EMPLOYMENT TRIBUNALS

Claimant: Mr D Clarke

Respondent: The Governors of the Lakeview School

RECORD OF AN OPEN PRELIMINARY HEARING

Heard at: Bury St Edmunds (by CVP) **On:** 30 July 2021

Before: Employment Judge M Warren (sitting alone)

Appearances
For the Claimant: In person.
For the Respondent: Ms G Crew (Counsel).

JUDGMENT

The respondent's applications for the claimant's claims to be struck out or in the alternative, for a deposit order to be made, are refused.

REASONS

Background

1. Mr Clarke applied for the position of school governor at the respondent school body. His application was unsuccessful. He was notified of that on 9 October 2020. After early conciliation on 15 December 2020, he issued these proceedings claiming race discrimination on 23 December 2020.

2. The case has been listed for hearing over 2 days in Cambridge on 11 and 12 November 2021. Case management orders were made by letter dated 3 May 2021.

3. By a letter dated 5 May 2021, the respondent applied for the claim to be struck out, or in the alternative, a deposit order made. The grounds of the strike out application, (reciting rule 37(1)(a) & (b)) are that the position of Governor is voluntary and unpaid and does not therefore amount to, "employment" as defined in the Equality Act 2010 and is not therefore afforded the protection of that Act.

Papers before me today

4. This hearing was conducted remotely and I therefore did not have the tribunal file. I had before me a bundle put together by the respondent's solicitors and an opening note from Ms Crew.

Strike out application on the basis of Mr Clarke's employment status

5. This is a question of jurisdiction. If a tribunal does not have jurisdiction, it dismisses a claim rather than strikes it out.

6. Ms Crew understandably refers to the well known authority of X v Mid Sussex Citizen's Advice Bureau [2013] ICR 249 SC as authority for the proposition that volunteers are not covered by the protection from discrimination afforded by the Equality Act 2010. However, the situation is a little more complicated than that.

7. Section 39 protects employees from discrimination by employers, including at s.39(1)(c) by not offering employment.

8. Section 83(2)(a) defines employment as, "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work". In X v Mid Sussex Citizen's Advice Bureau the claimant/appellant was expressly, not under any contract at all. The focus of the appeal was whether having regard to Article 3 of the European Directive, the reference to, "occupation" should include volunteers. The Supreme Court found that it did not. However, in the Court of Appeal in the Mid Sussex CAB case, Sir Patrick Elias, (at paragraph 3) observed that volunteers come in all shapes and sizes and one cannot assume that all will have the same status. Lord Mance in the Supreme Court specifically acknowledged that an intern for example, might fall within the definition. As acknowledged by the authors of Harvey at [535.04] and [535.05] a volunteer may have protection under the Equality Act if they were to work under a legally binding contract which included a legal obligation to work personally.

9. The difficulty that I have this morning is I am presented with the bare assertion by the respondent that the role of School Governor under consideration was voluntary and is therefore not covered by the Equality Act 2010. I have no evidence before me as to the form and nature of any legal agreement a successful applicant would be expected to enter into. Without that evidence, I am in no position to assess whether, had he been successful in his application,

Mr Clarke might have entered into a legally binding contract to provide work personally, which might then have come within the definition of employment at s.83(2)(a). For these reasons, the application to strike out is refused.

10. However, the issue has not gone away and is effectively parked until the final main hearing in November, when it will have to be dealt with at the outset. The Tribunal will have to be satisfied that it has jurisdiction to consider Mr Clarke's claims and the parties should be prepared to begin the hearing in November by presenting their evidence as to whether Mr Clarke would have been appointed to a position that would have brought his relationship with the respondent within the scope of the Equality Act 2010.

Application to Strike out – on the merits

Law

Strike Out

11. The Employment Tribunals Rules of Procedure, rule 37 provides that:

> *(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;*
> *…*

12. It is the reasonable prospect of success aspect of that rule which concerns us. The seminal authority is Anyanwu v Southbank Student Union 2001 ICR 391. In broad, general terms, that case was authority for the proposition that discrimination cases should be heard and not struck out. The theme set by the House of Lords in that case was followed in the whistle-blowing case of Ezsias v North Glamorgan NHS Trust 2007 CA ICR 1126. At paragraph 29, Kay LJ said that only in exceptional cases would a case be struck out when the central facts are in dispute.

13. In Morgan v Royal Mencap Society [2016] IRLR 428 the President of the EAT, Mrs Justice Simler, reminds us that the threshold is high, (paragraph 13). She acknowledges at paragraph 14 that there are cases where, if one takes the claimant's case at its highest, it cannot succeed on the legal basis on which it is advanced and in those circumstances, it will be appropriate to strike out. However, she says, where there are disputed facts, unless there are very strong reasons for concluding that the claimants view of the facts is unsustainable, a resolution of the conflict of facts is likely to be required.

