



EMPLOYMENT TRIBUNALS

Claimant: Mr John O'Neill
Respondent: The University of Leicester

Record of at an Open Preliminary Hearing heard by CVP at the Employment Tribunal

Heard at: Nottingham On: 3 November 2021

Before: Employment Judge P Britton (sitting alone)

Representation

Claimant: In Person
Respondent: Miss R Snocken of Counsel

Covid-19 statement:

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

JUDGMENT

1. It is hereby found that this claim has only little reasonable prospect of success.
2. I accordingly order that the Claimant pay a Deposit of £1000 as a condition precedent of continuing with this claim. He must pay that Deposit in accordance with the notice which accompanies **by not later than 21 days** from the issuing of this Judgment. For the avoidance of doubt if he does not pay the same then his claim will be automatically struck out.
3. Should the Claimant pay the Deposit then the orders hereinafter set out apply.

REASONS

1. I heard a first Preliminary Hearing in this matter on 24 September 2021. I found that

the Tribunal had jurisdiction to entertain this Claimant and gave reasons for so finding. I do not intend to rehearse them. However having read the documentation then before me I concluded that there should be a Preliminary Hearing before me to determine whether or not the claim had no responsible prospect of success and should be struck out or alternatively whether a Deposit should be ordered it having only little reasonable prospect of success.

2. I have reached the following conclusions.

3. The Claimant's case essentially is predicated upon that he did not get a new contract to teach English as a foreign language for the Respondent in its facility in China circa the 20 June 2020 because it either new or entertained a belief that he would be giving evidence in the Employment Tribunal claim of his colleague Mr Dargle (FD) who had also been on the contract teaching in China in the period in 2019. FD presented his claim on 6 May 2020 and thus the Respondent knew of it and had formed its belief before the Claimant was not provided with a further contract on 20 June.

4. I initially saw considerable force in the submissions of the Respondent that FD's claim would not have been know to the University at the time of the decision to not give the Claimant a new contract. But I undertook via the clerks further research into the FD claim because in terms of the chronology before me primarily as per the bundle index, it did not all make sense. What I was able to establish is that FD first brought his claim to the Tribunal on 13 May 2020, but he stated the Respondent therein at the appropriate box to be Mr J Horsfall (JH). who is very much at the heart of the Claimant's allegations. But the ACAS certificate, which is a prerequisite to starting such a claim, stated the Respondent to be the University of Leicester.

5. The matter was put before Employment Judge Hutchinson, who in accordance with the Tribunal's 2013 Rules of Procedure 2013 rejected the that same day; namely 13 May. FD asked for a reconsideration on the basis that his claim was intended to be against the University of Leicester. This came before Employment Judge Heap on 15 May. She granted that reconsideration. It is quite obvious that she therefore intended that the claim would now be served out not on JH but on the University of Leicester. But it was served out on JH on 27 May 2020. He did not respond. As to whether or not he got it is not for me today because I don't know and thus cannot enter into the realms of speculation. it would be pure speculation to otherwise venture into that area. Suffice to say the matter came before Employment Judge Adkinson on 9 July. He ordered that as there was no response there should now be a Remedy Hearing to assess loss. He ordered this to take place on 18 September and directed that FD supply a schedule of loss. He cancelled the main hearing which had then been scheduled for 13 August 2020.

6. On 13 September 2020 FD emailed the Tribunal to the effect that he was working abroad and where there was poor connectivity, and that he could not return for the live hearing and because Coronavirus would mean he would have to quarantine both in entering the UK and then returning to his job abroad. As it is on 15 September an experienced clerk in the Tribunal service having read that email traffic looked back on the file and realised that the claim had not been served on the University of Leicester. Thus it came before Employment Judge Blackwell on 16 September who directed that

it ought to now be reserved on the University of Leicester via its head of HR. This duly happened and the University thence filed its response.

