Appeal No. UKEAT/0342/14/RN
UKEAT/0343/14/RN

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 February 2015

**Before**

## THE HONOURABLE MR JUSTICE MITTING

**(SITTING ALONE)**

UKEAT/0342/14/RN

THE BASILDON ACADEMIES — APPELLANT

(1) MR E AMADI
(2) DR R FOX — RESPONDENTS

UKEAT/0343/14/RN

THE BASILDON ACADEMIES — APPELLANT

MR E AMADI — RESPONDENT

Transcript of Proceedings

JUDGMENT

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## APPEARANCES

| | |
|---|---|
| For the Appellant | MR SMAIR SOOR<br>(of Counsel)<br>Instructed by:<br>Qdos Legal Services Limited<br>Windsor House<br>Troon Way Business Centre<br>Humberstone Lane<br>Leicestershire<br>LE4 9HA |
| For Mr E Amadi | MR EMMANUEL AMADI<br>(The Respondent in Person) |
| For Dr R Fox | No appearance or representation by or on behalf of Dr Fox |

**SUMMARY**

**UNFAIR DISMISSAL**

**UNFAIR DISMISSAL - Compensation**

Whether the Claimant was obliged to report allegations of misconduct made against him under implied term of the contract or employment; if not, whether express terms of the contract required him to do so - no. Submissions on the Claimant's loss upheld.

**THE HONOURABLE MR JUSTICE MITTING**

## Introduction

1. The Claimant is a citizen of Nigeria. He has been working in the United Kingdom on a work visa valid until 8 March 2015. He was employed full-time by the employers as a work-based learning tutor from 1 November 2008. Following an adverse Ofsted inspection in March 2011 the Academies were reorganised. In consequence of the reorganisation the Claimant was offered and accepted part-time employment for two days a week, Thursday and Friday, as a Cover Supervisor. His Terms and Conditions of employment were set out in a letter dated 26 October 2011, which he signed on 8 November 2011. I will refer to the relevant Terms and Conditions of his employment in due course.

## The Facts

2. The facts as found by the Employment Tribunal, which are not in issue, are as follows. In September 2012 the Claimant was offered and accepted a zero hours contract to work between Monday and Wednesday at Richmond upon Thames College. He did not inform his employers, in breach of an express term of his contract of employment (Clause 2.6), for which the Employment Tribunal in an unappealed finding held that he had contributed to his ultimate dismissal to the extent of 30%.

3. On 19 December 2012 the Claimant was suspended by Richmond upon Thames College when a female pupil alleged that he had sexually assaulted her. The allegation was reported to the police. The Claimant was arrested and bailed. It is not clear from the findings of the Employment Tribunal whether he was also charged. If he was, then the charges were dropped.

There has no been prosecution of him and he is under no continuing bail obligation in respect of those allegations.

4. In March 2013 the police contacted the employers and told them that they were enquiring about the Claimant's previous employment with them. They also told them that the Claimant had been suspended by Richmond upon Thames College for the reasons stated. On 14 March 2013 the Claimant was suspended by the employers. On 19 July 2013 Bev Bell, a Principal employed by the employers, conducted a disciplinary hearing attended by the Claimant and a union representative. She concluded that the Claimant had decided deliberately not to inform the employers about his employment at Richmond upon Thames College and also about the allegation of sexual misconduct. She concluded that both were acts of gross misconduct and therefore dismissed him with effect from 22 July 2013.

**The Employment Tribunal Decision**

5. He made a complaint by Form ET1 to the Employment Tribunal. An Employment Tribunal panel, presided over by Judge Brown, held that he had been unfairly dismissed but that he had contributed to his dismissal to the extent of 30% for the reasons which I have indicated. Its Decision was sent to the parties on 13 March 2014. The employers appeal against that Decision.

**The Contract of Employment**

6. The starting point for considering the correctness or otherwise of the Employment Tribunal's Decision is that which it adopted, namely to analyse the terms of the Claimant's contract of employment. The opening operative paragraph of the letter of 26 October 2011 states:

> **"This letter outlines your terms and conditions of employment and I enclose a copy of the Basildon Academies terms and conditions document which together with the various policy and procedure documents to which it refers confirms the terms and conditions of your employment."**

There then follow particulars of the nature of the post and the salary scale. The letter goes on to state that general conditions of employment will include regulations made by the Secretary of Education, the decisions of the Academies discharging their functions in accordance with education legislation and the statement of pay and conditions of staff working within the Academies. It states:

> **"This letter, together with the attached Statement of Written Particulars (Terms and Conditions of Service), constitutes your contract of employment. …"**

7. The Claimant was invited to sign the document, which he did. Immediately above the signature of the Chair of Governors, on behalf of the employers, the following was stated:

> **"The Basildon Academies are committed to safeguarding and promoting the welfare of children and young people and expects all staff and volunteers to share this commitment. All adults are required to adhere to the Academies' safeguarding policies and practices. As part of the Academies' recruitment procedures all staff regularly undergo the enhanced CRB check."**

8. The Pay and Conditions of Service document referred to in that letter was a 15-page printed document, which set out in detail the obligations under which the Claimant was employed. Clause 2.6, as already noted, required him to notify the employers of any other employment taken up by him during the course of his employment. Paragraph 7 set out in bullet point form a summary of the Code of Conduct:

> **"You are expected to comply with the Academies' Code of Conduct which sets out rules in respect of:**
>
> - **Standards**
> - **Confidentiality**
> - **Use of Email and Internet**
> - **Relationships**
> - **Political Neutrality**

- **Use of financial resources**
- **Sponsorship**
- **Dress Standards"**

9. Those were headline summaries of paragraphs 1 to 11 of a detailed Code of Conduct. Clause 8 provided:

> ***"Safeguarding Children and Vulnerable Adults***
>
> **The Basildon Academies' Trust is committed to safeguarding and promoting the welfare of children, young people and vulnerable adults and expects you to share this commitment by complying with national standards and Academies' policy."**

10. An omission in the evidence deployed before the Employment Tribunal was any statement of national standards. As the Tribunal noted in paragraph 16 of its Decision, it was not shown the Basildon Academies' child protection procedures nor any national standards with regard to safeguarding children and vulnerable adults, nor any policy with regard to safeguarding children and vulnerable adults adopted by the employers.

11. Clause 14.1 of the Terms and Conditions of Service document identified on a non-exclusive basis what would be considered to be gross misconduct which would result in instant dismissal. There was a long list. At the foot of the list are the following:

> **"Failure to disclose any relevant criminal offences prior to employment and any criminal convictions which occur in employment**
>
> **Any other act of misconduct of a similar gravity"**

12. Clause 16 dealt with disclosure of criminal convictions during employment:

> **"Should you be convicted or cautioned for any offence during your employment with the Basildon Academies' Trust you are required to notify the Executive Principal immediately in writing of the offence and the penalty. This includes motoring offences which result in court action and licence penalty points, but not parking offences/fines where no penalty points are incurred. The effect of your conviction or caution will be considered with regard to the particular post you occupy and the nature and severity of the offence and penalty and in accordance with the Academies' policy on the employment of ex-offenders. Any action taken by the Basildon Academies' Trust will be in full accordance with the disciplinary procedure."**

13. The Academies' Code of Conduct, as I have already noted, fleshed out the bullet points referred in paragraph 7 of the Terms and Conditions of employment. Paragraph 4.1, under the heading "Standards", provided:

> **"There is an expectation that Academies employees will provide the highest possible standard of service to the public through the performance of their duties. Employees will be expected through agreed procedures and without fear of recrimination, to bring to the attention of their line manager any deficiency in the provision of service. Employees must report to the appropriate manager/the Governing Body any impropriety or breach of procedure."**

14. Appendix A to the Code of Conduct set out the employer's stance on whistleblowing. The opening paragraph stated:

> **"… the Academies wishes to promote an open environment that enables staff to raise issues in a constructive way and with confidence that they will be acted upon appropriately without fear of recrimination."**

15. Paragraphs 1 to 3 set out what employees should do when they believe they have reliable information about impropriety or misconduct by another employee. Paragraph 4 deals with the following question, "What if I receive a complaint about myself?":

> **"If the complaint or allegation is at all significant or made in a formal way, particularly by a member of the public or other external users, then you should inform your line manager, or Chair of Governors in the case of Executive Principals – even if you believe or know the complaint to be groundless or unjustified."**

16. The employer's case before the Tribunal was that that paragraph imposed upon the Claimant an express obligation to report an allegation of impropriety made against him even when the allegation did not concern anything that had occurred at the school at which he worked. Mr Soor, who has made helpful and intelligent submissions to me today, accepts that that obligation would, if it exists, be qualified by the provision that the allegation must be capable of having a bearing upon the employer's safeguarding duties in relation to children and/or its reputation.

