal first with the **victimisation** claim since that is a narrow dispute. As I have set out above, the single question is whether the claimant's email of 7 April 2020 a protected act. The key part of the email is:

> *"…I am becoming increasingly concerned that we're simply not doing all that we could do, or would be doing if schools were operating as normal under the usual duty of care for any vulnerable student…"*

27. Ms Amartey's submission on this email is set out from paragraph 19 of her skeleton. She says that the email "makes an allegation in laymen's terms the R was failing to make reasonable adjustments for Pupil M, pursuant to its obligations under section 85(6)" of the EqA. She submits, and I accept, that for an act to be a protected act there need not be any reference to the legislation; provided the act is done for the purposes of or in connection with the EqA it will be a protected act (see **Aziz v Trinity Street Taxis** 1988 ICR 534 CA).

28. I accept that M is vulnerable, but I have no evidence that she is disabled. It is as I understand it, a matter of dispute. But taking the claimant's case at its highest, it is said that the 7 April email contains an allegation that the respondent was failing to make reasonable adjustments for Pupil M.

29. I do not agree. The claimant's email is, in effect in three parts.

30. First, he confirms to the recipients that, in relation to a proposed meeting at the school:

> *I've still not gotten back directly to [M] or her mum yet*

31. Second, he refers to an email he received from the claimant on 5 April:

> *In the meantime I have received the below, mum will be aware or (sic) the 'news' or 'reaction'. But I will make sure mum is aware of this latest email.*

32. Finally he says:

> *However, I am becoming increasingly concerned that we're simply not doing all that we could do, or would be doing if schools were operating as normal under the usual duty of care for any vulnerable student.*

33. This latter paragraph is quite clearly a reference to (a) the "usual" duty of care that a school has for vulnerable students, and (b) is quite clearly focussed on the generality of the situation; he refers to the "normal" position in relation to "any vulnerable student". The focus of this paragraph, the key paragraph, is not M, but it is a general comment about the effect of the Covid 19 restrictions on the support which can be given to vulnerable students. I do not consider either that one can construe the reference to "any vulnerable student" as a reference to M, and in any event I do not consider that one can or should construe "vulnerable" with "disabled" within the meaning of section 6 EqA. The "usual duty of care" that a school has to vulnerable students is a reference to their general, common law, duty that a school has to look after the welfare of students. That duty will vary of course depending on the particular vulnerability of the student. But in my view the duty to make reasonable adjustments is a specific duty imposed upon schools under section 85(6) EqA which states simply that a duty to make reasonable adjustments applies to the responsible body of a school.

34. For those reasons I consider that there is no reasonable prospect of the victimisation claim succeeding and I strike it out.

35. I turn then to the claim for **direct sex discrimination**. Most of the submissions I heard dealt with this claim and the key point seems to boil down to a dispute between the parties about what the claimant's case really is. The claimant relies on a hypothetical comparator. He asserts that a female teacher in his position, sending the emails he sent would not have been disciplined and/or dismissed. Mr Sugarman submits that in effect this is a case where there is no dispute on the facts, that the claimant sent the emails which gave rise to the investigation and disciplinary hearing and which resulted in his dismissal. He says that the respondent's disciplinary case is about the claimant overstepping professional boundaries and that any teacher found to have done this would have been treated in the same way. Mr Sugarman's submission is that the claimant's case is "a fanciful assertion of less favourable treatment on the grounds of sex, again without any evidential basis".

36. Whilst I am not making any findings of fact about what happened in this case, I have been taken to the various emails which the claimant sent and alongside that I have read the other documents provided including the disciplinary documents. Along with the respondent's concerns over the content of the claimant's emails with M, he was also accused of being untruthful about contacting M out of school time, which he denied but which was plainly the case, and he was accused of a data/confidentiality breach in relation to disclosure of a student's attendance record.

37. Ms Amartey submitted that this case is not as simple as the documents I had before me suggests. There is other evidence from which the Tribunal will be asked to draw adverse inferences about the reason for the respondent's behaviour. She also pointed to page 98 of the bundle from which it is apparent that at least one occasion in late 2019 the claimant copied in Emma Williams, Assistant Head Teacher, to a number of his email exchanges with M, which included emails using a 'pet' name the claimant had for M, and in response to the email chain, Mrs Williams says "an appropriate response" (this is no doubt a reference to the last email in the chain, but one presumes she read all of them). Ms Amartey also says there will be evidence that female teachers have not been treated in the same way as the claimant albeit they would not be comparators per se, they will be "evidential comparators". As Ms Amartey points out, that issue was raised by the claimant on appeal and although I hesitate to say, it is delat with rather superficially by the appeal manger.

38. The claimant had made the point that he had used "comparator emails" (I assume this is a reference to the "evidential comparators" in Ms Amartey's submissions) at the disciplinary hearing to show that other teachers communicated with students in a similar way to the way he communicated with M. The appeal manager does not in fact deal with the point at all. He simply falls back on saying that the question for the disciplinary hearing was whether the claimant's communications were appropriate and, implicitly because he does not say it expressly, that other teachers' communications were not relevant.

39. I of course have not seen this evidence, but taking the claimant's case at its highest, I accept Ms Amartey's argument that if there are female evidential comparators, and given that the respondent had seen some of the communications between the claimant and M and appeared not to take issue with it, it would be open for a Tribunal to draw an inference that sex was the reason for the respondent's treatment of the claimant not the concern over professional boundaries.

40. For those reasons I am not able to conclude that the sex discrimination claim has no or little reasonable prospect of success. Therefore the applications in respect of that claim fail.

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Employment Judge **Brewer**
Date: 6 March 2021

JUDGMENT SENT TO THE PARTIES ON

12 March 2021

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FOR THE TRIBUNAL OFFICE