Appeal No. UKEAT/0308/14/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 23 March 2015
Judgment handed down on 8 June 2015

Before

MR RECORDER LUBA QC

(SITTING ALONE)

MR M NGWENYA — APPELLANT

CARDINAL NEWMAN CATHOLIC SECONDARY SCHOOL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CHRISTOPHER MILSOM (of Counsel) Bar Pro Bono Scheme
For the Respondent	MR NATHANIEL CAIDEN (of Counsel) Instructed by: Luton Borough Council Legal Services Town Hall Luton LU1 2BQ

SUMMARY

UNFAIR DISMISSAL

Reason for dismissal including substantial other reason

Reasonableness of dismissal

A school teacher brought unsuccessful Tribunal claims of race discrimination and underpayment of salary against his school, in the course of which he made serious allegations. The school later investigated the allegations and found them unsubstantiated. It brought disciplinary proceedings on the basis that the allegations were (*inter alia*) vexatious, malicious and/or frivolous. The disciplinary charges were found to have been made out. The teacher was dismissed. His dismissal was upheld by an appeal panel.

The Employment Tribunal dismissed a claim for unfair dismissal on the basis that: a potentially fair reason for dismissal (conduct) had been made out; a fair and reasonable investigatory procedure had been adopted; and the sanction of dismissal had been within the range of reasonable responses.

Two points were pursued on appeal: (1) the Tribunal had failed to consider whether the school had reasonably believed that the allegations had been made in bad faith; and (2) the Tribunal had failed to address a contention that there had been unfair treatment because another teacher who had made similarly unfounded allegations had been treated differently.

HELD:

(1) The Tribunal had correctly found that the disciplinary charges had expressly included reference to the allegations having been "malicious, vexatious or frivolous" and "in bad faith". The evidence the school provided had satisfied the

Tribunal that it had genuinely believed, on sound grounds, that the charges were made out. It had made no error.

(2) The Tribunal had not addressed the comparator point because it not had not been raised/pursued before it. If it had been, it was doomed to fail because the circumstances of the two cases were wholly different.

MR RECORDER LUBA QC

Introduction

1. This is an appeal in an unfair dismissal claim. The appeal is brought by Mr Ngwenya. It is his claim for unfair dismissal that was dismissed by the Employment Tribunal sitting at Huntingdon (Employment Judge Adamson sitting alone), following a two-day hearing in November 2013. The Respondent to his claim, and now the Respondent to his appeal, is the school which used to employ him as a teacher.

2. The Employment Judge gave a Reserved Judgment, which was issued to the parties on 5 December 2013. The Employment Judge identifies the issues before him as being: (1) whether the school had established a potentially fair reason for dismissal (it relied on misconduct); (2) whether the handling of the dismissal had been procedurally fair; and, if so, (3) whether, if the school had had a genuine belief in the fact of misconduct after a reasonable investigation, the sanction of dismissal had been within the range of reasonable responses open to a reasonable employer. The Employment Judge's list of issues includes those issues arising from the school's alternative answer to the unfair dismissal claim. The alternative answer had been that the Claimant had been dismissed for some other substantial reason; i.e. for bringing about a breakdown of trust and confidence between himself and the school.

3. In the event, the Employment Judge rejected the unfair dismissal claim. In essence, he upheld the school's primary case, that the Claimant had been fairly dismissed for misconduct. I can conveniently deal with the facts by reference to the terms of the Employment Judge's succinct Reserved Judgment.

The Facts

4. The Claimant, Mr Morrison Ngwenya, is a black African man. He qualified as a teacher in Zimbabwe in 1985. He is a graduate with qualifications from universities both in Zimbabwe and in South Africa. In 2007, he began to work at Cardinal Newman School, a Catholic voluntary aided secondary school. I shall refer to it simply as "the school". Initially, he had been placed there through an agency, but from June 2007 he had joined the teaching staff as a Religious Education teacher. In 2008, he obtained UK Qualified Teacher status.

