



EMPLOYMENT TRIBUNALS

Claimant

Miss A Eason

v

Respondents

Cuckoo Hall Academies Trust
Florinda Shamolli

Heard at: Bury St Edmunds

On: 3 & 4 February 2021

Before: Employment Judge S Moore
Mrs J Smith
Mr P Miller

Appearances

For the Claimant: Mr L Dilaimi, of Counsel

For the Respondent: Mr C Khan, of Counsel

This was a remote hearing, consented to by the parties. The form of remote hearing was audio (CVP). A face-to-face hearing was not held because it was not practicable and all the issues could be determined in a remote hearing.

JUDGMENT

- (1) The claim of direct race discrimination dismissed.**
- (2) The claim of harassment related to race is dismissed.**
- (3) The claim for breach of contract is dismissed on withdrawal by the Claimant.**

REASONS

Introduction

1. This is a claim of direct race discrimination and harassment related to race. At the outset of the hearing the Claimant withdrew her claim for breach

of contract. For the Claimant, we heard evidence from the Claimant and Mr Andy Nicholas. For the Respondent we heard evidence from Mr Charambolous and the Second Respondent. We were also referred to an agreed bundle of documents. On the basis of that evidence we make the finding of facts set out below.

2. For the Claimant we were also referred to a statement of Mr Alan Jenner. However, since Mr Jenner did not attend the hearing (which took place via CVP) and there was no explanation for his absence, we have decided not to place any weight on his evidence.

The Facts

3. The Claimant is a qualified teacher with the additional qualifications of a Master's in Education and that of Associate Member of Dyslexia Accreditation (AMBDA), the latter being a qualification given to individuals who have undertaken the study of dyslexia at postgraduate level. She is a black woman.
4. The 1st Respondent is a multi-academy trust consisting of five schools which are all based in Enfield ("the Trust"). One of those schools is Cuckoo Hall Academy ("the school"). Mr Marino Charalambous (MC) became a governor of the school in 2002, before it was converted to academy status in 2010. The Trust was set up in 2010 and acquired different schools between 2011 and 2014. MC became a director of the Trust on 1 July 2011 and was appointed its Chief Executive on 1 July 2015.
5. On 20 March 2018 the Claimant attended an interview at the school for the position of Special Educational Needs Co-ordinator (SENCo). Prior to working for the school she worked as a Deputy SENCo and Year 1 teacher at a primary school in Leytonstone.
6. At the time the school was in special measures. It had been rated as inadequate following a full OFSTED inspection in July 2017.
7. In the same month Mr Andy Nicholas (AN) was asked to join the Trust as a school improvement consultant working two days per week and focus on the problems at Cuckoo Hall. An interim head (Trisha Davis) was also appointed but she left shortly afterwards and AN asked Mr Alan Jenner (AJ) "to come on board". They had known each other for a period of approximately forty years. It was intended that AN and AJ would share the role of interim head, but in the event AN stepped back to the role of school improvement consultant. Both AN and AJ were employed on fixed term contracts.
8. The 2nd Respondent, Ms Florinda Shamolli (FS), was one of the deputy heads at the school and has been working there for over thirteen years. The second deputy head was Ms Rosanna Ojosipe.
9. We were shown the staffing structure of the school, which sets out approximately 41 posts. At least 50% of the staff are from ethnic minority backgrounds and approximately 14 staff are of black or mixed-race backgrounds. Ms Ojosipe is of black Caribbean ethnic origin.

