



EMPLOYMENT TRIBUNALS

Claimant

Miss S Goodall

Respondent

Impact Education Multi Academy Trust

Heard at: Leeds

On: 22 February 2024

Before: Employment Judge Davies

Appearances

For the Claimant:

In person

For the Respondent:

Ms R Blythe (solicitor)

RESERVED JUDGMENT

1. The Claimant's complaints have no reasonable prospect of success and are struck out in full.

REASONS

Introduction

1. This was a preliminary hearing in public to decide whether the Claimant should be permitted to amend her claim; and whether any part of her claim should be struck out because it has no reasonable prospect of success or whether the Claimant should be ordered to pay a deposit as a condition of continuing with it because it had little reasonable prospect of success.
2. The Claimant represented herself. The Respondent was represented by Ms Blythe. Ms Blythe had prepared a file containing the relevant documents. They were all documents the Claimant had seen before.
3. The background to these complaints is the Claimant's dismissal by the Respondent during her probationary period. The Claimant is a qualified teacher with more than 20 years' experience. She worked in the school as an agency worker from 12 January 2023 and as an employee from 1 April 2023.
4. The Respondent says that there was a complaint about the Claimant's conduct of a year 8 science lesson on 10 May 2023.¹ She drew a picture of a rocket and asked the students who wanted to be a passenger in it. She drew faces of those pupils in the rocket. One of the students is black. The Claimant drew his face

¹ The date may have been 9 May 2023 – different documents give different dates. Nothing turns on whether it happened on 9 or 10 May 2023. In this judgment I refer to 10 May 2023 for ease of understanding.

black. The student asked why his face was black and the Claimant said something like “I tried to make it black.” The Claimant drew another student using black and yellow pen to indicate that that pupil had a different skin colour. She later spoke to the first student and told him that she had coloured him in because he was “chocolate”. She described other students as different types of chocolate. This complaint was investigated. Other students confirmed what had happened. Mr Watkin and Mr Hinchcliffe spoke to the Claimant on 11 May 2023. The Claimant told them that she had a friend who was a “chocolate diva.” The Claimant was absent from work on 12 May 2023. On Monday 15 May 2023 she returned to work and was invited to a meeting on 18 May 2023. She was warned that she might be dismissed. She was dismissed because on the basis that her behaviour on 10 May 2023 was inappropriate. She was paid in lieu of notice. The Claimant appealed. Her appeal was considered on 20 June 2023 and her dismissal was upheld.

5. I emphasise that that is just the Respondent’s version of events and I have not made any findings about it. However, the Claimant gave me an account of what happened on 10 May 2023. On her account, she accepted that she drew faces of students on the rocket. She said that using a black pen she drew a black “goatee” on one student (who was black). He approached the board and asked her “what’s that black?” and she told him, “That represents you.” He returned to his seat, “pretending to be upset”. She used a yellow pen to make the colour of the face “more brown than black” then went to his seat and whispered to him, “There, I’ve made it look more like chocolate. Sweet like you.” A child nearby asked what she had said, and she told them. Children asked her what chocolate they were, and she told them. It was nothing to do with skin colour. The Claimant also said that she had told the students that her friend was a “black girl.” She said that Mr Watkin and Mr Hinchcliffe had asked her whether she had called her friend a “chocolate diva” in front of the children. She said that she had told Mr Watkins and Mr Hinchcliffe that her friend was “her chocolate diva” but that she had not said that to the children. The Claimant said that she had given a similar account at the meeting when she was dismissed and at the appeal hearing.

Claims

6. I went through the claim form with the Claimant. She also referred to a timeline she had produced and further particulars she had provided in response to a request from the Respondent, as ordered by EJ Lancaster. I read all the documents carefully and discussed them with the Claimant when asking her to explain what her complaints are. She confirmed that the complaints she wanted to bring are as set out below. I took care to ensure that nothing significant was missed from the Claimant’s documents. I have indicated in brackets whether each complaint is included in the original claim form, or whether the Claimant needs permission to amend her claim to add it:

Sexual orientation discrimination

- 6.1 During a PHSE class the Claimant was teaching about relationships. She made a comment about having a relationship with her cat in the course of that session. It was reported to senior leaders. On or about 10 May 2023 they asked her about it and:
 - 6.1.1 Mr Hinchcliffe asked her “how do you identify”; and

- 6.1.2 Mr Watkin questioned her about what relationship she had with her cat.
[Included in original claim form]

Religion or belief discrimination

- 6.2 The Claimant taught about the genetics of hair colour, skin colour and other inherited traits in a science lesson. There was discussion in the next lesson about it. That was the 10 May 2023 lesson in which the rocket was drawn. When asking her about what had happened on 10 [or 11] May 2023 Mr Watkin referred to a description of what the Claimant had said and described it as a “racial slur” and “casting.” The Claimant does not have a single religion. She embraces all religions and cultures. She believes everyone matters. Mr Watkin’s comments were designed to gaslight the Claimant and say that her religion was wrong. “Caste” is a concept in Hinduism. Mr Watkin’s comments portrayed a lack of knowledge. He was compartmentalising her.