5. Thereafter, between 2008 and 2011, the Claimant became and remained dissatisfied about what he perceived to be the inadequate degree of recognition of his qualifications and his experience compared to the grading of his post and the salary it was attracting. He raised a complaint about that - and about his perception of race discrimination in his treatment - with the school. Not having been satisfied with its response, in November 2011 he pursued a complaint to the Employment Tribunal Service. That was found, in April 2012, to have been brought out of time in respect of the race discrimination element. A linked claim for arrears of pay was struck out as having no real prospect of success. The Employment Tribunal then dealing with the matter considered that the contention that the Claimant should have been on a different and higher pay scale had been misconceived.

6. In May 2012, the Head Teacher of the school wrote to the Claimant about the issues he had raised in the course of his claims and in the Employment Tribunal's proceedings flowing from them. In particular, about the allegations of mistreatment he had received at the hands of colleagues at the school. She commissioned an investigation by the Deputy Head. The Deputy reported that he could find no evidence to sustain the criticisms that the Claimant had made that members of staff were prejudiced against him on racial or religious grounds.

7. In July 2012, the Claimant was suspended by the Chair of the Governing Body pending an investigation of three allegations. Those allegations were that the Claimant had:

> **"1) Made false, inaccurate or misleading statements;**
>
> **2) Made vexatious, malicious and/or frivolous complaints;**
>
> **3) By carrying out (1) and/or (2) above, there has been an irretrievable loss of trust and confidence between the school and [the Claimant]. …"** (Tribunal Judgment paragraph 13)

The investigation was conducted by the Human Resources Department of the local education authority in the circumstances described in paragraphs 14 to 16 of the Employment Judge's Judgment. A large number of staff were interviewed, as was the Claimant himself.

8. The culmination was an invitation to the Claimant to attend a disciplinary meeting. The Employment Judge sets out the terms of what he described as "the full charges" against the Claimant. These were:

> **"1) Committed Gross Misconduct … by making false, inaccurate and misleading statements;**
>
> **2) Committed Gross Misconduct … by making vexatious, malicious and/or frivolous complaints;**
>
> **In respect of allegations (1) and/or (2) it is alleged that you have, in bad faith, made numerous allegations that School employees have demonstrated racist behaviour towards you. …"** (Tribunal Judgment paragraph 17)

The full charges then gave detailed particulars of those allegations and concluded with the following:

> **"… Carrying out (1) and/or (2) above has resulted in an irretrievable breakdown of the mutual trust and confidence necessary for the employment relationship between you and the School to continue."** (Tribunal Judgment paragraph 17)

The disciplinary hearing in relation to those allegations took place in January 2013. The relevant staff of the school gave evidence. The Claimant asked them no questions and did not challenge their statements. He gave evidence himself but he called no witnesses. His defence to the allegations was that the school was seeking to dismiss him because he had brought his

Employment Tribunal claims of discrimination and underpayment of salary. He contended that he had been, and continued to be, the victim of discrimination on account of his race.

9. The disciplinary charges were found to have been proven. By letter, summarised by the Employment Judge at paragraph 18 of his Judgment, the Claimant was told that he was to be dismissed. The dismissal letter explained that the various allegations of race discrimination that the Claimant had made were considered to have been made without foundation; further, that they were vexatious, malicious and frivolous. The pursuit of them was considered to have constituted gross misconduct and to have caused an irretrievable breakdown in the Claimant's working relationship with the school.

10. The Claimant appealed against the dismissal decision. The appeal was heard but rejected in circumstances described by the Employment Judge at paragraphs 21 to 23 of his Judgment. At paragraph 24, the Employment Judge records that the appeal panel had considered all three allegations again on appeal and had been satisfied that all three were made out. Indeed, the Head Teacher had told the appeal panel that her own position would be untenable in the school if, despite the unfounded and malicious allegations the Claimant had been found to have been making, he had been allowed to return to the school.

