



EMPLOYMENT TRIBUNALS

Claimant: Mr J McMillan

Respondent: Beacon Education MAT Limited

Discrimination

Heard at: Exeter **On:** 6 – 8 May 2025

Before: Employment Judge Smail
Mr K. Sleeth
Mr I. Ley

Representation

Claimant: In Person

Respondent: Mr M Palmer, Counsel

Judgment having already been sent to the parties, at the request of the Claimant, the Tribunal provides the following –

REASONS

1. By a claim form presented on 3rd February 2024, the claimant claims breach of contract and race discrimination. The race discrimination claim is based on association with his Vietnamese wife and Vietnamese children.

The Issues

1. Direct race discrimination by association (s.13 EqA 2010)

1.1 The Claimant describes himself as of Scottish nationality with a Vietnamese wife and children.

1.2 Did the Respondent do the following things:

1.2.1 Withdrew its offer of employment on 30 November 2023

1.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the

same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who he says was treated better than he was and therefore relies upon a hypothetical comparator.

1.4 If so, was it because of his association with his wife's and children's nationality?

1.5 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to his association with his wife and children?

2. Wrongful dismissal; notice pay

2.1 Was there a concluded contract of employment?

2.2 What was the Claimant's notice period?

2.3 Was the Claimant paid for that notice period?

2.4 If not, was the Respondent entitled to dismiss without notice?

3. Breach of Contract (Extension of Jurisdiction Order 1994)

3.1 Was there a concluded contract of employment?

3.2 Did this claim arise or was it outstanding when the Claimant's employment ended?

3.3 Did the Respondent do the following:

3.3.1 Dismissed the Claimant without notice

3.3.2 Withdrew the Claimant's offer of employment when he had complied with the conditions of the offer?

3.4 Was that a breach of contract?

3.5 How much should the claimant be awarded as damages?

Findings of Fact

2. The claimant is a UK national who has been living in Vietnam for the past eight years or so. The claimant applied for a teaching job as a maths teacher

at the respondent's Minehead Middle School. His application form was dated 5th October 2023. He had an interview on the 3rd November 2023. He was offered the job on 7th November 2023 by Mrs Mackie the Head Teacher and accepted it that day. A letter confirming the job offer was sent on 9th November 2023 from Robert Lakin the Chief Executive of the respondent. The start date was 1st January 2024 and the offer was expressly said to be subject to the following.

- (1) Successful DBS clearance.
 - (2) Successful medical health clearance
 - (3) Two satisfactory references.
3. The claimant argues that there was a concluded contract of employment made verbally on 7th November 2023 without those express conditions. Although he acknowledges, in some contradiction to that position, that it was implied that there would need to be successful DBS clearance.
4. The respondent says there was no offer of a contract of employment on 7th November 2023; there was an offer of a conditional contract of employment on 9th November 2023. It withdrew the offer on 30th November 2023 because by then there had been
- (1) No receipt of successful completion of a DBS check because they had been unable to complete the checks due to insufficient documentation to verify.
 - (2) They had not received two satisfactory references.
 - (3) As part of the DBS check they had not received a certificate of good conduct and full police checks from any candidate who has lived abroad i.e. from the claimant who has lived abroad.
5. In his application form the claimant had significant gaps in his work history. Bearing in mind the application date was 5th October 2023, the following was the position. In respect of current employment, none provided.
6. In his previous employment it stated as follows:
- July 2022 STEM teacher Well Spring bilingual school, that was a summer school.
 - June 2017 – July 2017 English teacher Albert Einstein School, Vietnam, that again was a summer school.
 - August 2015 – June 2017 teacher of English, Science and Mathematics. Long Thanh Education Centre Vietnam
 - August 2013 – June 2015 Mathematics teacher in Kazakhstan,
 - January 2012 – June 2012 Mathematics teacher Greenfields International School, Dubai.

- August – December 2011 Abu Dhabi
 - September 2008 – July 2011 Supply Mathematics teacher Mansfield Nottinghamshire
 - September 1999 – July 2008 Mathematics teacher, Cotelands School, Sleaford, Lincolnshire
 - September 1998 – July 1999 Mathematics teacher in Doncaster
7. So, there was no current teaching; there was summer school in July 2022.
8. The Claimant declared a previous conviction in the disqualification declaration dated 11th October 2023. This related to some considerable time ago - 28 years previously - a conviction in 1995 in Worksop Magistrates Court. What he said about this in the declaration was as follows:

“Prior to starting university on my teaching degree, I was convicted of common assault. I was attacked by two men with a broom handle, I wrestled with them. They pushed me over the wall, I was trapped. As the second one was coming to attack me further, I punched the first one then I had the broom handle. I continually backed away holding the broom handle as protection while I escaped, this was witnessed by a third party. My plea was obviously not guilty but the magistrate said to my solicitor that my solicitor should have pleaded self defence and not, not guilty, as my testimony showed that I had committed common assault.

