



EMPLOYMENT TRIBUNALS

Claimant

Mr D B Clarke

Respondent

v Governing Body of Lakeview School

Heard at: Bury St Edmunds Employment Tribunal

On: 10 November 2021

Before: Employment Judge King

Members: Mr C Grant
Mr G Page

Appearances:

For the Claimant: In person.

For the Respondent: Ms A Johns (Counsel).

JUDGMENT having been sent to the parties on 29th November 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant represented himself in this hearing. The respondent was represented by Ms Johns (counsel). We heard evidence from Mr Clarke and also evidence from Mr Stokes of the respondent and the parties had exchanged witness statements in advance and prepared an agreed bundle which ran to 71 pages. The case was due to be heard over two days. There were some issues over the initial evidence and the tribunal asked for additional documents, some of which we have not had regard to because they go to the substantive issues in this case but it did include the Governor's Handbook in this matter.
2. At the outset the claims were identified as that of direct race discrimination and we went through with the claimant to identify the particulars of those claims.
3. The claim was essentially about the failure to appoint the claimant as a governor and whether this was less favourable treatment on the grounds of race. Together the parties formulated a list of issues in relation to the

issue the tribunal had to decide. The first of those was identified at the preliminary hearing before Employment Judge Warren which took place on 30 July 2021 and this was an issue of jurisdiction as to whether the tribunal had the jurisdiction to hear Mr Clarke's claim of direct discrimination and the Tribunal took this issue as a preliminary issue which it determined on the first day having heard evidence.

4. The issues were identified as follows:
 - a. Does the Tribunal have jurisdiction to hear the claim due to Mr Clarke's volunteer status as identified in the preliminary hearing on 30th July 2021 before EJ Warrem?
 - b. If so the claimant relies on his race as African Caribbean or black British.
 - c. It is agreed that the claimant was not appointed to the role of Governor. Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the hypothetical comparator.
 - d. If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally?
5. We agreed to make a determination as to jurisdiction first and heard evidence on this issue first.

Law

6. During the hearing we made reference or were taken to a number of provisions of the Equality Act.
7. Section 13 Equality Act 2010 (Direct Discrimination) states as follows:

"13 Direct discrimination

- (1) 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.
- (2)
- (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B. ..."

8. Section 39 Equality Act 2010:

"39 Employees and applicants

- (1) An employer (A) must not discriminate against a person (B)—
 - (a) in the arrangements A makes for deciding to whom to offer employment;
 - (b) as to the terms on which A offers B employment;
 - (c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—

- (a) as to B's terms of employment;
- (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
- (c) by dismissing B;
- (d) by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)—

- (a) in the arrangements A makes for deciding to whom to offer employment;
- (b) as to the terms on which A offers B employment;
- (c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)—

- (a) as to B's terms of employment;
- (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
- (c) by dismissing B;
- (d) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

(6) ...

(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

- (a) by the expiry of a period (including a period expiring by reference to an event or circumstance);
- (b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

(8) Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms.”

9. We also had regard to s.83(2)(a) Equality Act 2010.

“83 Interpretation and exceptions

...

(2) “Employment” means—

- (a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

...”

10. In addition the tribunal has looked at additional provisions of the Equality Act including that relating to office holders to see whether the claimant fell

within those provisions either as well or instead but these did not seem applicable in this case.

11. During the course of the hearing before reaching our decision we discussed a number of authorities in this matter. The key case had already been identified to the parties in EJ Warren's case management order at the preliminary hearing and discussed in some detail as to the proposition that volunteers are not covered by the protection from discrimination afforded by the Equality Act 2010 under *X v Mid Sussex CAB* below but as identified by EJ Warren the issue is more complex than that. The authorities were:

X v Mid Sussex Citizens Advice Bureau [2013] ICR 249 SC
Daley v Alloys Suppliers Ltd [1983] IRLR 14,
Rowlands v City of Bradford Metropolitan District Council [1999] EWCA Civ 111,
Nursing and Midwifery Council v Somerville [2021] 5 WLUK 60,
Jivraj v Hawashij [2011] IRLR 827,
Allonby v Accrington & Rossendale College (C-256/01),
James v Redcats (Brands) Ltd [2007] ICR 1006.

