



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms E Williams

V

**Aim High Fostering
Services Ltd**

Heard at: Watford (CVP)

On: 25 July 2023

Before: Employment Judge G D Davison

Appearances:

For the Claimant: Ms E Williams

For the Respondent: Ms S J Wood (Solicitor)

JUDGMENT

1. Aim High Fostering Services Ltd is added as a Respondent to these proceedings, the claim against the initially named Respondent Ms D Burns, is struck out.
2. The Claimant's Breach of Contract claim has no reasonable prospects of success and is struck out accordingly.

REASONS

1. At a Preliminary Hearing on 17 April 2023 EJ Eeley made Case Management Orders and stated the issues for determination at the Preliminary Hearing held today would be:

a. Whether the Claimant's claim should be amended to add Aim High Fostering Services Ltd as a Respondent;

b. Whether the Claimant's claim should be struck out as against the currently named Respondent, Debbie Burns; in the event that Aim High Fostering Services Ltd is added as a Respondent,

c. Whether the Claimant's claim should be struck out because she did not name that party as a prospective Respondent when she contacted ACAS.

d. Whether the Claimant's claim should be struck out pursuant to rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 on the basis that it has no reasonable prospects of success; or

e. Whether the Tribunal should issue a deposit order in relation to the claimant's claim on the basis that it has little reasonable prospect of success (rule 39 of the Employment Tribunal Rules of Procedure 2013.)

Regarding (a) and (b)

2. The Respondent agreed that the initially named Respondent Ms D Burns, should be substituted for Aim High Fostering Services Ltd. The claim against Ms D Burns is therefore struck out.

Regarding (c)

3. This point was not pursued by the Respondent. The claim was not therefore struck out on this basis.

Regarding (d)

4. I find the relevant facts to be as follows, these were not disputed by the Claimant.
 - On 13 May 2022 the Claimant was interviewed and offered the post of full time Supervising Social Worker. An application form was attached to the offer for completion. [R 43]
 - On 16 May 2022 the Claimant sent an email acknowledging she had been offered the post and that she needed to 'fill in the appropriate forms.' [R 44]
 - On 20 May 2022 the relevant form was returned, this listed her referees and the contact details for the same.
 - On 23 May 2022 the Respondent sought references from the named referees.
 - The Claimant was well aware that the post was offered subject to referencing [R 63]. The Claimant wrote to the Respondent stating: 'Please let me know as soon as possible if my reference has come back and satisfactory to you. As your Offer is clear that it is subject to this condition.....'(sic)
 - Unfortunately for the Claimant the reference from her current employer was not favourable [R 73 – 74]

- As a result, on 29 June 2023, the job offer was rescinded. [R 78] *'your reference from Hertfordshire was unsatisfactory and as a consequence we are unable to continue with your appointment'*
- On 1 August 2022 the Claimant provided an abbreviated reference from Hertfordshire [R 79]. This provided start and end dates of employment but did not address any of the performance issues raised in the earlier reference. An email of the same date [R 80] stated the first reference *'was sent in error and contained factually incorrect statements'*
- The Respondent replied to the updated reference [R 82 – 83] and stated:

'Sadly because of the contents of the previous reference, I could not continue with it. Our safer recruitment process states that we will have to receive satisfactory references in order to appoint.'

'We have now recruited for the post and a SSW started with Aim High at the end of July.'

5. The Claimant accepted that her contract of employment with the Respondent was *'subject to referencing'*. The Claimant avers the first reference was *'malicious'* and *'intended to cause harm.'* [R 82]. Alternatively, the Claimant asserts that the Respondent has acted unethically by seeking references without her consent.
6. Whether the Claimant's previous employer was acting maliciously or otherwise does not affect the factual position. The offer of employment was subject to appropriate references. No satisfactory reference was received and so the offer was rescinded. There was no enforceable contract.
7. The Claimant could point to no legal provision which states that when seeking references an Employer must not only ask for details of the referees to be contacted, but then to separately contact a claimant and notify them that the provided referees will in fact be contacted.
8. On the above agreed facts it is clear the Claimant was offered the post subject to references. The Claimant then provided the references and the Respondent duly contacted them. I see no unlawfulness in this. Further, it does not affect the legal position of whether there was a legally binding and enforceable contract. One document provided by the Claimant [R 126] states; *'Providing your references on a job application could be considered written consent'*. It is clear there was an element of urgency in the process, the Respondent needed someone to start work promptly. (See by way of example [R 71]).
9. Rule 37 of a The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides:

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;

(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;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

10. For the reasons provided I find the claim has no reasonable prospects of success, the Claimant has been given a reasonable opportunity to make both written and oral representations. The risk of strike out was explained to her at the previous Preliminary hearing and the issues were again ventilated in full before me today.

11. In making the above decision I remind myself of *HHJ K Kaul v Ministry of Justice + 2 [2023] EAT 41*;

*‘The Tribunal considered whether the Employment Judge’s conclusions were consistent with authority: *Ezsias v North Glamorgan NHS Trust [2007] ICR 1126* applied. Although caution had to be exercised, Rule 37(1)(a) included the power to strike out a claim because on one or more critical factual issues it has no reasonable prospect of success: *Ahir v British Airways [2017] EWCA Civ 1392* applied.*

In the present case, the Employment Judge had been entitled, as a matter of assessment, to reach the conclusions he had. The need for caution when considering a strike-out application does not prohibit realistic assessment where the circumstances of the case permit. In this case, the claims rested on undisputed events. The matters complained of were apparently ordinary events that might occur in the course of any grievance process. No part of the Claimant’s case explained why those events should not be taken at face value.

In these circumstances, the decision that the claims had no reasonable prospect of success was one reasonably open to the Employment Judge.'

12. There is a need for caution before any claim or part thereof should be struck out. However, a 'realistic assessment' must be conducted. On the undisputed facts of this matter there was no valid and enforceable contract of employment against which a claim for breach of contract could be brought.

Regarding (e)

13. In light of my finding above on (d) I did not need to consider a deposit order.

Conclusion

14. There was never a valid and enforceable contract of employment. There can therefore be no breach of the same. I am therefore entirely satisfied that there are no reasonable prospects of success and the claim should be struck out.

Employment Judge G D Davison

25 July 2023

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Sent to the parties on

8/9/2023

For the Tribunal

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