11. Thus it was that, in March 2013, the Claimant brought his claim of unfair dismissal to the Employment Tribunal Service. He acted in person throughout and represented himself before the Employment Tribunal.

The Employment Tribunal's Reasons

12. Having set out the facts found in much greater detail than given in the short summary that I have just provided, the Employment Judge turned to the determination of the agreed issues, all of which arise from the terms of section 98 of the **Employment Rights Act 1996** and the well-settled jurisprudence concerning its application. As to the first of the issues, the reason for dismissal, the Employment Judge found that the reason was the one given by the school: i.e. misconduct. He found that the conduct had been of such degree as to have destroyed the basis of the employer/employee relationship (see his Judgment at paragraph 28). As to the second issue, the fairness of the procedural investigation, the Employment Judge found that a fair investigation and disciplinary process had been followed (see paragraph 29). As to the third issue, he found that, because of the nature of the Claimant's acts and their effects, the school had been acting within the range of reasonable responses in dismissing him (see paragraph 30 of the Judgment). An application for reconsideration of the Judgment was made by the Claimant to the Employment Judge, but was rejected later in December 2013.

The Appeal

13. The Claimant brought this appeal to the Employment Appeal Tribunal in a Notice of Appeal dated 10 January 2014. It was considered on a paper sift to raise no grounds of appeal with any real prospect of success. The Judge considering the matter on the papers directed that the appeal should proceed no further.

14. The Claimant sought and obtained a hearing to reconsider that ruling. The matter thus came before Lady Stacey, for that purpose, on 3 September 2014 under Rule 3(10) of the **Employment Appeal Tribunal Rules**.

15. For that hearing the Claimant had the good fortune to obtain representation under the ELAAS Scheme. His representative sought and obtained permission to amend the Notice of Appeal by the total replacement of the previous grounds with two new grounds of appeal. Lady Stacey was satisfied, for the reasons she gave in a short Judgment, that both of the new grounds disclosed a real prospect of success in the appeal. The appeal before me therefore proceeds on those two grounds. I heard oral argument on 23 March 2015 and supplementary material was provided by the parties on 26 March 2015 relating to the written evidence that the Claimant had put before the Employment Tribunal.

16. Although, as will be seen, the grounds of appeal are relatively straightforward and no issue was taken as to the applicable statutory provisions or the Employment Judge's self-direction as to them, the bundle of authorities lodged in support of the appeal contains some 14 cases. In those circumstances, the appeal took a full day to hear. The Claimant was represented by Mr Christopher Milsom and the Respondent school was represented by Mr Nathaniel Caiden, who had appeared for it at the Employment Tribunal. I am grateful to both counsel for their helpful skeleton arguments and their oral submissions.

Ground 1: Bad Faith

17. This ground is expressed in the following terms in the Amended Notice of Appeal:

> **"The Employment Tribunal failed to consider (or consider adequately) whether the employer had a reasonable belief that the Claimant had made allegations of discrimination in bad faith."**

18. Mr Milsom's essential submission was that the Employment Judge had been required to make an explicit finding as to whether the allegations of race discrimination that the Claimant had pursued in his original Employment Tribunal claim had been pursued in bad faith. The Employment Judge ought to have directed himself that, if the Claimant had pursued those

matters misguidedly but with a genuine belief in their truthfulness, then he had not been acting in bad faith, however robustly he had made his case. Mr Milsom relied on the freedom of expression case **Matuz v Hungary** [2015] IRLR 74 at paragraphs 31 and 32 for the proposition that an employee must have the right to advance his own views even if the effect of promulgating them is to cause upset to others, even to fellow employees.