10. Very shortly before the Claimant's interview, AN asked FS if she would sit with him on the interview panel. The first part of the interview comprised AN and FS observing the Claimant as she took a lesson. FS reported to AN she thought the Claimant had conducted the lesson well.
11. The second part of the interview comprised a standard interview format of questions and answers. Since FS had been pulled into the interview at the last minute, she didn't have either the Claimant's CV or her application form. She was given a list of questions by AN and asked to take notes. FS says, and we accept, that most of the questions, were asked by AN and that the only question she asked was why the Claimant wanted to join the school. At the end of the interview FS gave her notes to AN who put them in his briefcase. She understands the notes were then given to AJ to be passed to HR. In any event, the notes have disappeared and were therefore not in the bundle.
12. The Claimant agreed in cross-examination that during the interview FS did not laugh or smirk at her or try to trip her up. She also said that FS "listened intently", and that both interviewers showed warmth towards her and made her feel that she wanted to come to the school when she had been undecided before the interview. The Claimant said she had a telephone call offering her the post within about 30 minutes of leaving the school.
13. The Claimant also gave evidence that FS asked her if her qualifications of a Master's in Education and AMBDA were the same as a National Award for SEN Coordination (NASENCo) qualification, and she replied that they were not. She further says that FS asked her if she was prepared to complete the NASENCo qualification while she was at the school and she said she was prepared to do so. FS denies that this conversation took place. FS was very clear that the only question she asked the Claimant was why she wanted to work at the school.
14. For reasons which will become apparent, nothing directly turns on this conflict of fact but since the matter is relevant to credibility we record that on the balance of probability we prefer FS's evidence and find the Claimant was mistaken about when, or if, the conversation she is referring to took place. Since FS had herself recently completed a NASENCo and is an experienced teacher and deputy headteacher, we accept she would have known that the Claimant's qualifications were not the same as a NASENCo. Further when on 25 May 2018 FS informed the Claimant that her appointment was being terminated because she did not hold a NASENCo qualification, the Claimant did not suggest that she responded by reminding FS that FS had known since the interview that she did not have that qualification, which would have been the natural response if the conversation in the interview had happened as the Claimant now recalls.
15. The Claimant's employment started on 16 April 2018. She worked alongside two Trust-wide SENCOs, Victoria Connolly and Fola Awofadeju.

16. It is a statutory requirement that a SENCo either holds a NASENCo or achieves the qualification within three years of being in post. MC said in evidence, and we accept, that because the school had been criticised by OFSTED for having too many unqualified or under qualified staff, he regarded it as crucial that the school appointed a SENCo who already held the NASENCo.
17. As a result of being in special measures, on 24 April 2018 the school had a visit from the Department for Education (DfE), and on 9-10 May 2018 a monitoring visit from OFSTED.
18. On 23 April 2018 the Claimant met with FS in her office. FS showed the Claimant data she had produced overnight showing pupil statistics. The Claimant made a comment to the effect that FS was very dedicated and says that FS responded by saying something along the lines of she was Eastern European and they were the most hard-working migrants in the UK (witness statement para 11) or that only Eastern Europeans were hard-working migrants (witness statement para 20). The Claimant further said that at the time she had found the comment surprising but not offensive or racist, although looking back with hindsight she now did so.
19. FS denies making any such comment. She said she would never say such a thing and in any event that she is Albanian and would never refer to herself as Eastern European. On the balance of probabilities we prefer FS's evidence. The Claimant's evidence on the point is unclear and at the time she did not perceive any comment FS may have made to be racist or offensive. Accordingly, we find that any comment FS may have made was innocuous and unrelated to race.
20. On 11 May 2018 FS met with MC and made a complaint that she was being bullied by AN and AJ. This was followed up with a detailed grievance contained in an email of 14 May 2018 alleging a number of incidents of bullying and sexual harassment. That email refers to an incident on the morning of Thursday 3 May 2018 when FS records that she spoke to AN and told him she had had enough of his bullying behaviour and that she would no longer accept "sexual or derogatory comments" from either him or AJ. She records that AN became aggressive, told her that the issue was her, and that she "would never be a head as long as he has anything to do with it".
21. On 18 May 2018 AJ informed the Claimant that in June she would be joining the Senior Leadership Team ("SLT").
22. At some point, during the DfE and OFSTED inspections the 1st Respondent discovered that the Claimant did not have the NASENCo qualification. FS says, and we accept, that the discovery was made by Victoria Connolley who reported it to FS. FS then reported the matter to AJ, who blamed FS and AN for recruiting the Claimant. AN blamed the HR Department for not making it clear in the recruitment material that a candidate needed to hold a NASENCo.