7. The important point being that at this stage I can't rule out that JH may have seen that Tribunal claim when it was served out on 27 May and thus prior to the decision not to give the Claimant a further contract on 20 June 2020.

8. Why does it matter? It is because the Claimant says that it could at least be inferred from his involvement in the investigation into FD's grievance in mid-March 2020, conducted by inter alia JH, that he could be a witness for FD at a subsequent proceeding in that FD would have made it apparent in the ACAS Conciliation period which was between 17 March and 7 April 2020 that he would be relying on a witness as to what had occurred at Christmas in China where they were all teaching and which led to FD's grievance and then the subsequent employment tribunal claim.

9. It follows that the issue of JH's knowledge of FD's likely intentions and his knowledge or otherwise of the employment tribunal claim before 20 June 2020 is a matter that cannot be resolved without making findings of fact having heard the evidence and which is the province of the tribunal at the main hearing and not a judge sitting at a preliminary hearing.

10. Thus I will not strike out the claim.

11. However, when I look at the statement that the Claimant gave to the grievance investigator and assuming that inter alia FD was "raising discrimination" and because it is referred in the grievance outcome letter to FD of 26 May 2020, the Claimant makes no reference to thinking that what had occurred in the run up to and then at the Christmas party in China constituted discrimination. And I note that Judge Clark at the Preliminary Hearing into FD's claim, which was based on race discrimination, struck it out as having no reasonable prospect of success because FD is a white Liverpudlian which is not a race or nationality as per the provisions of the Equality Act 2020 (the EqA). Thus although there might have been banter from his fellow ex pat colleagues over Christmas as to his mispronunciation of the name of the city where they were all working in China and because of his Liverpudlian accent, even if he was offended he could not bring his claim, which would essentially be for harassment pursuant to s26 of the EqA, and because race/nationality was not engaged

12. Furthermore in the written evidence (bundle page 78 dated 19 March 2020) which the Claimant submitted to the FD investigation, although he observed this banter he concluded: "I did struggle that could lend support to a bullying allegation" albeit it did not mean that FD might have felt that he was being bullied.

13. So on the face of it not a witness that one would think would either a) be supportive of FD or b) therefore concern the Respondent.

14. And the Respondent's position is that the Claimant did not get the new contract on 20 June 2021 because of concerns about his performance viz the previous contract and whilst he was in China. The Claimant disputes that and in effect is telling me that this a trumped up or over exaggerated assertion because the real reason why he didn't

get the job is because they believed he might give evidence for FD. If true that of course could be victimisation pursuant to s27 of the EqA.

15. But the Respondent raised before me that this assertion will not succeed because another member of the teaching cohort on the 2019 teaching placement also did not get a further contract and more important had not been a witness in the FD investigation. Thus this flies in the face of victimisation. I gather she is Brenda. The Claimant however seems confident that he can rebut that assertion. But he does not appear to dispute that she was not interviewed in the investigation.

Conclusions on these issues

16. On this rehearsal of the likely evidence the core point is the evidence the Claimant gave to the FD investigation. On the face of it is fanciful for him to therefore suggest that the Respondent would wish to victimise him given what he had said. Thus were that the only issue, then I would dismiss this claim as having no reasonable prospect of success.

17. But what just about saves the Claimant from strike out is this issue of whether or not JH received the ET1 and if so did it influence him against the Claimant. If it did not, then the case collapses.

18. However, that I have concluded that this claim has only little reasonable prospect of success and because the evidence as to the FD investigation which I have rehearsed in summary points to it being highly likely that the Claimant will lose because the Respondent would have no reason to believe the Claimant was a potential witness for FD because of what he had told that investigation.

Deposit Order

19. That accordingly engages Rule 39 of the Employment Tribunal 2013 Rules of Procedure. Having so concluded that the Claimant has only little reasonable prospect of success, I may order a Deposit as a condition precedent of the Claimant continuing with this claim. I exercise that judicial discretion in favour of making a deposit order because it provides a mechanism by which the Claimant can reflect upon the wisdom of proceeding with his claim because there are potential consequences if he loses.