12. The claimant raised a number of other matters with us to which we have had consideration the first was the public duty provisions of the Equality Act and secondly Article 6/7 of this human rights.
13. The claimant also referred us to a case *Ready Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 and the definitions of employment in the Employment Rights Act 1996. We recognise that the Equality Act provisions go further but we also referred to these also for completeness and in so far as it assisted us.
14. Under *section 230(1)* of Employment Rights Act 1996, an employee is defined as:

"an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment".
15. Under *section 230(2)* of ERA 1996, a contract of employment means:

"a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".
16. We do recognise that the Equality Act definition of employment is wider than the ERA definition as it covers employees workers and those under a contract to personally do the work. This is key in this case.
17. We also noted that there are provisions relating to education in the Equality Act and whether the respondent falls within that section as an education provider because that is not within the remit of this employment tribunal. Those matters would not fall to be heard here but in the County Court but we merely make reference to them for completeness. Likewise a claim that the respondent has failed to act in accordance with their public duty does not assist the claimant in this respect because it is a claim that

ought to be brought by the European Human Rights Commission and it cannot be a free standing claim that the claimant can bring that the respondent is in breach of a public duty in relation to the Equality Act. We make no findings in this regard. As the claimant was a litigant in person we have as set out above looked wider at the Equality Act to ensure that there are no other sections we ought to be having regard to than those brought to our attention.

18. We had regard to all of these matters when reaching our decision.

Findings of fact

19. The claimant applied for the role of Governor at the respondent school body. His application was unsuccessful and the claimant was notified of this on 9th October 2020. He commenced ACAS early conciliation on 15th December 2020 and issue these proceedings for race discrimination on 23rd December 2020.
20. If the claimant had been successful for the role, it was not one for which remuneration was paid. No other allowances would have been paid and in effect it was an unpaid role.
21. A Governor does not act in an individual capacity but acts on the Board of Governors who operate as a collective. Had the claimant been successful he would not have been given a contract or individual paperwork. All Governors agree to a Code of Conduct. Prior to the pandemic this was individually signed by Governors but this is now and at the relevant time dealt with annually and ratified by the Board of Governors and signed by the Chair. There is no individual written contract.
22. There is no agreement as to the hours that are spent on duties or tasks. There is an expectation that a Governor will attend Governor's Board meetings but could give their apologies and not do so. The meetings are not onerous and take place at intervals throughout the year during the academic year and could be every couple of months. The Governor could not send a substitute, if they missed a meeting they would just their apologies and the remaining Governors would make any decisions in their absence that of course being subject to any quorum provisions that may apply in this case. Mr Stokes' evidence was that if a Governor failed to attend a meeting and subsequent meetings in a six month period they would be removed from the Board.
23. There is no role profile for the role of Governor or expectation of duties on an individual level but the governing body use the guidance from the Department of Education entitled 'Conducting the Competency Framework for Governance' as its framework. It is not clear whether this has any statutory force i.e. whether it is a statutory framework although we are aware the claimant relied on various provisions of legislation found within the education arena.
24. This is in essence a voluntary role. a Governor could be co-opted, a parent governor or a local authority governor but in essence each member of the governing body contributes to the collective. The Board makes

decisions collectively and on a voting basis. No individual's vote carries more weight save for the Chair of Governors in the event of a tie-break only and the chair of governors then gets the casting vote. Governors can be given individual tasks called "links" but these are the focus areas for the Governing Body but it is not a requirement that all Governors have such a link, for example safeguarding, SEN etc.

25. The role of Governor is an unpaid voluntary role but the individual contributes to the collective. They can do very little other than attend the governor's meetings from time to time or be very involved with "links" to certain areas. This is down to the individual and the needs of the Governing Body. There is no requirement to do a set number of days or hours or provide a certain level of input into the role.
26. Mr Clarke gave evidence of his expectations of the role and what he would have liked to do for the school. He has this knowledge from other roles but not from any impression or obligations that the respondent informed him of.