23. At a similar time, the Claimant applied for the role of Assistant Headteacher at the School. On reviewing her application MC noticed that she did not appear to have the NASENCo qualification and asked HR to confirm what qualifications she had. At that time he had not met the Claimant and was not aware of her race. MC then discussed his concerns with the head of HR and spoke to FS, who confirmed that the Claimant was not a qualified SENCO. As a result MC believed it was necessary to terminate the Claimant's appointment, however before doing so he took legal advice and spoke to the trustees to make sure "they were all on the same page".
24. On 19 May 2018, as a result of the allegations made against AJ and AN by FS, MC suspended AJ and emailed AN asking him not to go into work on Monday 21 or Tuesday 22 May 2018.
25. On Tuesday 22 May 2018 AN resigned.
26. On Friday 25 May 2018, the last day before the summer half-term, MC instructed the two Deputy Headteachers, FS and Ms Ojosipe to hold a meeting with the Claimant and explain the reasons for terminating her contract. Since Ms Ojosipe was uncomfortable having such a difficult conversation, MC instructed FS to hold the meeting with someone from HR.
27. An email of 25 May 2018 from MC to Rosanna Ojosipe states:
- "Unfortunately we need a qualified SENCo. The SLT should be aware that a SENCo needs to be qualified. Why are we advertising a SENCo role without this being a requirement? If we are employing an unqualified SENCo in the first place **I need to be consulted!**
- The needs of the children are more important than any personal feelings we may have. We do not have the luxury of being able to employ people that do not have the necessary requirements. We are in special measures and need to make progress rapidly. I cannot allow the Trust and any of our schools to take unnecessary risks with employing unqualified people especially for our most disadvantaged children.
- This is not a personal issue or something that is taken lightly."
28. It was put to MC that at the time he dismissed the Claimant he believed the Claimant had to have the NASENCo qualification to hold the post of SENCo and didn't understand that she could acquire the qualification while in post. MC denied this. He stated, and we accept, that there were absolutely no circumstances in which he would have appointed the Claimant if he had known she was unqualified. The school had been classed as inadequate, its SENT provision was of particular concern, and the last thing he believed he should be doing was appointing someone who might take up to three years to become qualified.
29. At 3.30pm on 25 May 2018 FS and Ollia Alexis from HR met with the Claimant and informed her that her employment was being terminated because she did not have the NASENCo qualification. She was given a letter from MC of the same date informing her of the dismissal and stating that her last working day would be 25 May 2018.

