

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

At the Tribunal  
On 6 June 2014

**Before**

**HIS HONOUR JUDGE SHANKS**

**(SITTING ALONE)**

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MRS E GREENWOOD

APPELLANT

(1) CORNWALL COUNCIL  
(2) THE INTERIM EXECUTIVE BOARD

RESPONDENTS

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellant

MR MICHAEL PAULIN  
(of Counsel)  
Instructed by:  
Pannone LLP Solicitors  
123 Deansgate  
Manchester  
M3 2BU

For the Respondents

MR ANGUS GLOAG  
(of Counsel)  
Cornwall Council  
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## **SUMMARY**

### **PRACTICE AND PROCEDURE – Parties**

The Claimant/Appellant was a teacher at a primary school. Her contract of employment was with Respondent one's local authority. She brought proceedings in Employment Tribunal for unfair constructive dismissal, notice pay and sex discrimination. Respondent one and the Employment Tribunal pointed out that by virtue of the **Education (Modification of Enactments Relating to Employment) (England) Order 2003** the correct Respondent was the "interim executive board" of the school. On the Claimant's application an Employment Judge joined the board as Respondent two without hearing submissions from Respondent one or Respondent two.

At a subsequent PHR another Employment Judge dismissed the claims against Respondent two on the grounds they were out of time. That was an error of law: the Employment Judge should have considered whether Respondent two should have been joined as a matter of discretion; time limits were a factor in the exercise of the discretion but not decisive as a matter of jurisdiction.

The Employment Judge also dismissed the claim against the Respondent one on the basis that under the 2003 order the only proper Respondent was Respondent two; the order was complicated and the facts needed to be established, so it could not be said at this stage that Respondent one was definitely not liable by virtue of the order. Accordingly the appeal in relation to Respondent one was also allowed: Respondent one should remain a party and all matters as between it and the Claimant should be resolved following a full hearing.

## **HIS HONOUR JUDGE SHANKS**

### **Introduction**

1. This is an appeal by Mrs Greenwood, the Claimant below, against a decision of Employment Judge Parker, sitting in Bodmin following a pre-hearing review on 19 June 2013, nearly a year ago. Judge Parker dismissed the Claimant's claims against Cornwall Council, the first Respondent, on jurisdictional grounds and dismissed the claim against the second Respondent, the Interim Executive Board of St Newlyn East Primary School, on the grounds that it was out of time. Lest it be said that by describing the decision in that way I am pre-judging anything, that is what is recorded on the judgment document at page 2 of my bundle.

### **The background**

2. The background is that the Claimant was a teacher at St Newlyn East Primary School from 1 September 2005. She was employed under a contract with Cornwall Council in the normal way. On 23 August 2012 she resigned, claiming constructive dismissal. She brought claims against Cornwall Council, alleging unfair dismissal, sexual discrimination, and notice pay. In her ET1 she alleged that a new head teacher, who had been appointed in April 2011, had bullied her. She alleged that a change to her job description, which was put in to effect in January 2012, was sexually discriminatory and that she should have been consulted about it. She complained that her grievances had not been dealt with properly.

3. The first Respondent responded to that claim, inter alia by saying that the correct Respondent was "the Governing Body of St Newlyn East Primary School" by virtue of legislation to which I will refer later, although it is noteworthy that the first Respondent referred to an earlier version of that legislation, I think from 1999. On 4 January 2013 Pannone LLP, on

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behalf of the Claimant, invited the Employment Tribunal to add something called the “Interim Executive Board” to the proceedings, stating in the process that the governing board had resigned in April 2012 and contending at the same time that Cornwall Council should remain in the case.

4. On 17 January 2013 Judge Roper ordered that the interim executive board should indeed be added as a second Respondent. It seems that no submissions were sought from either Cornwall Council or the interim executive board before that decision was made, although that is not unusual, and it is always open following such a decision for the parties to apply for a review and to have a fully contested hearing as to whether it was the right decision.

5. In due course, on 19 June 2013, there was a full pre-hearing review. The Respondents were both represented at that hearing by the same solicitor, a Miss Dosangh. As I have said, Judge Parker dismissed the claims against both Respondents on the basis I have described.

#### **Interim executive board appeal**

6. So far as the claim against the interim executive board is concerned, there is no doubt that they were joined to the case after the expiry of the limitation period in respect of all claims and the Judge, as I have already said, dismissed them from the proceedings on the basis that the claims against them were out of time and that he would not extend time under either the “reasonably practicable” or the “just and equitable” basis.

7. In proceeding that way, I am afraid the Judge clearly adopted an erroneous approach. The Employment Tribunal proceedings were undeniably started in time, at least so far as the unfair dismissal claim was concerned. The question whether the interim executive board

should have been joined was a matter of his overall discretion. One of the factors that the Employment Judge could and should have taken into account in exercising that discretion was the fact that, if new proceedings were being started against the Interim executive board, they would have been out of time. That was by no means the determinative consideration, and there are many other factors that should have been in his mind. It seems to me clear that the appeal on this basis must succeed and that the matter must be remitted to the Employment Tribunal for a consideration of whether it was right as a matter of discretion for the interim executive board to be joined as second Respondent. That further hearing, if it is necessary, can be dealt with by Employment Judge Roper, who would be reviewing his original decision, or another Judge but not, I think, in fairness, by Employment Judge Parker. That deals with the appeal in relation to the interim executive board.

### **Cornwall Council appeal**

8. The position in relation to Cornwall Council is, I am afraid, more complicated and tricky. It depends on the construction of the **Education (Modifications of Enactments Relating to Employment Tribunal)(England) Order 2003 (SI 2003/1964)**. That legislation has given rise to two cases in the Court of Appeal, a division between members of the Court of Appeal as to their effect, and I would imagine to quite a lot of other litigation. I do not mind admitting, for my part, that I find the provisions almost impenetrable.