**Discussion**

17. Construction of a written contract of employment is a matter of law. I am therefore just as well able to construe it as the Employment Tribunal and I am not bound by any findings as to issues of law which the Tribunal made. The contractual provisions to which I have referred seem to me to be perfectly clear. The conclusions which can and should be drawn are as follows. (1) The letter by which employment was offered to and accepted by the Claimant dated 26 October 2011 set out exclusively every express term of the contract between him and his employers. (2) He was under a duty to comply with the Academies' Code of Conduct, namely those rules set out in paragraphs 1 to 11 of the Code of Conduct. (3) The Claimant was obliged to disclose immediately to an executive principal any conviction or caution for an offence other than a minor motoring offence. (4) Failure to fulfil that obligation was a serious breach of contract which could result in immediate dismissal. (5) By virtue of paragraph 4.1 of the Code of Conduct, not Appendix A to the Code of Conduct but the Code itself, the Claimant was under an obligation to report any impropriety committed either by himself or by another member of staff.

18. Like the Tribunal, I cannot read into the advice given to potential whistleblowers in Appendix A to the Code of Conduct any contractual obligation on the Claimant to report an allegation made against him to the employers save for one which he knew or had reason to believe to be true. The obligation is not imported by Clause 4.1 of Appendix A but by Clause 4.1 of the Code of Conduct itself.

19. It may well be that national standards impose on teachers and those such as the Claimant who are responsible for the care of children at a school to report allegations made against them of impropriety involving children, not only at the school but elsewhere. If that were so, then by

virtue of the express term to which I have referred in paragraph 8 of the Terms and Conditions of employment, the Claimant might well have been in breach of contract and so liable to be dismissed for failing to report the allegation made against him. But it was a critical omission in the employer's case that no information about national standards was presented to the Tribunal. Mr Soor tells me that that was a deliberate decision because, although it was possible to obtain then current national standards, it was not possible to obtain national standards applicable at the time of the event which gave rise to the Claimant's dismissal. Accordingly, the conclusion which the Tribunal reached and which I am about to announce, need not necessarily be taken to be of general application. It is a conclusion which arises on the facts as presented in this case to this Employment Tribunal.

**The Case-Law**

20. There being no express term requiring the Claimant to report an allegation which he did not believe to be true and had no reasonable ground to believe to be true, Mr Soor is driven back to reliance upon an implied term. This issue was not extensively canvassed before the Tribunal, but it has been today before me. The starting point is the well-known and problematic case, **Bell v Lever Bros** [1932] AC 161 in which, for many years, the majority were understood to have declared it to be part of the law that an employee was under no obligation to disclose to his employer his own misconduct (see the speeches of Lord Atkin at 228 to 229, Lord Thankerton at 231 to 232). The position is now less clear, as is demonstrated by two modern authorities, the decision of the Court of Appeal in **Item Software (UK) Ltd v Fassihi** [2005] ICR 450 and the observations of two of their Lordships in **Lister v Hesley Hall Ltd** [2001] ICR 665, in which they preferred to express no concluded view on the issue.

**Conclusions**

21. I take it now to be established that there is no rule of law that under no circumstances can an employee owe to his employer a duty to disclose his own misconduct (see the Judgment of Arden LJ in the **Item Software** case at paragraphs 55 and 60). But in no case of which I am aware (and none has been cited to me) has the proposition ever been advanced, let alone held to be good law, that an employee must disclose to his employer, in the absence of an express contractual term requiring him to do so, an allegation however ill-founded of impropriety against him.

22. In my judgment it is clearly not the law that an employee is under such an implied obligation. It therefore follows that the Claimant committed no breach of contract by failing to disclose the allegation made against him by the pupil at Richmond upon Thames College. If he was not in breach of contract in failing to make that disclosure, it is difficult to see how that omission could amount to misconduct at all, let alone misconduct sufficient to justify dismissal. Sensibly adopting a belt and braces approach to the issue, the Employment Tribunal dealt with that at paragraphs 132 and 133 of its Judgment:

> **"132. Had Ms Bell looked at the Code of Conduct applicable to the Claimant, she would have seen that the Code of Conduct, itself, does not state that employees are required to report allegations against them. As the Tribunal has found, it is the whistle blowing policy which refers to a duty to report allegations, but even that policy is not clear that allegations made elsewhere, not in the current employment, are to be reported under the whistle blowing policy.**
>
> **133. While Ms Bell was of the view that the Claimant ought to have reported the allegation against him, she undertook no reasonable investigation into what the relevant policies stated and what the Claimant had been told. There was no reasonable evidence upon [which] she could conclude that the Claimant ought to have reported the allegation. Her decision to dismiss the Claimant for failing to report the allegation, when there was no evidence of a rule that he should report it, was outside the band of reasonable responses of a reasonable employer."**

23. That, in my judgment, is a conclusive and accurate refutation of any suggestion that might be made that, absent a contractual term to report the allegation, the employers were

entitled to dismiss the Claimant for failing to do so. Accordingly, and for the reasons which I have given at some length, this appeal against the Tribunal's findings on liability is dismissed.