[Not included in original claim form. Box ticked for religion or belief discrimination but this complaint not included.]

Race discrimination

- 6.3 The Claimant confirmed that her complaint about race discrimination was that when she raised issues, she was treated badly. I explained that this sounded like a complaint of victimisation. She agreed and confirmed that she did not have any other complaint of race discrimination apart from a complaint of victimisation.

Sex discrimination

- 6.4 The Claimant was pressured to wear trousers and high cut tops, and:
6.4.1 Ms Stokes told her on about 20-22 March 2023 that she herself always wore trousers because she felt safer in them; and
6.4.2 On a Friday around 20-22 March 2023 Ms Stokes physically pulled down the bottom of the Claimant’s skirt, which had raised above her knee.

[General complaint included in original claim form. Details relating to Ms Stokes not included and require amendment.]

Victimisation

- 6.5 The Claimant says that she did three protected acts:
6.5.1 In around January 2023 she asked Mr Watkin about the school’s Prevent procedures, in particular about the procedure for what to do if there was a lockdown. There had been a stabbing in the community and she wanted to know about the school’s procedures. She asked for access to the mandatory certificate. Mr Watkin told her that the procedures were voluntary but he expected everybody to have access to the procedures and to follow them.

- 6.5.2 On 7 February 2023 the Claimant sanctioned a student and the student asked her, “is it because I’m brown?”. The Claimant reported this comment but her report was not logged.
- 6.5.3 On 20 March 2023 she objected to the approach being taken in the school about challenging female pupils who were wearing short skirts. She handed in a written note saying that she objected to it. When Mr Watkin asked her about that, she told him that girls were being harassed and discriminated against, and that boys wearing inappropriate trousers were not being challenged.
- 6.6 The Claimant says that she was treated detrimentally because she did a protected act, by the Respondent manipulating the situation when a complaint was made about comments she made in the science class on 10 May 2023, culminating in her dismissal. She also complains that her comments were described as “racist” and a “racial slur.”

[First two protected acts not included in original claim form and require amendment. Third protected act included in original claim form. None of detrimental treatment, including dismissal, included in original claim form and amendment required.]

Protected disclosure (whistleblowing)

- 6.7 The Claimant says that she made protected disclosures on the following occasions:
- 6.7.1 On 14 February 2023 she asked Mr Watkin if there was Prevent training and what the procedures were. He told her that the courses and information were voluntary but he expected everyone to do them.
- 6.7.2 On 7 February 2023 the Claimant sanctioned a student and the student asked her, “is it because I’m brown?”. The Claimant reported this comment but her report was not logged.
- 6.7.3 On 2 March 2023 the Claimant reported that her PE kit was missing after her workstation and belongings had been moved from one side of the Office to another.
- 6.7.4 On 20 March 2023 she objected to the approach being taken in the school about challenging female pupils who were wearing short skirts. She handed in a written note saying that she objected to it. When Mr Watkin asked her about that, she told him that girls were being harassed and discriminated against, and that boys wearing inappropriate trousers were not being challenged.
- 6.7.5 On 17 April 2023 she reported to Ms Stokes that the work left by the Head of Subject for Performance Arts students suggested that they study a particular musical artist. No link to a particular piece of the artist’s work was left. The Claimant therefore googled the artist for the students and the first hit was a video that was lewd and inappropriate.
- 6.7.6 On 9 May 2023 the Claimant reported to Mr Watkin by email to his PA Ms Ainley that a student had informed the Claimant that other students were saying that she was racist.
- 6.7.7 On 10 May 2023 she reported that 3 students in the homework club had been making racist remarks to each other.

6.8 The Claimant says that she was treated detrimentally because she made protected disclosures by the Respondent manipulating the situation when a complaint was made about comments she made in the science class on 10 May 2023, and by her comments being described as “racist” and a “racial slur.”

6.9 The Claimant also says that the reason or principal reason for her dismissal was that she made the above protected disclosures, so she was automatically unfairly dismissed.