I have a letter from the Secretary of State at the time before starting my teaching degree that the offence does not bar me from teaching. I think this information is already known through the application and/or discussions”.

9. He named the referees on his application form as follows:
- Maybe contacted prior to interview? yes. Miss Tram Phan Thi Bich at the Albert Einstein school in Vietnam, an email address was given.
 - Maybe contacted prior to interview? No. Mr Duncan Annandale no longer there he said but I have a written letter signed and stamped from the Long Thanh Education Centre. An email address was given.
 - Additional referees could be contacted prior to interview. Miss Julia Voskresenskaya, a principal of a school in Kazakhstan an email address was given.
10. He was asked on the application system, the TES system, for permission so that the respondent could approach the first two named referees. He did not on the system give such approval, instead he wrote an email on 11th October 2023, in these terms:

“Hello Laura Mackie

I tried to call the school a few times and then when I was finally connected you were not available. I received a message from TES to update my references. I started explaining this but I must have got side tracked Long Thana Education Centre was taken over and changed its name to George Washington International School just after I left because there was some issue with the school not paying taxes to the Vietnamese government. Later George Washington International school closed down because the owner was an American Vietnamese national and the Vietnamese government changed the law so he could no longer own the business in Vietnam.

Duncan Annandale left Vietnam and went back to the UK in 2018 or 2019 and I lost contact with him which is part of the reasons why I got a police check from the Vietnamese government.

With the new Data Protection Act GDPR I am only sure that the reference from Cotelands School is still on file at the LEA because I know it was sent there and they said they would keep it for 65 years.

In Kazakhstan Julia's email is no longer active. I tried it a few months ago, it was still active in 2017, 2018 because she asked me how I was doing.

I can supply character references in Vietnam from teachers Mr Trung, who was my neighbour for five to six years now retired university teacher, he speaks low level conversational English and Me Khi Dep who has known me for most of my time in Vietnam. She is a Vietnamese teacher but doesn't speak any English but I am sure she will send a reference email from her school email address in Vietnamese but google translate will do a fair translation.

References from colleagues Fergus Riach, I have his Facebook contact. He shared my apartment in Abu Dhabi and taught at the same school as I. I could ask him for his current number and he could talk to and provide a more formal reference.

In Lincolnshire Tracey Hewitt and Andy Green both taught with me in Cotelands school, now St Georges Academy Rustington Sleaford. I visited him in 2019 and they were both still working there.

I am sure it would be easy to talk to each of them if they are still there. I don't have any other professional contact/references other than the testimonials that I sent to you. Apparently now people are reluctant to write testimonials and/or references."

11. The claimant was addressing the issue that verifying references was going to be problematic. He says in that email and he said to us that he has sent to the respondent written testimonials. He provided us with a copy from a PDF file on the first day of this hearing and that bundle of documents includes a letter from Duncan Annandale in these terms:

"Dated 14th June 2017, open reference for Mr James McMillan

Principal of the school

Mr McMillan worked at Long Thana Education Centre from August 2015 – June 2017. His duties were teaching English Maths and Science in various public schools, various grades from grade 6 to grade 10 were taught. James used a lot of ICT in his classes when available and made many resources for his classes. His knowledge of ICT must be one of his biggest strengths. The lessons I observed of Mr McMillan were always fast paced and student focussed. He always used the student's Vietnamese name, this was very noticeable as he was the only foreign teacher I saw do this. His students and he were always happy in the classes and each student was included in the lessons. His punctuality was excellent. I am unaware of any time he was late and he had no sick leave. James always conducted himself with the upmost professionalism. His classroom management was very good and his organisation was excellent. He also helped Vietnamese teachers to incorporate some western methods into their classes.

Mr McMillan had a very positive influence throughout the schools he taught at and I have no hesitation in recommending him to any school. I wish him all the best in the future. He will sadly be missed here."

There were no similar documents from the other named referees.

12. The school has a policy on references - they have a 'safer recruitment' policy within the recruitment and selection policy for employees and volunteers. The policy provides:

- (1) All recruitment must be in line with the policy to ensure that we identify, deter and prevent people who pose a risk or harm from working with our pupils.
- (2) The recruitment of all applicants and volunteers to our Trust must without exception follow the processes of safer recruitment. All offers of employment will be subject to us being satisfied that the applicant or volunteer is a suitable person to work with children and young people. Any offers of employment made by the respondent are said in this policy to be subject to satisfactory references. The section on references reads as follows:
 - (i) All offers of employment will be conditional upon receipt of at least two satisfactory written references.
 - (ii) References will be requested for all shortlisted applicants including internal applicants include the applicant's current or most recent employer and where an applicant for a teaching post is not currently employed as a teacher, will include the applicant's most recent employer as a teacher.
 - (iii) Ask the current employer for details of any capability history in the previous two years and reasons for this.