20. As to the amount of that deposit, the maximum of £1000. I must take account however of his means. The Claimant undertakes these types of teaching roles on a regular basis. He has just finished a teaching English as a Foreign Language (TEFL) assignment for the University of Liverpool. He will now seek another assignment. There are obviously gaps in between, not least because of the academic year, and also the continued impact of the corona virus; albeit he told me how such as the University of Leicester have still been able to undertake this type of teaching on a virtual basis. So, I would take the view that the Claimant is likely to obtain further employment in this field with other Universities or Colleges. Its not highly paid but of course the perk is being able to go to various places in the World, all found, and flights back and forth paid for by the employer.

22. He doesn't own his own house and instead lives with his mother in Bracknell. He has got savings of about £15000.

23. Therefore, I am going to order that he pay the maximum Deposit of £1000. I explained to the Claimant, as I must do as per Rule 39, the implications of that order. If he doesn't pay his claim is struck out. If he does and loses Rule 39 (5)(a) means that he will meet the first stage of the Tribunal's costs threshold because he will be treated as having acted unreasonably as per Rule 76(1)(a). He would be best to get some advice.

24. If he does pay the deposit, then my orders hereinafter set out apply.

25. As to those orders and the existing bundle, the Respondent will obviously in relation to a core point as to how many of the cohort that the Claimant was in for the purposes of teaching in 2019 were given jobs circa June 2020, provide full details as to who was invited to apply or otherwise applied; how many were rejected and why; finally how many were appointed and why.

26. As to witness statements, JH will of course now need to be a witness for the Respondent. The Claimant has in mind calling FD and it maybe Brenda. The Respondent otherwise plans to call three witnesses. There is a considerable amount of documentation which will now obviously increase. I bear in mind that the Tribunal will first have to make a decision on liability and needs to be given time to do that and give its Judgment. If it decides in favour of the Claimant, then it would need to move on to liability. The compensation claimed by the Claimant is quite substantial and may require evidential scrutiny thus further extending the hearing. For all those reasons, and because I do not want the hearing go part heard I am relisting the matter for 7 days.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. By way of additional discovery, the Respondent will send the Claimant its proposed amended trial bundle index, double spaced, with any additional documents it proposes be in the trial bundle. It will do this **by the 7 January 2022**.
2. The Claimant having received the same will consider whether there are any additional documents that should be in that trial bundle because he considers they are relevant and necessary to the issues. If so, he will at the appropriate space in that trial bundle index put the said document by brief description and if he has the document, he will send a copy back with the completed trial bundle index to the Respondent. If he doesn't and he believes that it has it in its custody or control he will make that plain and that he requires it to be in the trial bundle. He will do this **by Friday 11 February 2022**.
3. The Respondent will prepare and serve upon the Claimant the final trial bundle **by 18 March 2022**.

4. The parties will exchange witness statements **by not later than Thursday 14 April 2022.**
5. **Not later than 7 days before the main hearing** the parties will have agreed a neutral chronology and cast list. The Respondent to have conduct of the preparation of the same.
6. **Not later than 3 working days** before the main hearing the Respondent will deliver to the Tribunal Offices in Leicester **4 copies** of the following: -
 - i. Trial bundle.
 - ii. Combined indexed witness statement bundle.
 - iii. Chronology.
 - iv. Cast list.

The Main Hearing

5. The hearing currently listed for 19 – 21 April 2022 is **cancelled.**
6. The main hearing will now take place **over the 7 working days commencing Monday 23 May 2022.** The first morning will be a reading in period for the Tribunal to which the parties attendance will not be required. The parties must be in attendance for a prompt start of the live hearing **at 2.00pm.**

Employment Judge P Britton

Date: 19 November 2021

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