[Disclosures 4 and 6 included in original claim form. Remaining disclosures not included in original claim form and require amendment. Detrimental treatment not included in original claim form and requires amendment. Unfair dismissal complaint included in original claim form.]

Legal principles

7. Under Rule 37 of the Employment Tribunal Rules of Procedure 2013, a Tribunal may strike out all or part of a claim or response on the basis that (among other things) it has no reasonable prospect of success.
8. In considering whether a claim or response has “no reasonable prospect of success” the question is not whether it is likely to fail; there must be *no* reasonable prospects: see *Balls v Downham Market High School and College* [2011] IRLR 217 EAT.
9. In a case where the central facts are in dispute, in general it is not appropriate to strike out: see *North Glamorgan NHS Trust v Ezsias* [2007] ICR 1126. It is only in an exceptional case that striking out might be appropriate, for example where there is no real substance to the factual assertions made, particularly if contradicted by contemporary documents, or where the facts sought to be established were “totally and inexplicably inconsistent with the undisputed contemporaneous documentation.”
10. Further, as a general principle, discrimination cases should not be struck out except in the very clearest circumstances: see e.g. *Anyanwu v South Bank Students’ Union* [2001] IRLR 305, HL. That does not mean that they cannot be struck out, but indicates that Tribunal should exercise particular caution in discrimination cases. Guidance was given by the EAT in *Mechkarov v Citibank NA* [2016] ICR 1121:
 - 10.1 Only in the clearest case should a discrimination claim be struck out;
 - 10.2 Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
 - 10.3 The Claimant’s case must ordinarily be taken at its highest;
 - 10.4 If the Claimant’s case is “conclusively disproved by” or is “totally and inexplicably inconsistent” with undisputed contemporaneous documents, it may be struck out; and
 - 10.5 A Tribunal should not conduct an impromptu mini-trial of oral evidence to resolve core disputed facts.

11. Nonetheless, discrimination claims can in appropriate cases be struck out: see *Ahir v British Airways plc* [2017] EWCA Civ 1392. The Court of Appeal reminded Tribunals that they should not be deterred from striking out claims, including discrimination claims, involving a dispute of fact if there were indeed satisfied that there was no reasonable prospect of the facts necessary to liability being established and provided that they were keenly aware of the danger or reaching such a conclusion without the full evidence having been heard and explored. Again, this is particularly so in a discrimination case. The question whether that threshold is met is a matter of judgment for the Tribunal in each case. The Court of Appeal held at para 24:

In a case of this kind, where there is on the face of it a straightforward and well-documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so.

12. The principles to be applied in deciding whether to allow an amendment to a claim are well-established: see in particular *Selkent Bus Company Ltd v More* [1996] ICR 836 and *Cocking v Sandhurst (Stationers) Ltd* [1974] ICR 650. Essentially:
- 12.1 The discretion to amend must be exercised judicially and taking into account all the relevant circumstances.
 - 12.2 The Tribunal should consider the nature of the amendment: does it simply add detail to existing allegations, does it apply a new label to facts already pleaded, or does it make entirely new factual allegations that change the basis of the existing claim?
 - 12.3 If the amendment seeks to add a new complaint or cause of action, the Tribunal should have regard to any applicable time limit for bringing such a claim. However, that is just one factor in deciding whether to allow the amendment; it is not by itself determinative.
 - 12.4 Further, it is not necessary to determine time points before or at the same time as any amendment application; while this may be appropriate in some cases, it is not required: *Galilee v Commissioner of Police of the Metropolis* [2017] UKEAT/0207/16/RN.
 - 12.5 The Tribunal must also consider the timing and manner of the application, including the length of and reasons for any delay in making the application.
 - 12.6 Having considered the relevant facts and circumstances, fundamentally the Tribunal must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

Conclusions

13. I began by considering whether any of the existing or proposed complaints had any reasonable prospect of success. I reminded myself of the very high threshold for striking out a discrimination complaint and of the importance of determining claims on evidence if there is any doubt. I have taken the Claimant's case at face value and assumed she will prove that the things above happened. Applying that high threshold and test, I have nonetheless concluded that the following claims or proposed claims have no reasonable prospect of success:

- 9.1 The Claimant has no reasonable prospect of proving facts from which the Tribunal could infer that the questions asked about how she identifies and about her relationship with her cat were less favourable treatment because of sexual orientation or unwanted conduct related to sexual orientation amounting to harassment. The Claimant has not said what her sexual orientation is. On the Claimant's own account, the question arose from her telling pupils in a PHSE class that she had "a relationship" with her cat. She says that she was illustrating that relationships can be of different kinds, and that she did not say that she was "in a relationship" with her cat. Nonetheless, what she said must have been reported, because Mr Hinchcliffe and Mr Watkin would not have asked her about it otherwise. Given that it was reported, there is a straightforward and undisputed innocent reason why the questions were asked, which was not the Claimant's sexual orientation, but the comment she had made to the pupils in the PHSE class. In that context, the Claimant has no reasonable prospect of succeeding in a complaint that the questions would not have been asked if she had been of a different sexual orientation, and she has no reasonable prospect of succeeding in a complaint that the purpose or effect of the questions was to violate her dignity or create an intimidating, hostile, degrading, offensive or humiliating environment.
- 9.2 The complaint of religion or belief discrimination as explained by the Claimant does not make sense. It appears to rest on the fact that Mr Watkin used the term "casting", which is a term that is associated with the Hindu religion. That is not the basis for a complaint of religion or belief discrimination in the Tribunal. The Claimant has no reasonable prospect of proving facts from which the Tribunal could infer that Mr Watkin was treating the Claimant less favourably because of religion (i.e. that he would have treated someone of a different religion differently). She has no reasonable prospect of proving facts from which the Tribunal could infer that Mr Watkin's comment was unwanted conduct related to religion amounting to harassment.
- 9.3 The victimisation complaint has no reasonable prospect of success. The first two alleged protected acts, as described by the Claimant, do not arguably amount to protected acts as defined in the Equality Act 2010. Asking about the school's Prevent policy and/or complaining about lack of compliance with it is not making a complaint about a breach of the Equality Act or doing something for the purposes of or in connection with the Equality Act. Reporting that someone had accused her of being racist was not making a complaint about a breach of the Equality Act or doing something for the purposes of or in connection with the Equality Act, it was disclosing an allegation that had been (she said wrongly) made about her. The third alleged protected act does amount, on the face of it, to a protected act.
- 9.4 However, the Claimant has no reasonable prospect of proving facts from which the Tribunal could infer that the Respondent manipulated the situation when a complaint was made about her comments in the science class on 10 May 2023, culminating in her dismissal, because she had done any of the three alleged protected acts. Nor does she have any reasonable prospect of proving facts from which the Tribunal could infer that referring to her comments as "racist" or "a racist slur" was done because she did any of the three alleged protected acts. The Respondent has put forward

straightforward innocent explanation for its treatment of the Claimant, namely her conduct in the science class. Even on the Claimant's own account, much of that conduct took place. It is the obvious explanation for her dismissal and for the comments that were made, and it is fanciful to suggest that the real reason was any of the alleged protected acts or that this formed any part of the reasons for the Respondent's treatment of the Claimant. The Claimant advances no basis for the suggestion that her conduct on 10 May 2023 was not the real reason for the Respondent's treatment of her, this is mere assertion.

9.5 The complaint of being subjected to detriment for making a protected disclosure and the complaint of being automatically unfairly dismissed for making a protected disclosure have no reasonable prospect of success. The first alleged protected disclosure does not arguably amount to a protected disclosure. The Claimant does not say that she was disclosing information, but asking questions. The second and sixth alleged protected disclosures do not arguably amount to protected disclosures. The Claimant does not say that she was disclosing information that tended to show one of the relevant matters and that she reasonably believed it to be in the public interest. She says that she was reporting an accusation that had been (she said wrongly) made about her. The third alleged protected disclosure does not arguably amount to a protected disclosure. Reporting that her belongings had gone missing was not a report about one of the relevant matters nor could it be said to be in the public interest. The fourth alleged protected disclosure does not arguably amount to a protected disclosure. The Claimant was not disclosing information, she was expressing her objection to the approach being taken to the uniform policy. There is very little prospect, but conceivably the fifth alleged protected disclosure might amount to a protected disclosure, if the Claimant were disclosing information that tended to show a risk to the pupils' health and safety in the broadest sense or a breach of a legal safeguarding obligation and if she reasonably believed this was in the public interest. The seventh alleged protected disclosure does not arguably amount to a protected disclosure. The Claimant was not disclosing information that tended to show one of the relevant matters and it was not arguably in the public interest. She was reporting behaviour by pupils internally so that appropriate action could be taken.

9.6 In any event, for the same reasons as the victimisation complaint, the Claimant has no reasonable prospect of persuading the Tribunal, even having regard to the burden of proof, that the Respondent manipulated the situation when a complaint was made about her conduct on 10 May 2023 because she had done any of the alleged protected acts, nor that this was the reason her comments were described as "racist" or a "racist slur." In the automatically unfair dismissal complaint, she would have to prove that the reason or principal reason for her dismissal was not her conduct on 10 May 2023 but the doing of one or more of these acts. That is, again, fanciful. The Claimant's suggestion that her conduct was not the reason for the Respondent's treatment of her is mere assertion.