19. This was said by Mr Milsom to be particularly important in the present context. The Claimant had believed that he was being adversely treated in relation to his status and pay level by persons discriminating against him on racial grounds. His claim to that effect had indeed failed before the earlier Employment Tribunal but he had been entitled to pursue it. The school was now, in effect, victimising him for pursuing his statutory right to bring a claim. If that claim had been pursued in good faith then, in effect, the subsequent dismissal ought to have been found automatically unfair on the basis of victimisation. Mr Milsom's criticism was that, by this reference in paragraph 26 of his Judgment:

> **"This is a claim of unfair dismissal only. It should not be inferred from that statement that if the claim was of a different type it would necessarily succeed, I have not speculated. …"**

the Employment Judge was raising and recognising the thrust of this point but he thereafter failed to deal with it. Mr Milsom contended, therefore, that the Judge had failed to produce a Judgment giving adequate or sufficient reasons on this point and he cited familiar passages from **Anya v University of Oxford** [2001] ICR 847 and **Tran v Greenwich Vietnam Community Project** [2002] ICR 1101 on the need for proper reasons.

20. Yet further, Mr Milsom submitted, questions of motive and good/bad faith must have been central to any consideration of the part that any of the allegations made by the Claimant

had played in the alleged breakdown in trust and confidence between employer and employee. The Employment Judge had not really grappled with that at all.

21. Mr Caiden's response (in summary) was that this ground of appeal bore no relation to the way in which the Claimant had pursued his own claim before the Employment Judge. In any event, he contended that the question of motive or good/bad faith had been implicit in the way the charges against the Claimant had been cast by the school in the disciplinary and appeals processes. He submitted that those had been thoroughly considered by the Judge in his Judgment. Insofar as the case for the Claimant now turned on Convention rights, he reminded me that Articles 8 and 10 were qualified rather than absolute rights. There was no want of reasoning by the Employment Judge and, insofar as the challenge was put on a deficiency of reasons basis, that point was not expressly taken in the ground of appeal as framed.

22. In his reply, Mr Milsom took the point that of the three original disciplinary charges (set out at paragraph 7 above), reliance on (1) and (3) alone would have amounted to a plain case of victimisation for bringing the earlier Employment Tribunal claims. Only charge (2) had focussed on motive, and the Employment Tribunal had failed to deal with motive as an issue. Although language normally used in a reasons challenge had not been deployed in the ground of appeal, it was necessarily brought within the ground by use of the phrase "consider adequately".

23. As ably and comprehensively as the point was argued by Mr Milsom, I do not consider that this ground of appeal has been made out. The second of the charges, that was made subject of the disciplinary process against the Claimant, alleged in terms that the complaints he had made about the school and its staff including the complaints of race discrimination had been

"vexatious, malicious and/or frivolous". In the rider to the way in which the final charges were drafted for the disciplinary meeting (see paragraph 8 above), it was made plain that the contention was that he had acted in that way "in bad faith". That framing of the charges against him had required both those who dismissed the Claimant and those who upheld that dismissal on appeal to engage with the motive of the Claimant and to consider with what intent, or with what purpose, or to what end the Claimant had made his complaints of race discrimination.

24. The Employment Judge, in his Judgment at paragraph 19, explains precisely why the dismissal decision had been made in this respect. At that stage the school had noted the circumstances surrounding the Employment Tribunal claim, the terms of certain of the Claimant's correspondence, not least with his trade union representative, his outlandish offer to settle his claim at over £250,000, his attempt to excuse his conduct on an unsustainable basis relating to ill-health, and other factual matters going to his motive. They had expressly found that he had used language that had been "excessively emotive and designed to upset". For the reasons given at the time, and as summarised by the Judge, the school had been satisfied that the complaints made by the Claimant had indeed been made vexatiously, maliciously and/or frivolously. The same position had been reached by the appeal panel when rejecting the appeal.

