

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

At the Tribunal
On 21 July 2015

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MRS D MARSHALL

APPELLANT

THE LEARNING TRUST & OTHERS

RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR DEEN TIYAMIYU
(Representative)
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London
E8 4AE

For the Respondent

MS REBECCA TUCK
(of Counsel)
Instructed by:
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SUMMARY

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

Two live issues:

- (1) The Appellant was not permitted to run a new argument on aiding and abetting under section 57 **Disability Discrimination Act 1995**.
- (2) Having heard live evidence I found that the Appellant's representative (her husband) had not pursued a claim for damages for wrongful dismissal at the Remedy Hearing.

HIS HONOUR JUDGE PETER CLARK

1. This has been a long-running saga. The Claimant, Mrs Marshall, was employed as a teacher at Benthall Primary School from 1 September 1996 until her dismissal effective on 25 July 2008. She brought a total of five ET claims against a number of Respondents in what is now the East London Tribunal. The two relevant Respondents for present purposes were her employer, the London Borough of Hackney (“Hackney”) and the Head Teacher of the school, Mr Tim Hunter-Whitehouse.

2. A Liability Hearing took place before a Tribunal chaired by Employment Judge Laidler (the Laidler Tribunal) over 20 days in January and February 2010. The Tribunal delivered itself of a Liability Judgment with Reasons running to 135 pages on 6 September 2010, following deliberation in Chambers. A Remedy Hearing was held before that Tribunal in March 2012.

3. The Liability Judgment was, in part, successfully appealed by the Respondent and certain aspects of liability were remitted to a fresh Tribunal by a division of the EAT presided over by HHJ David Richardson in July 2012.

4. The matter then returned to a Tribunal chaired by Employment Judge Foxwell. That Tribunal’s Judgment on liability was promulgated on 10 September 2013. An appeal against that Judgment failed. On 7 October 2013 the parties agreed a consent order in relation to the Claimant’s complaint of unfair dismissal whereby Hackney agreed to pay to the Claimant her basic award entitlement and a then maximum compensatory award for ordinary unfair dismissal of £66,200. Outstanding remedy issues were timetabled to come before the Foxwell Tribunal

on 14 January 2014. On that occasion the Claimant did not attend and was not represented. The Remedy Hearing was adjourned to 28 January.

5. On 28 January the Claimant again did not attend but her husband, Mr Marshall, did so and represented her.

6. By a Judgment with Reasons dated 13 February 2014, the Foxwell Tribunal awarded the Claimant compensation totalling £10,000 plus interest and ordered her to pay costs to Hackney. Material for present purposes is an award of £1,500 costs thrown away by the abortive Remedy Hearing fixed for 14 January 2014.

7. Against the Foxwell Remedy Judgment this present appeal (EAT/0237/14/MC) is brought. At an Appellant-only Preliminary Hearing held before HHJ Hand QC on 8 December 2014 the appeal was permitted to proceed to this Full Hearing on four amended grounds only for the reasons given in a Judgment delivered that day. I shall deal with each of those grounds in turn.

8. *Ground 1:* It is common ground that counsel's fee for the aborted hearing on 14 January 2014 was £1,200 and not £1,500. I accept that the error arose because Ms Tuck's refresher fee for the Liability Hearing was £1,500 but it turns out that for the Remedy Hearing her refresher fee was £1,200. Accordingly, Hackney agrees that the costs order should be reduced by £300. The appeal is allowed to that extent on ground 1.

9. *Ground 2:* As Ms Tuck concedes, she took what turned out to be a bad point below, namely that Mr Hunter-Whitehouse was not a Respondent to the claim of disability

discrimination; he was. It follows that the Foxwell Tribunal was under a misapprehension as to this point and, therefore, the finding at paragraph 31 of their Remedy Reasons cannot stand.

10. *Ground 3*: However, the ET went on to make an alternative finding at paragraph 32, namely that Mr Hunter-Whitehouse had no personal liability for the three acts of disability discrimination in the form of a failure to make reasonable adjustments found; see paragraph 3.2. These three occasions concerned meetings on 7 May, 16 June and 21 July 2008 when Mr Marshall was not permitted to accompany his wife. At paragraph 32 the ET recognised that the decisions in each case to exclude Mr Marshall were reached by the respective panels, albeit heavily influenced by Mr Hunter-Whitehouse and another person, Mr Wren. However, they concluded that in those circumstances no personal liability lay with Mr Hunter-Whitehouse.

11. Ground 3 contends that the Respondents, Hackney and Mr Hunter-Whitehouse, were jointly and severally liable by virtue of section 57 and/or section 58 of the **Disability Discrimination Act 1995**, then in force.

12. It is necessary to separate out sections 57 and 58. Section 57 provides:

“(1) A person who knowingly aids another person to do an unlawful act is to be treated for the purposes of this Act as himself doing the same kind of unlawful act.”

And by section 58:

“(1) Anything done by a person in the course of his employment shall be treated ... as also done by his employer ...”

13. Ms Tuck submits that whilst Hackney accepted responsibility for any tortious act contrary to the **Disability Discrimination Act** done by Mr Hunter-Whitehouse under section

58, it was never the Claimant's case, either before the Laidler Tribunal or the Foxwell Tribunal that Mr Hunter-Whitehouse was personally liable under section 57.