Conclusions

27. There is no written contract. A contract requires acceptance and intention to create legal relations and in this case there is difficulty over the intention to create legal obligations given that this is a voluntary role. No consideration passed between the parties and there was no intention to create legal relations. It was a voluntary role with no legally binding contract.
28. The key question in this case is, would the claimant have been employed under a contract to do the work personally in accordance with s.83(2)(a) Equality Act 2010? .
29. First of all we would like to start by echoing our thoughts in line with the Judge in the case of X v Mid Sussex Citizen's Advice Bureau, they are found at paragraph one and it says as follows:

"Any responsible organisation aims to combat discrimination on the grounds of in that case disability or indeed any other protected characteristic by the Equality Act and will do so for the benefit of people serving or wishing to serve as volunteers for the organisation no less than anyone else but the present appeal and indeed this case is not about the moral imperative, it is about whether as a matter of law a claim can be brought by volunteers for discrimination against the CAB."

30. So we echo those thoughts and indeed it is good practice for an organisation to follow the Equality Act. That said we do not of course make any findings about whether discrimination has occurred in this case or not, we have not got that far.
31. There was no written contract in this case. There is of course no requirement for a contract to be in writing, a contract can be oral and it can also be implied and we have had regard to that as well as the express

contract. There was no remuneration in this case and therefore no consideration in relation to the contract but again we are aware this is not a sole point that we should consider. We have considered whether there was a contract or something capable of amounting to a contract and an intention to create legal relations on both sides. We found that there was no intention to create legal obligations and no contract in this matter.

32. Turning to the mutuality of obligations, there is no requirement to do a set number of hours, days or indeed put certain input into the role. There was a requirement to attend Governor's Board meetings but we do not find that this enough to get around the hurdle of mutuality of obligations, neither is the Code of Conduct enough on it's own.
33. We are aware that a written contract is not the only way a contract can be in force, was this implied or oral? We have heard evidence from Mr Clarke as to his expectations from his experience with the role elsewhere not with this respondent but they are not his expectations given from an impression that was given by the respondent at a job interview or anything else of that nature in this case.
34. In this case it cannot be said there was offer and acceptance but we are cautious about that approach because that is the very essence of this case as the claimant did not get the role he applied for. We are not satisfied however that there was any intention to create a legal contract on either side and moral duties are not enough.
35. The role of Governor is not being diminished by this tribunal, in fact it is an important role and it is an admirable role but in essence it is a voluntary role. It is unpaid.
36. In the absence of a contract in accordance X v Mid Sussex CAB the claimant does not fit within the definition of s.83(2)(a) Equality Act 2010 in that he did not have a contract to do the work personally and was not employed under a contract to do the work personally.
37. We have considered Daley which related to a youth opportunity programme and in that case the claimant was not employed as there was no mutually binding obligations between A and B to which a contract could be inferred. We considered Rowlands where foster carers were not classed as workers as there was no contract and their relationship was governed by statute and of course the key case of X who was a voluntary worker with no legally binding contract. Allonby echoed the distinction between those employed and those who are independent providers of a service not in a relationship of subordination with the person who receives the services. These cases are not race discrimination cases but cases where a similar pattern of the status of the claimant has been considered. They are useful considerations for our decisions on the issue of volunteers.
38. We are aware that the s.83 Equality Act definition is wider than the Employment Rights Act provisions and we have considered both. It is clear that the claimant was not an employee within the meaning of those definitions under ERA 1996 and did not have a contract of employment but

for discrimination cases the definition is wider. However, it is not wide enough to cover volunteers in all cases. The claimant would not have been personally required to fulfil the role, there was no contract, no set obligations on either side and not even an obligation to attend all governor's meetings throughout the term. The role was very much part of a collective and not based on any individual. Like the case of X Mr Clarke was expressly not under any contract at all nor would he had been had he been accepted into the voluntary role of Governor.

39. We wanted to say that this decision does not sit comfortably with us in that the claimant falls outside the protection as a volunteer under the Equality Act but we are bound by the law and the authorities on the issue and X in particular. That is not to say that we find he was discriminated against but it denies us as an industrial jury the ability to test this case on the evidence because the jurisdiction issues means the claim must be dismissed and it is with regret that this panel dismisses the claim without deciding it on its merit.

Employment Judge King

Date:09.03.2022.....

Judgment sent to the parties on

10 March 2022

For the Tribunal office