- (iv) Be directly from the referee who will be a senior person with appropriate authority and confirmed as accurate by the head teacher/principal in respect of any disciplinary investigations.
 - (v) Not be accepted if they are to whom it may concern letters.
 - (vi) Request information on the applicant's suitability to work with children and young people from the last employer where the applicant worked with children if not currently working with children.
 - (vii) Be verified with the person who provided the reference and where the reference is provided electronically verify that it is from a legitimate source.
 - (viii) Be clarified with the referee whether information is vague or insufficient.
 - (ix) Establish the reason for the candidate leaving their current or most recent post.
 - (x) Be compared with the information set out in the application form and any discrepancies discussed with the candidate.
 - (xi) Be requested before the interview.
 - (xii) Be explored further with the referee and with the applicant during the interview if necessary.
13. These conditions on the policy makes it clear that the claimant was going to struggle to satisfy the requirement of 2 satisfactory referees. The claimant tells us he wrote the email on 11th October 2023 so that the respondent knew the position. The claimant's point is essentially that if they did not accept what he told them in that email on 11th October 2023 why waste his time. He makes a fair point.
14. The claimant was interviewed. He received no questions in the interview about either the gaps in his work history or the position on references. The Tribunal finds that very surprising.
15. The respondent says that he did not receive any written testimonials from the claimant. We think it likely that the Claimant intended to send the testimonials through the application portal and thought he had. The Respondent says they did not receive them. If they had received the reference from Mr Annandale, it would not have been accepted under the respondent's safer recruitment policy because it was an open letter, 'To whom it may concern'. The fact was that the respondent would not have been able to verify the reference by tracing Mr Annandale; that was not possible. They were not able to trace the first named referee either. This was a major stumbling block for the claimant's application.

16. The claimant is correct that he sent in a police letter from Vietnam dated 13th September 2023 stating no convictions. Nothing more was required, we find, from Vietnam. It is unclear that they needed documentation from Dubai, Kazakhstan and Abu Dhabi because the policy could be construed as requiring information for only the last five years; but there was no documentation from Dubai, Kazakhstan and Abu Dhabi in the same way that there was from Vietnam. We reject the respondent's suggestion that they needed two documents from each country, they did not. They only needed one record of convictions.
17. The UK DBS check was not able to be started because the respondent had only two out of three necessary gateway documents. They did not need originals, they could have copies, the originals of which would be verified when the claimant presented himself to the school in the UK. They had copies of passport and driving licence, they needed one more document. A birth certificate or proof of address or UK bank statement. With that they could then have obtained a DBS check. However they only had two out of three.
18. Had they started the process, the school would have received information from DBS in terms of green, amber or red. The actual DBS details goes to the employee. If the school receive an amber or red notification, they would ask the job applicant for production of the DBS certificate. Full details of the conviction would then come from the applicant. In the event the respondent did not get that far because it did not have the third gateway document.
19. The claimant says that he was on his way back to the UK and could have provided the third document no later than 4th December 2023. There had been communications between the claimant and the respondent when it was clear that he was at least going to visit the school on 4th December 2023. The claimant asserts the withdrawal of the job offer on 30th November 2023 was premature. He says, with reason, that the draft rejection of his job was drafted on 27th November 2023. The respondent was planning to withdraw the job on 30th November 2023. The significance of 30th November 2023 was that there had been a video meeting on 24th November 2023 when the 30th November 2023 was given as the deadline. The claimant did not ask for a further extension and so the respondent withdrew the offer on 30th November 2023. In keeping with his position that the respondent has wasted the claimant's time, the claimant says well they could have waited until 4th December 2023.
20. Had they waited, and had they completed the DBS clearance, and had the claimant agreed to supply the full DBS search to the respondent, the respondent would then have discovered that the claimant had only partially informed them of the matter that had happened admittedly twenty-eight years previously. He was also convicted for possessing an offensive weapon in addition to common assault all resulting from the same event and he happened to be sentenced to three months imprisonment.
21. The respondent says that this information not having been disclosed would have led to them withdrawing the job offer because of issues of trust. The claimant did not help himself by only making partial disclosure of the position but events did not get that far, of course, because the job offer was withdrawn.