14. In advancing this appeal, Mr Tiyamiyu accepts that the section 57 point was not taken below at any stage. However, he submits that it was a point which the Tribunal itself ought to have taken at the Foxwell Remedy stage, particularly bearing in mind that the Claimant was then represented by her husband, who is not, in any sense, professionally qualified.

15. At the Preliminary Hearing, Judge Hand raised the question as to whether or not there was an obligation on the Employment Judge to take the section 57 point. That is to say, that Mr Hunter-Whitehouse was liable as an aider and abettor. In my judgment, it was not a requirement that the Tribunal took that point on behalf of the Claimant. As Ms Tuck points out, had the point been taken there would have been evidential issues as to whether or not on the facts found thus far Mr Hunter-Whitehouse was in truth aiding and abetting the members of the panels who declined to allow Mr Marshall to represent his wife. Reference has been made in the course of discussion to cases including **Anyanwu v South Bank Students Union** [2001] ICR 391.

16. There are occasions when Employment Tribunals, and indeed this Employment Appeal Tribunal, raise matters which occur to them and which are then gratefully adopted by the party in whose favour it may work, but there was no obligation on this Tribunal to take a point which had never been raised before them, putting the case against Mr Hunter-Whitehouse personally, on the basis that he was aiding and abetting the panel members. Accordingly, ground 3 fails.

17. *Ground 4:* The complaint here is that the Foxwell Tribunal failed to award the Claimant damages for wrongful dismissal, a claim upheld by the Laidler Tribunal and not challenged on appeal before Judge Richardson's division of the EAT.

18. Ms Tuck contends that the damages for wrongful dismissal, that is pay in lieu of notice and, had the point been fully raised below, so-called "Gunton damages", following the case of **Gunton v Richmond upon Thames LBC** [1980] ICR 755, was subsumed in the unfair dismissal settlement agreement dated 7 October 2013. Had the matter ended there I would have been inclined to side with the Claimant on this aspect of the appeal, however, it does not because for the purposes of the aborted Remedy Hearing before the Foxwell Tribunal of 14 January 2013 Ms Tuck, appearing on behalf of the Respondent, prepared a list of issues for the Remedy Hearing. Item 1 of that list of issues, which is in the EAT bundle at page 370, reads as follows:

"1. The claimant was successful in the following claims in relation to which total payment of £74,785.50 has been made:

1.1. "ordinary" unfair dismissal (incl. basic award)

1.2. Wrongful dismissal

1.3. Holiday pay."

Pausing there, the holiday pay, totalling £3,305.50, was paid by a cheque sent under cover of a letter of 31 March 2011 and covered the last summer holidays following the end of her employment on 21 July 2008. That is how the matter was framed in that list of issues. The critical question, as Judge Hand anticipated at the Preliminary Hearing stage, was whether given that the agreement reached on 7 October 2013 was, on the face of it, concerned only with the unfair dismissal claim, whether at the hearing on 28 January 2014 Mr Marshall raised an outstanding claim for damages for wrongful dismissal.

19. On instructions Mr Tiyamiyu, told Judge Hand at the Preliminary Hearing that Mr Marshall had raised that claim. Since that time Ms Tuck has disclosed a copy of her contemporaneous notes taken at the hearing on 28 January 2014 and on the Respondent's application I put questions to Judge Foxwell, to which he responded by letter dated 23 April 2015. It is fair to say that the position remained unclear after Judge Foxwell's response. He had no note of Mr Marshall raising the question of wrongful dismissal damages at the hearing on 28 January, that on the face of it is inconclusive.

20. As the hearing before me progressed today, it became clear that the only way to resolve this matter was to hear oral evidence from Mr Marshall and from Ms Tuck. Both gave evidence before me, both, I am quite satisfied, did their very best to assist me. Ms Tuck's note, which I accept is a true record which she kept at the time makes it clear that her list of issues was provided to Mr Marshall and he accepts that he did receive them on that morning; whether or not they got to him via Ms Tuck's instructing solicitor before that day, it seems to me, does not matter.

21. What Ms Tuck records is that there was a break, she put it at half an hour, for Mr Marshall to consider her list of issues. When the Tribunal resumed she records the Judge saying Mr Marshall had time to look through bundles and then the Judge "Assessing compensation - as per paragraphs 4 and 5 of [Ms Tuck's] note". Mr Marshall: "Yes", and then Judge, "Claim for [personal injury] damages in addition to injury to feelings", Mr Marshall, "Yes". It is clear on the face of the note that no separate claim for damages for wrongful dismissal is raised by Mr Marshall.

22. Is he correct on balance when he says that he did raise the wrongful dismissal claim? I fear that I am unable to accept that he is correct in that recollection. I think he is mistaken. I am entirely satisfied that had he raised a separate claim for damages for wrongful dismissal, first, Ms Tuck would have noted it and, indeed, dealt with it on the day and, secondly, the Judge would have noted it.

23. Since I am not satisfied that the wrongful dismissal claim was separately raised on 28 January, the basis on which this ground of appeal was allowed through by Judge Hand falls and consequently ground 4 fails and is dismissed.

24. It follows that the outcome is that the appeal is allowed to the limited extent that the award of costs below is reduced from £1,500 to £1,200.