Appeal No. UKEAT/0055/15/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 June 2015

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

THE BASILDON ACADEMIES TRUST — APPELLANT

MS P POLIUS-CURRAN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS SAARA IDELBI (of Counsel) Instructed by: Qdos Legal Services Limited Windsor House Troon Way Business Centre Humberstone Lane Leicestershire LE4 9HA
For the Respondent	MR WILLIAM YOUNG (of Counsel) Instructed by: Sternberg Reed Solicitors Focal House 12-18 Station Parade Barking Essex IG11 8DN

SUMMARY

RACE DISCRIMINATION - Continuing act

JURISDICTIONAL POINTS - Extension of time: just and equitable

RACE DISCRIMINATION - Direct

Limitation - whether a continuing act - whether just and equitable to extend time.

Substantively, the Employment Tribunal failed to consider the Respondent's explanation at Stage 2 of **Igen v Wong**.

Employer's appeal allowed. Case remitted to same Employment Tribunal for reconsideration.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the East London Employment Tribunal. The parties are Ms Perena Polius-Curran, Claimant, and the Basildon Academies Trust, Respondent. This is an appeal by the Respondent against part of the Reserved Judgment of an Employment Tribunal chaired by Employment Judge Jones, promulgated with Reasons on 16 October 2014.

2. By way of background the Claimant was employed by the Respondent as a Maths Teacher from 16 April 2012 until her resignation effective on 30 April 2013. By a Form ET1 lodged on 15 May 2013 she raised complaints of unfair dismissal, direct race discrimination and harassment. The unfair dismissal claim was dismissed at a Preliminary Hearing. Before the Jones Tribunal complaints of race discrimination and harassment were dismissed save for one finding of direct discrimination in relation to the Claimant's non-appointment as Head of Department in the Maths Department and the appointment of a Mr Coombs to that position. The Claimant is described as Black British Caribbean; Mr Coombs as White English.

3. The appeal focuses on two matters: first, limitation, and second, the single substantive finding of unlawful discrimination.

Limitation

4. Mr Coombs was appointed Acting Head of Department on 1 May 2012 at a time when he did not have sufficient post-qualification experience to hold the post substantively. On acquiring sufficient qualifying experience he was appointed substantively to the post on 1 September 2012. The Claimant had expressed interest in that post, through an employment agency, Prospero, in November 2011. She had been assessed on 10 February 2012 for the post

of Maths Teacher but was regarded by the Respondent as unsuitable for the Head of Department role at that time on the ground that she had a five-year gap in her CV due to bringing up her child during that time (see the Reasons, paragraph 23).

5. At paragraph 161 the Tribunal appear to hold that the complaint to the Tribunal was out of time: the three-month primary limitation period, taken from Mr Coombs' permanent appointment on 1 September 2012, expiring on 30 November 2012. However, they went on to find that, because the Claimant continually raised the issue of Mr Coombs's appointment during her employment and because his appointment was never regularised by going through the Respondent's own recruitment process, this was a continuing act of discrimination within the meaning of section 123(3) of the **Equality Act 2010** (see paragraphs 165 to 166).

6. Ms Idelbi submits that here the Tribunal fell into error. The appointment of Mr Coombs was a one-off act with continuing consequences; it was not a continuing act extending over a period. See **Amies v Inner London Education Authority** [1977] 2 All ER 100, approved by the House of Lords in **Barclays Bank plc v Kapur** [1991] 2 AC 355 at 368-9 per Lord Griffiths.

7. Further, she submits that the act was completed on 1 May 2012 when Mr Coombs was appointed to the Head of Department role in an acting capacity.

8. I agree that this was a one-off act with continuing consequences. The fact of the Claimant complaining about it does not create a continuing act. Nor does a failure to regularise his appointment in the sense of undergoing a proper recruitment process. However, I agree with Mr Young that the appointment decision was not completed until 1 September 2012. In

my judgment time began to run from that date, as the Tribunal found at paragraph 161. The relevant claim was out of time.