Deposit Order

14. The Employment Tribunals' rules of procedure at Rule 39 provide as follows:

> *(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.*
> *(2) …*

15. In Hemdan v Ishmail and another UKEAT/0021/16, Mrs Justice Simler reviewed the legal principles to be applied when considering whether or not to make a Deposit Order. She said at paragraph 10,

> *"There can accordingly be little doubt in our collective minds that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails."*

At paragraph 12,

> *"The test for ordering payment of the deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasis the fact that there must be such a proper basis."*

She says at paragraph 13,

> *"The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. …a mini-trial of the facts is to be avoided…Where there is a core factual conflict it should be properly resolved at a full Merits Hearing where evidence is heard and tested."*

Lastly, at paragraph 15,

> *"Once a tribunal concludes that a claim or allegation has little reasonable prospect of success, the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance with the overriding objective, having regard to all of the circumstances of the particular case. That means that regard should be had for example, to the need for case management and for parties to focus on the real issues in the case. The extent to which costs are likely to be saved, and the case is likely to be allocated a fair share of limited tribunal resources, are also relevant factors."*

16. Rule 2 sets out the Overriding Objective as follows:

> *The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
>
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
>
> *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
>
> *(e) saving expense.*
>
> *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.*

Discussion and Conclusions

17. Ms Crew says that the respondent did not know the ethnicity of Mr Clarke and that in any event, the reason he was unsuccessful is that the Board of Governors realised that the vacancy was for a local authority nominated governor as opposed to a vacancy for a co-opted governor, where they are free to appoint whom they choose. It is for that reason that his application was unsuccessful, as communicated to him in an email dated 9 October 2020.

18. Mr Clarke says that he was approached and encouraged to apply by a Ms Sarah Lindsay of an organisation called Governors For Schools. He says that is an organisation which recruits school governors and that the respondent must have approached this organisation with a view to it recruiting a co-opted governor, which it would not have done had the vacancy been for a local authority appointed post.

19. Mr Clarke says:

    a. Ms Lindsay knew of his ethnicity from her conversations with him, (which were by telephone) and that she would have passed that on to the respondent;

    b. The minutes of the meeting of the Board of Governors on 30 September appear to indicate that there is potential for other co-opted vacancies;

c. The respondent's website showed that there had been a number of governor resignations in the previous year, which suggested there were other vacancies;

d. There was no record of there being a vacancy for a local authority governor, and

e. The minutes of the meeting on 30 September, prayed in aid by the respondent, were not signed off until 8 December 2020. The respondent had been aware he was going to claim discrimination, as indicated in an email he wrote to a Jackie Gibson on 22 October 2020 at 12:31. He suggests that these minutes have therefore been created with a view to the respondent defeating any potential claim.

20. For my part, I noted that contrary to the argument put forward today, the grounds of resistance at paragraphs 7 and 10 state that Mr Clarke was not appointed because he did not possess the required skills. Having read his application contained within the bundle, that seemed to me to be a surprising assertion.

21. I have to take Mr Clarke's case at its highest. On the basis of the foregoing, I could not say he has no reasonable prospects of success. Nor could I say that he has little reasonable prospects of success. I therefore refuse the applications both for strike out on the merits and for a deposit order.

Case Management Orders

22. We discussed whether the existing listing of two days on 11 and 12 November 2021 is sufficient. I fear that postponing those two days and re-listing the case for three will result in the case being listed for hearing late spring or early summer of 2022. I do think that two days may be tight in terms of determining the preliminary issue as to status and then if appropriate, the discrimination claim and providing an oral judgment. I will therefore direct that Wednesday 10 November should be added to the listing of this case and it should then be heard over three days. The parties agree, and I agree, that this case is suitable for hearing by CVP and that should make this amendment more easy to accommodate.

23. If for any reason the third day is not possible, the hearing should go ahead on 11 November on the understanding that there will be a reserved decision.

24. Case management orders have already been made, but we agreed that dates for compliance should be amended so that disclosure should be by 21 August 2021, the respondent shall prepare the bundle by 17 September 2021, witness statements should be exchanged on 8 October 2021 and the provision for upload of documents on 4 November should remain.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. The case shall now be heard over the course of **3 days** by CVP commencing on **10 November 2021**.

2. The case management orders of 3 May 2021 shall be amended as to their dates of compliance as follows:

   2.1 Disclosure shall be on **21 August 2021**.

   2.2 The respondent shall prepare the bundle by **17 September 2021**.

   2.3 Witness statements shall be exchanged by **8 October 2021**.

Public access to employment tribunal decisions

The parties should note that all judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

President's guidance

The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at: *www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/*

Other matters

(a) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(b) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

(c) You may apply under rule 29 for this Order to be varied, suspended or set aside.

Employment Judge M Warren

Date: 6 August 2021

Sent to the parties on:26/8/2021

N Gotecha - For the Tribunal:

……..