30. The Claimant was deeply shocked.
31. At that point FS got up and left the room, leaving the Claimant with Ollia Alexis to collect her things and depart the school. The Claimant says that as FS left the room she looked at her with contempt and smiled and/or smirked at her. Ollia Alexis did not see this because she had her back to the door and the Claimant did not complain about it at the time.
32. On the balance of probabilities we find that FS did not smile or smirk as alleged, and that any facial expression she may have made was not related to race.
33. On 25 May 2018 AJ was also dismissed.
34. On 30 May 2018 AN contacted the DfE and alleged that there was corruption, embezzlement and fraud at the Trust. The DfE contacted MC to discuss the allegations but were subsequently satisfied that the Trust had not done anything wrong. It has since lifted a "Financial Notice to Improve", confirming that the Trust is well managed, with good governance and making good progress.
35. On 31 May 2018 AN spoke with the Claimant. He told her that the reason for her dismissal was her ethnicity and not because she did not have a NASENCo. He told her that after her interview FS had voiced concerns about employing a black woman and voiced the opinion that black women were lazy. He also told the Claimant that when FS was told the Claimant would be joining the SLT she said she did not want another "black lazy bitch joining the team". This was the first time AN had told the Claimant that FS had apparently said such things.
36. It is these allegations, made by AN, that form the essence of the Claimant's case of race discrimination and we turn to them now.
37. In evidence before the Tribunal AN said that after the Claimant's interview on 20 March 2018, when he said that he wanted to appoint the Claimant, FS "threw her pencil on the floor" and said, "I am not appointing that black bitch".
38. When cross-examined about the chronology of events, AN said he then had a telephone conversation with MC and told him that although the Claimant wasn't qualified he wanted to appoint her, but that FS didn't agree. Apparently, MC didn't ask AN why FS didn't want to appoint the Claimant but simply told AN that he was "running the show" and could decide. AN says he didn't mention FS's racial behaviour in the course of that conversation but later went to MC's office and told him what FS had said. AN said he also spoke to FS about the matter the following day and asked, "what was the matter with you?" but she only shrugged her shoulders and didn't want to talk about it.
39. MC denies both that AN told him after the interview the Claimant wasn't qualified and that AN later told him FS had made a racially derogatory comment. FS categorically denies making the racially derogatory comment.

40. We are not only not satisfied that FS made such a comment, we are also satisfied that the comment was not made and that the allegation has been fabricated by AN.
41. It is incredible that FS would have changed personality between the interview (when she was perceived by the Claimant to be listening intently and warm and encouraging) and the moment immediately afterwards. It is incredible that if she had said such a thing, an offer would have been made to the Claimant so quickly. It is incredible that if AN had told MC that he wanted to appoint the Claimant, but that FS did not, that MC would not have asked why that was the case. It is also incredible that if FS had made such a racially derogatory comment that AN would not have considered formal disciplinary action was necessary. We also record that when giving his evidence on this matter, we had the impression of AN making things up as he went along. In particular in his witness statement he makes no mention of having apparently had two separate conversations with MC about the interview, the first where he did not report the racial insult and the second where he says he did. And his witness statement makes no mention of the apparent follow up conversation with FS about her comment. We find this is because they did not happen.
42. We turn to AN's second allegation, namely that when FS was told the Claimant would be joining the SLT she said she did not want another "black lazy bitch joining the team" to which AN replied "I'm sorry you can't say that I'm going to report you". Apparently, AN could not be precise about when this was alleged to have happened, but said it occurred sometime after the DfE visit on 24 April 2018 and before 10 May 2018. AN said he went to MC's office, which is located in a different building from his own, and told him what FS had said. MC told AN to put the comment in writing so AN went back to his office, wrote a paragraph but did not save it on the computer because he did not know how to do so, printed out a hard copy of what he had written and took the copy back to MC's office. On the way back from MC's office he apparently ran into Ollia Alexis from HR (who has now changed employment) and told her he had left something serious on MC's desk which they would talk about another time. He said that he did not want to put the allegation in an email because it was too serious. As regards printing out the alleged comment, AN said that although he couldn't save the document, AJ was there and helped him to print it.
43. MC denies that AN ever told him FS had said such a thing and/or given him a written record of a racial insult. FS not only denies she said such a thing, but further states that she had no problem with the Claimant joining the SLT and in fact treated her as though she was already part of it.
44. Again, we are not only not satisfied that FS made such a comment, we are also satisfied that the comment was not made and that the allegation has been fabricated by AN.
45. It is incredible that AN would have chosen to record what had happened by printing out a document and taking it back by hand to MC's office, rather

than use email. It is incredible that having chosen to record the comment on a computer rather than by hand, he didn't know how to save the document. Further, if he did nonetheless decide to record such a serious matter in this way, we find it incredible he wouldn't have asked AJ to help him save it (as well as print it), or that he didn't make a photocopy. Again, we also record that when giving his evidence on this matter, we had the impression of AN making things up as he went along. In particular his statement makes no mention of running into Ollia Alexis and mentioning the matter to her, nor of AJ helping him to print out the document. Again, we find that this is because these things did not happen.