9. At paragraph 166 the Tribunal went on to extend time under the just and equitable proviso (see section 123(1)(b)). Their reasoning was as follows:

> **"166. … It is also our judgment that it is just and equitable for the time limit to be extended in respect of this complaint. We consider that it is of sufficient gravity and importance to the Claimant and the purposes of anti-discrimination legislation in a pluralistic society to address recruitment practices such as exemplified by the appointment of Mr Coombs in this case."**

10. There are a number of objections to that finding. First, that was not a factor advanced before the Tribunal. I have been shown the respective written closing submissions of the parties' representatives below; there were no oral submissions. Secondly, both parties referred to the factors identified by Smith J (as she then was) in **British Coal Corporation v Keeble** [1997] IRLR 336 by analogy with section 33 of the **Limitation Act 1980**. Although it is not necessary for a Tribunal to follow those factors slavishly (see **London Borough of Southwark v Afolabi** [2003] IRLR 220), it was incumbent on this Tribunal to apply their mind to those factors in determining whether or not time should be extended. They wholly failed to do so. Nor do they appear to have had regard to the approach set out by Auld LJ in **Robertson v Bexley Community Centre** [2003] IRLR 434, at paragraph 25, to which Ms Idelbi referred in her closing submissions. They ought to have done so.

11. In these circumstances I am satisfied that the Tribunal's ruling on limitation cannot stand. However, I am not in a position to judge whether or not time should be extended; see the recent Court of Appeal guidance in **Jafri v Lincoln College** [2014] IRLR 544. That is a matter which should return to the Employment Tribunal for determination. Whether the same or a different Tribunal is an issue to which I shall return.

Substantive Finding

12. Ms Idelbi challenges the Tribunal's finding that, in relation to the appointment of Mr Coombs, the Claimant, who was of a different race and who was not appointed, raised a *prima facie* case of direct discrimination at stage 1 of the **Igen Ltd v Wong** [2005] IRLR 258 enquiry. She contends that the Tribunal gave insufficient reasons for that conclusion and, more substantively, that they failed to find something more than the difference in treatment and the difference in race. See **Madarassy v Nomura International plc** [2007] ICR 867, paragraphs 54 to 56 per Mummery LJ.

13. I reject that submission. Mr Young has satisfied me that the express findings at paragraphs 49 and 53, coupled with the reference to the "tap on the shoulder" at paragraphs 174 and 180, are sufficient to cross the threshold requiring an explanation by the Respondent which is untainted by the Claimant's race.

14. The Tribunal purport to address that question at paragraph 181; a need to have someone in the Head of Department role for OFSTED at a time when the Academy had been placed in special measures. However, I accept Ms Idelbi's submission that the Tribunal failed to consider the explanation advanced and recorded at paragraph 23, namely the five-year gap in the Claimant's CV. Mr Young submits that this matter was addressed at paragraph 176. True it is that reference is there made to the five-year gap, but in relation to whether the Claimant could be considered an experienced maths teacher, not whether that was in fact the reason why the Claimant was not appointed to the post but Mr Coombs was.

15. It is thus in relation to the second stage of the **Igen** enquiry that the Tribunal, in my judgment, fell into error by not considering the actual explanation advanced by the Respondent. I do not accept that their conclusion in that respect was perverse in the strict legal sense.

Disposal

16. I shall allow the appeal and remit both the limitation and substantive discrimination issues in relation to the "Coombs finding" to the Tribunal. Counsel disagree as to whether the case should return to the same or a different Tribunal.

17. Having considered the factors identified by Burton P in **Sinclair Roche Temperley v Heard** [2004] IRLR 763, at paragraph 46, I prefer the submission of Mr Young that the matter should, if practicable, return to the same Tribunal chaired by Employment Judge Jones. That Tribunal heard the evidence and resolved all but one issue in favour of the Respondent. No question of bias arises. The case returns on a narrow basis, as Ms Idelbi observed, which in my judgment it is proportionate for the same Tribunal to reconsider. I am told that a Remedy Hearing has taken place before the Jones Tribunal and an award of £6,000 plus interest was made in respect of injury to feelings. Whilst the appeal has succeeded on the Tribunal's approach to the continuing act and just and equitable extension questions and in relation to stage 2 of the **Igen** enquiry, that does not mean that the decision was totally flawed. I am confident that the Tribunal will approach the matter on remission in a totally professional way.