25. In those circumstances the first function of the Employment Judge was simply to find whether the school had established that the reason for dismissal was misconduct. He found that it had. Next, having found a fair disciplinary process had been operated, the Employment Judge needed to be satisfied that the school had had a genuine belief in the Claimant's wrongdoing. The Judge not only gives a full account of the facts the school had relied on in that respect but he identifies, at paragraph 26 of his own Judgment and in his own terms, that the making of the particular complaints/allegations had never been denied by the Claimant but

they had been expressed in "florid and emotive language" and that there had been nothing in the context to substantiate them. The school had found that the matters raised by the Claimant had been baseless, in that there had been nothing to enable the Claimant to justifiably advance these complaints/allegations. The Employment Judge plainly considered those findings had been open to the school on the facts and that they had genuinely believed that the matters put forward by the Claimant had been put forward maliciously, vexatiously and/or frivolously. For his own part, the Employment Judge expressed himself satisfied that the effect of this conduct by the Claimant had been to destroy the employer and employee relationship. I can detect no want of reasoning or inadequacy of consideration of any relevant point here by the Employment Judge. It was not necessary for him to expressly find that the Claimant had pursued his allegations against the school and its staff in bad faith. Bad faith had been an express aspect of the allegations that the disciplinary hearing had considered. The Employment Judge's task was to determine whether the school had been entitled to find that the complaints, allegations and criticisms made by the Claimant had been made maliciously, vexatiously or frivolously and in bad faith. He amply discharged that task by finding that the school had been so entitled on the factual material before it, which the Judge recounts in his Judgment.

26. Mr Milsom made much, in pursuit of this ground of appeal, of the development in the law relating to "some other substantial reason" and the nature of the mutual trust and confidence essential to an employer/employee relationship. Mr Caiden made full submissions in response. I did not find this line of argument - on the part of either party - of any real assistance. Nor the numerous authorities cited on each side in relation to it.

27. That is because the Employment Judge was plainly satisfied that the school's primary ground for dismissal (misconduct) had been made out and that this misconduct had itself caused

an irretrievable breakdown in the relationship between the parties. He did not need to repeat the exercise all over again in relation to the school's subsidiary or secondary case based on "some other substantial reason". The reliance on the Claimant's own misconduct had, in the Employment Judge's Judgment, brought the employer home. I can detect no error in his approach or any inadequacy in his handling of the issues.

28. Accordingly, and essentially for both the reasons advanced in argument by Mr Caiden and those that I have set out myself, I am not satisfied that this ground of appeal is made out.

Ground 2: the Comparator

29. The second ground of appeal in the Amended Notice of Appeal is put in the following terms:

> **"The Employment Tribunal failed to address the Claimant's complaint that the Respondent had acted unreasonably by dismissing the Claimant in circumstances where it had not subjected a colleague (Mr Businge), who had made similar allegations, to any disciplinary sanction."**

30. As might be gathered from that formulation, Mr Milsom's central point was that a fair reading of the Employment Judge's Judgment by a third party would not lead the reader to believe that it had been any part of the Claimant's case that he had been treated more severely than another employee in broadly comparable circumstances. The other employee (Mr Businge) had not been subject to a sanction for raising issues about race discrimination, but the Claimant had been subject to the ultimate sanction of immediate dismissal for gross misconduct. Mr Milsom's submission was that, insofar as the Employment Judge considered and reached a conclusion on the point, there is no reference in his Judgment to what that conclusion was. Mr Milsom contended that because fair play between employees in comparable circumstances is an essential part of the overall reasonableness assessment required

by section 98(4), the Employment Judge had failed to discharge his obligations to deal with the Claimant's case appropriately in omitting to deal with that point. Putting his case crisply, Mr Milsom contended that either the Employment Judge had wrongly failed to consider the point or, if it had been considered and determined against the Claimant, no reasons had been given.

31. Mr Caiden's response was that the absence of the point from the Employment Judge's Judgment accurately reflected the fact that it was not part of the live issues in the claim as presented to him. It had been no part of the Claimant's case at the Employment Tribunal hearing that the treatment of Mr Businge bore on the fairness or otherwise of his own dismissal.