Conclusions

46. Section 13(1) of the Equality Act 2010 provides that a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
47. In this case the protected characteristic is race and less favourable treatment relied upon is dismissal. The issue is therefore whether the effective cause of the Claimant's dismissal was her race.
48. As Mr Dilaimi for the Claimant submitted, the foundation of the Claimant's case turns on oral evidence, namely whether FS made the comments alleged. If we found that she did, Mr Dalaimi's submitted the burden of proof would shift, and it would be for the Respondent to show that the effective cause of the Claimant's dismissal was not race. In this respect he did not allege that MC was motivated by race but argued that either the decision to dismiss was made jointly by FS and MC, or that if the decision to dismiss was made by MC alone then it was made on the basis of "tainted information". The "tainted information" he relied upon for this purpose was said to be that MC didn't know the Claimant had three years to acquire the NASENCo qualification while in post and he had been wrongly persuaded or told by FS, who was motivated by race, that the Claimant need to hold the NASENCo qualification already.
49. Mr Dilaimi accepted that if we found that FS did not make the comments alleged, then the Claimant's case necessarily failed at the first hurdle. In this respect her case was unusual because her evidence of discrimination was not the most important evidence, the crucial evidence was that of AN. On this point he pressed upon us that AN had no reason to lie before the Tribunal and asked us to bear in mind that AN was a senior Head Teacher coming towards retirement and a magistrate of 25 years.
50. We have set out above our findings of fact and on the basis of those findings it is clear the Claimant case fails. On the evidence we heard we are satisfied that AN's evidence was not truthful. In short it contained an overwhelming number of inconsistencies and implausibilities and we did not believe it. We also note that AJ choose not to attend the Tribunal and support AN's evidence. By contrast the evidence of FS was clear, credible and entirely consistent with someone who has worked successfully in a multi-cultural school for many years without having previously ever having been accused of

discrimination. Her evidence was also supported by that of MC. Although Mr Dilaimi submitted that AN had no reason to lie to the Tribunal, we find that he did. FS had made allegations of bullying behaviour and sexual harassment against AN and AJ and as a result of those complaints their employment at the First Respondent had just terminated. The inevitable inference is that the allegations against FS were fabricated by AN as a means of retaliation, an attempt to make good on the threat he made to her on 3 May 2018 as recorded in FS's email to MC of 14 May 2018.

51. For the sake of completeness, we also record that we find the decision to dismiss the Claimant was made for one reason only, namely that she did not hold the NASENCo qualification. The decision was made by MC alone, and not jointly with FS, and when he made that decision MC was not under the misapprehension that the Claimant needed to have the NASENCo qualification to be lawfully in post; he understood she would have three years to acquire it but did not consider it acceptable to have an unqualified SENCo in post for any length of time given the fact the school had been classed as inadequate and criticised, in particular, for its SENT provision.
52. As regards the complaint of sexual harassment, section 26 of the Equality Act 2010 provides that a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
53. In this case the unwanted conduct relied upon is the comment allegedly made by FS to Claimant on 23 April 2018 in respect of Eastern Europeans and hard work, and the smirk FS apparently gave the Claimant after dismissing her.
54. In view of the findings of fact made above, this complaint also fails. We do not believe that any comment FS may have made to the Claimant on 23 April 2018 about hard work or any facial expression of FS that the Claimant may have seen when she was dismissed was related to the Claimant's race or to race at all.
55. It follows that the Claimant's complaints of direct race discrimination and of harassment related to race are dismissed.

Employment Judge S Moore

Date: 19.02.2021

Sent to the parties on: 17.03.2020.....

.....T Henry-Yeo.....
For the Tribunal Office