**Remedy**

24. The Employment Tribunal, by way of remedy, made a basic award of £536.53, against which there is no appeal, and a compensatory award of £19,170.97. That was based on four years' loss of future earnings at the pre-dismissal rate less 30% for contributory fault, to which I have already referred, and a further 30% by way of a **Polkey** deduction to reflect the chance that the Claimant would have been dismissed in any event for reasons of capability. There is no appeal or cross-appeal against either of those findings. The Tribunal was invited by the Claimant to make an award for loss of career and declined to do so. The employers have appealed against the compensatory award. The nub of their appeal is that an award based on four years' future earnings was simply arbitrary. The Tribunal was faced with a difficult task. It made relevant findings of fact as follows. In paragraph 6 that the Claimant had a work visa, which expired on 8 March 2015. Secondly, he had taken reasonable steps to mitigate loss or at the very least the employers had not proved that he had not done so. Despite that, he had obtained no alternative work. Thirdly, he was seriously handicapped in obtaining employment in the United Kingdom, and his ability to remain in Britain was now in jeopardy. It concluded that the Claimant was unlikely to obtain another sponsor or another UK job. And if he did not do so, it was unlikely that he would obtain another visa to work in the United Kingdom.

25. Four years was a proposition advanced by the Claimant as an alternative to his claim that he should be awarded compensation for loss of his career. The Tribunal, in accepting the Claimant's suggestion, identified the principal reason for doing so in paragraph 24:

> **"… his severe difficulties in finding work arising out of his immigration status do justify an award of four years' loss from today."**

26. There is force in Mr Soor's submission that the selection of four years as both the extent of, and limit on, future loss was arbitrary. As it happened, this award was made in respect of a dismissal which, had it taken place only a little over a week later, could have given rise to no higher award than one year's loss of pay, an arbitrary limit imposed by Parliament. But, as the Tribunal correctly observed, that limit did not apply on the facts of this case because the date of dismissal occurred before that provision came into force. I accept Mr Soor's proposition that the figure of four years was arbitrary. But it was arbitrary both ways. It both extended loss into the future and imposed an arbitrary limit upon it. It is not in general permissible for this Tribunal, unless it receives fresh evidence formally, to examine what has happened since the Employment Tribunal reached its Judgment on future loss. But it can perhaps be noted that, according to the Claimant (and I have no reason to disbelieve what he says), that which was foreseen by the Employment Tribunal - that he would have difficulty in renewing his work visa - has come to pass. The UKBA have, the Claimant tells me, refused to renew his visa, but because he applied before it expired they have done so with a right of appeal to the First-tier Tribunal Immigration and Asylum Chamber. But his prospects there must be, at the very least, highly uncertain.

27. In theory what the Tribunal should have done, and were I to remit the case to them to decide this issue afresh would have to do, is to examine the Claimant's employment prospects. If, as they found to be likely, his visa was not renewed. That would involve him returning to Nigeria and finding himself for the first time for ten years on the Nigerian labour market, with a young family. There would have to be some evidence about the earnings achievable by someone in the Claimant's position in Nigeria. In the end, the Tribunal would be stuck with questions to which it could give no reliable answer. A degree of arbitrariness was therefore, in

my judgment, justified in assessing the compensation for future loss in this factually difficult case.

28. I discern no error of law on the part of the Tribunal in setting an arbitrary limit and imposing an arbitrary extent upon its assessment of future loss. The factors to which it did have regard, in my judgment, were capable of justifying a conclusion that the Claimant could not reasonably have been expected to have achieved any earnings up to the date of the hearing, and would suffer future loss at least the equivalent of four years' lost earnings discounted in the manner that I have indicated.

29. My conclusion therefore is that, although the Tribunal's Judgment involved an arbitrary assessment, it had no choice but to make that assessment, and reached a figure that was not based upon nor demonstrated any error of law. Accordingly, and for those reasons, the appeal against the compensatory award is also dismissed.