14. To the extent that these complaints are in the claim form, I have concluded that they should be struck out. This is one of those exceptional cases in which it is appropriate to strike out discrimination or equivalent complaints. The central

complaints are about the events leading up to the Claimant's dismissal and the dismissal itself. Even if what she says about the "goatee" is correct, she accepts that she then went over the face in the picture with a yellow pen, to make it "more brown than black" and then told the pupil that she had "made it more chocolate." She then went on to tell other pupils in the class what chocolate they were. On her own version of events, there was an obvious basis for the Respondent to conclude that her behaviour potentially amounted to a breach of the Equality Act or its own standards and that this should lead to her failing her probation and being dismissed. That is the straightforward innocent explanation the Respondent advances for its treatment of the Claimant. The contention that the real reason was protected acts or protected disclosures made by the Claimant is mere assertion with no basis at all and these complaints should not be permitted to go forward on that basis. To the extent that the Claimant requires permission to amend her claim to add the complaints, it would not be consistent with the overriding objective to allow the Claimant to amend her claim to add complaints that have no reasonable prospect of success.

15. The sexual orientation discrimination and religion or belief discrimination complaints are not directly connected to the complaints about dismissal. However, they simply do not fit into the relevant legal definitions. They are not complaints that will turn on the evidence or the drawing of inferences and they do not turn on disputed facts. They are complaints that, as put, do not amount to less favourable treatment because of sexual orientation or religion, and do not amount to complaints of unwanted conduct related to sexual orientation or religion.
16. That leaves the complaint of sex discrimination. The complaint as pleaded in the claim form is that the Claimant felt pressured into wearing trousers and high cut tops. She seeks permission to amend that complaint to add the specific allegations about Ms Stokes in March 2023. Those details make clear that this is a complaint about events in March 2023.
17. I concluded that it is not consistent with the overriding objective or in the interests of justice to allow the Claimant to amend her claim to add these specific complaints. These are new factual allegations that were not included in the claim form nor in the Claimant's timeline or further particulars. The first time these allegations were made was at the preliminary hearing on 22 February 2024. That is around eleven months after the events are said to have taken place. It is not clear why this is the first time such allegations have been made. There would be clear prejudice to the Respondent in allowing this amendment, not least because Ms Stokes would now be asked to recall, for the first time, events that took place almost a year ago. That prejudice outweighs the prejudice to the Claimant if I refuse to allow the amendment. These appear to be weak claims. When she described Ms Stokes's alleged conduct at the preliminary hearing, the Claimant told me that Ms Stokes made the comment about wearing trousers herself in the context of the action being taken in relation to pupils wearing short skirts at the time. It is difficult to see how the Claimant will establish that this comment amounted to less favourable treatment of the Claimant because of sex or unwanted conduct related to sex in those circumstances. Arguably, the alleged conduct in pulling the Claimant's skirt down might amount to unwanted conduct related to sex. However, the Claimant told me that she did not think much of it at the time, she just thought it was Ms Stokes's choice. In those circumstances, it

would be difficult for her to establish that the conduct had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Weighing all the relevant matters, I have concluded that permission to amend the claim in this way should be refused.

18. The unamended complaint as it stands – that the Claimant was pressured to wear trousers and high cut tops – has no reasonable prospect of success. Her complaint at the time in relation to outfits was about the way the female pupils were being treated, not about the way she was being treated. That is the clear thrust of what her timeline says too. Her factual allegation that Ms Stokes told her that she wore trousers because she felt safer doing so is on the face of it about Ms Stokes's choice, not to the Claimant's. No mention whatsoever is made of high cut tops. I consider that the Claimant has no reasonable prospect of proving as a matter of fact that she was being pressured to wear trousers or high cut tops. Furthermore, in circumstances where all the other complaints have been struck out, this would be the sole complaint. As such, it was presented outside the Tribunal time limit. The Claimant did not contact ACAS within three months of these events in March 2023, and she did not present her claim about them until August 2023. The claim was therefore presented about 8 weeks outside the three-month time limit. I consider that the Claimant would also have no reasonable prospect of persuading the Tribunal that it is just and equitable to extend the time limit for bringing this complaint. That is in the context that the Claimant engaged employment law solicitors in May 2023 to assist with her appeal against dismissal.

**Employment Judge Davies
29 February 2024**