32. In his reply, Mr Milsom developed the proposition that it was not for the Claimant to have to highlight deficiencies in the employer's procedure or defence. He relied on the dictum of Elias LJ, given in **Crawford v Suffolk Mental Health Partnership NHS Trust** [2012] IRLR 402 at paragraph 53 that:

> **"… It is for the employer to ensure that a fair procedure is adopted. … In my judgment, however, it cannot be enough for an employer to say that although a fair procedure was not adopted, the responsibility for failing to remedy it lies at the door of the employee for failing to alert him to the error."**

It was, he said, the Claimant's case that the school had inadequately addressed the inequality of treatment point as between himself and Mr Businge, and it did not lie with the Claimant to ensure that the school had thoroughly examined that point once raised.

33. Again, I am not satisfied that this ground of appeal is made out. I can find no fault on the part of the Employment Judge. I have grave doubts whether the issue of the comparative treatment of Mr Businge and the Claimant was ever at the forefront of - or any significant part of - the Claimant's case. It was not a ground on which he sought to challenge his dismissal

before the school's appeal panel (see the Tribunal Judgment, paragraph 22). Mr Businge and his treatment were not mentioned in the application to the Employment Tribunal in the form ET1. The issue was not identified as an issue that the Employment Judge would need to consider either at the prior case management discussion or at the final hearing. It does not appear in the agreed list of issues.

34. True it is that what had happened to Mr Businge was raised, at least in some way, in the witness statements made by the Claimant. True it also is that a letter relating to Mr Businge's conduct (and his apology for it) was in the Employment Tribunal's bundle of documents. But, in so far as it had been raised, the point about inconsistent treatment had been met before the hearing by the Head Teacher's witness statement explaining the difference in treatment. She had not been challenged on that material in her statement at the hearing. It had not been raised with her in cross-examination or in the Claimant's closing submissions.

35. In that context and in those circumstances, I do not consider that the Employment Judge can be blamed for not expressly addressing a feature of the case that the Claimant had not himself raised as a material element of his claim.

36. Mr Caiden contended that, in any event, the issue was an irrelevant one, because the Employment Judge must have, at least inferentially if not expressly, accepted the employer's secondary or freestanding case that there had been "some other substantial reason for dismissal": i.e. a total breakdown in the relationship between employer and employee. In those circumstances his case on this ground of appeal, supplemented with much authority but subject to issue joined by Mr Milsom, was that no element of comparison with others arose. If the relationship between an employer and an employee had fractured by operation of the

employee's own conduct, the question of how and in what circumstances the employer had treated other employees was irrelevant.

37. Attractively as this argument was advanced, I am not required to determine it. For the reasons I have already given, I have rejected the criticism of the Employment Judge's determination of this claim in upholding the primary ground on which the school's response to it was advanced, namely that the Claimant was fairly dismissed for his own gross misconduct in making - in bad faith - allegations and complaints that were malicious, vexatious and/or frivolous.

38. However, for good measure Mr Caiden additionally contended that even if there had been an oversight or omission by the Employment Judge in dealing with the comparator point, there could have been no different outcome. He submitted that, in any event, the circumstances of the two men were not comparable beyond their making of an unjustified allegation of race discrimination. On the one hand, Mr Businge had fulsomely retracted and apologised at the first opportunity and that had happened immediately following his circulation of a single email. On the other hand, the Claimant had made persistent and numerous allegations against multiple staff at all levels of seniority and had not retracted or apologised at any time prior to his dismissal.

39. I accept those additional submissions advanced by Mr Caiden. The two employees were not in circumstances in any way comparable and, if the Employment Judge had in terms addressed the contrary submission, he would inevitably have had to reject it.

40. In those circumstances, having found that I cannot uphold either ground of appeal advanced, I have no hesitation in dismissing this appeal.