22. Central to the claimant's case before us is his contention that there was a complete oral contract of employment completed on 7th November 2023. There was a contract of employment, offer and acceptance, and there was no need for any further document. No need he submits for a written contract of employment, setting out all the terms and conditions. Do we accept his submission? Regrettably we do not.
23. It was understood that there would be subsequent HR processes before a written contract of employment containing the terms and conditions of employment was concluded. The written confirmation of the offer made it in any event clear that the offer was subject to conditions. Those were express written conditions in the offer of employment, those conditions were conditions precedent. There would be no contract of employment until they were satisfied. The claimant himself acknowledges that it was implied there would have to be satisfactory DBS clearance. This was not a matter of implication, that was one of three express written conditions. The other significant one of which was the need for two satisfactory references.
24. The references were a real stumbling block regrettably for the claimant in this case. It seems that it was not possible for those references to be verified. This was because of the passage of time and reflective of the fact that there had been no teaching for a considerable period of time.
25. We wonder whether the claimant is right that the respondent wasted his time. One does ask oneself rhetorically why did they make him an offer of employment in the first place when there were so many stumbling blocks to this application and to that extent the Tribunal has some sympathy with the claimant's position.
26. The condition as to references was not met, the condition as to DBS was not met. Had they gone too quickly on the DBS? We understand what the claimant says about this – wait for the third gateway document. However, they had not gone too quickly on the matter of references. The total picture of uncertainty in respect of the claimant's application meant that the respondent lost its nerve about this application and on or around 27th November 2023 decided that they would withdraw the offer in all probability on 30th November, when it had been confirmed that not all the documentation had been received. The respondent is right for what it is worth that the claimant had not asked for an extension.
27. This application and what happened is in our judgment a sorry story, for which we have some sympathy with the claimant. DBS would have revealed, however, that the claimant had only been partially forthcoming about his conviction. That is another problem that his application would have faced but we did not get that far because of the problem with references. The problem with references was sufficient to justify the respondent in withdrawing its job offer.
28. The claimant's case on breach of contract regrettably fails because he did not have a concluded contract. The job offer was conditional upon the condition precedents of references, DBS and health checks being satisfactory. Health checks has not been mentioned as relevant in this case.

References was relevant which was the immediate cause of why the job offer was withdrawn. There would have been problems in connection with the DBS later down the line. There was no concluded contract of employment. On 7th November there was a conditional written offer; the conditions were not met; therefore no contract of employment. Therefore, the claimant cannot argue breach of contract.

29. Race discrimination. Section 13(1) EqA 2010 defines direct discrimination as:

“....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.”

That protected characteristic could in theory be the ethnic origin or nationality of the Claimant's wife and children. Discrimination by association.

30. Burden of proof is important in discrimination cases. By section 136 subsection (2) of the EqA 2010 if there are facts from which the court could decide, in the absence of any other explanation, that the employer had contravened the provision concerned, the court must hold that the contravention occurred. By subsection (3), subsection (2) does not apply if the employer shows that the employer did not contravene the provision. What this means is that the employee must establish facts which amounts to a prima facie case of discrimination. If the employee does that, the burden transfers to the employer to show that discrimination played no role whatsoever in the relevant decision making: Igen v Wong [2005] IRLR 258 (CA).
31. The claimant told the respondent in his application that his wife was Vietnamese and that he lived in Vietnam with his children. It was implied, then, that his children may be Vietnamese. In full knowledge of all of those things, the respondent made him a conditional offer of employment. As we have found, the offer was withdrawn in the first instance because of the problem of references. Secondly, because there had been no DBS clearance. Further down the line, there would have been a real problem with the DBS information. The immediate reason and justification for the withdrawal of the job offer was no satisfactory references.
32. That is a perfectly cogent explanation for why the job offer was withdrawn. There is no shred of evidence that the fact that the claimant's wife was Vietnamese and his children also provided any reason whatsoever for this decision. On the contrary, the respondent had offered the claimant a job knowing that his wife was Vietnamese and his children likely to be Vietnamese also. Why would those matters come into this at all. There is a clear explanation for why the job offer was withdrawn. It has nothing whatsoever to do with the fact that his wife is Vietnamese and his children also. The Claimant does not adduce facts showing a prima facie case.
33. The list of issues says the claimant relies upon a hypothetical comparator. He does not construct a hypothetical comparator because there is a clear and obvious non-discriminatory reason for why the job offer was withdrawn. There have also been references in evidence to a colleague who was recruited from the USA, Lynne Robson, but there is no evidence before us

that her referees were unsatisfactory in the same way that the claimant's referees were unsatisfactory. It is not necessarily his fault that his referees were unsatisfactory; it is a consequence of the fact that there was no recent teaching history. None of this goes to show that the race of his wife and his children played any role whatsoever. We find that this position is unarguable.

CONCLUSION

34. In all of the circumstances, these claims fail. There was no concluded contract of employment. There was no direct discrimination when the job offer was withdrawn.

Employment Judge Smail
Date: 22 May 2025

REASONS SENT TO THE PARTIES ON
28 May 2025 By Mr J McCormick

FOR THE TRIBUNAL OFFICE