9. The purpose of the Order is stated in the explanatory note as being to modify:

“...various statutory provisions relating to employment to take account of the requirement contained in the School Standards and Framework Act 1998 for authorities to delegate financial management of schools to their governing bodies. While a school has a delegated budget, the governing body has powers as to the appointment, suspension, conduct and discipline, capability and dismissal of staff at the school, although the authority remains the employer of staff at [various schools are mentioned].

The relevant provisions for the purposes of today are Articles 3, 4, and 6. Just to give a flavour of them, Article 3(1)(a) says this:

**“In their application to a governing body having a right to a delegated budget, the enactments set out in the Schedule [which I take to include the Employment Rights Act and the Equality Act have effect as if –**

**(a) any reference to an employer (however expressed) included a reference to the governing body acting in the exercise of its employment powers and as if that governing body had at all material times been such an employer”**

Article 4 says:

**“Without prejudice to the generality of article 3, where an employee employed at a school having a delegated budget is dismissed by the authority following notification of such a determination as is mentioned in article 3(1)(d) [that is a notification under some other regulations] –**

**...**

**(b) Part X of the 1996 Act [that includes unfair dismissal] has effect in relation to the dismissal as if the governing body had dismissed him, and the reason or principal reason for which the governing body did so had been the reason or principal reason for which it made its determination.”**

Article 6 says:

**“(1) Without prejudice to articles 3 and 4, and notwithstanding any provision in the Employment Tribunals Act 1996 and any regulations made under section 1(1) of that Act, this article applies in respect of any application to an employment tribunal, and any proceedings pursuant to such an application, in relation to which by virtue of article 3 or 4 a governing body is to be treated as if it were an employer (however expressed).**

**(2) The application must be made, and the proceedings must be carried on, against that governing body.**

**(3) Notwithstanding paragraph (2), any decision, declaration, order, recommendation or award made in the course of such proceedings except in so far as it requires reinstatement or re-engagement has effect as if made against the authority.**

**(4) Where any application is made against a governing body pursuant to paragraph (2)—**

**(a) the governing body shall notify the local education authority within 14 days of receiving notification; and**

**(b) the local education authority, on written application to the employment tribunal, is entitled to be made an additional party to the proceedings and to take part in the proceedings accordingly.”**

I may say that, given that the local authority in this case, Cornwall Council, would in effect be liable to pay any award and entitled to be a party, I find it strange that they are taking the

position that they should not remain a party given all the circumstances of the case. But that is a matter for them.

### **The Governing body**

10. The facts, so far as the governing board or body of this particular school are concerned, are obscure, but they appear at the moment to be these.

11. In April 2012 there was a governing body in existence, which I take it had been in existence for some time past. It appears that that governing body may have resigned *en masse*, but it had certainly ceased to exist by May 2012. I am told that whatever exactly happened its existence as a legal entity just came to an end. I am bound to say I am not sure how that works, but that is what I am told today.

12. In May 2012, I have been shown a note of a meeting which demonstrates that there was in existence something called an interim governing body, which apparently had been appointed by Cornwall Council. Again, this may be wrong, but there is apparently no statutory basis underpinning that entity. It certainly was not a governing body for the purposes of the schedule that I looked at in the relevant Education Act, but there may be some provision relating to it somewhere else.

13. Then on 3 July 2012 the Secretary of State approved the appointment of something called an interim executive board, which is the second Respondent to these proceedings. Again, I have not been shown any statutory provision about that, but I am told that that an interim executive board stands as a governing body and is the governing body and was the governing body as at 23 August 2012.



14. Bearing in mind the nature of the claims, as I have described them very briefly, it will be seen that events relied on by the Claimant straddle the regimes of the three different bodies which I have described.

### **The Employment Judge's decision**

15. The Employment Judge was obviously referred to the 2003 Order, and he said this at paragraphs 10 and 11 of his decision:

“10. Accordingly it seems quite clear that I should not retain the County Council as a party in these proceedings. I am fortified in that view by the decision of the Court of Appeal in *Green v Governing Body of Victoria Road Primary School and another* [2004] LGR 336 which held that a local education authority could not be made a party to a teacher's unfair dismissal claim against its will. In Article 2(2) of the 1999 Order, the predecessor to that with which I am concerned, employment powers were widely defined and were sufficiently wide to embrace a claim for constructive dismissal in an Employment Tribunal.

11. In the instant case, the actions of the governing body had been actions in the exercise of its employment powers. By virtue of Article 3(1)(a) and Article 6 of [the] 2003 Order, the governing body are to be treated as if they had been the employer, and any application to a tribunal claiming unfair dismissal should be made against them. It seems to me that the appropriate course here is to dismiss Cornwall Council as a respondent to this claim.”

16. It seems clear to me that the Employment Judge has made a number of errors in those paragraphs. First, the point in **Green** was not that a local authority could *never* be made a party to a teacher's unfair dismissal claim and **Jones v Neath Port Talbot County Borough Council** [2011] ICR 1415 makes clear that there are circumstances where a claim can be maintained against a local education authority and a governing body, so that the apparent absolute rule on which the Employment Judge relies is not really a rule at all. Second, in paragraph 11, he refers to “the governing body” without addressing his mind to which governing body he is talking about. Third, he also appears to have overlooked entirely the claim for sex discrimination.

## **Submissions**

17. Mr Paulin says that, one way or another, the local authority may be directly liable in respect of things that happened at least up to July 2012 and thus directly liable in respect of one or more of the Claimant's claims. He says that, given that the factual position is so unclear and that there is doubt about who is going to be responsible in law for what happened, the right course procedurally was for the local authority to remain a party at least until all the facts had been established at a full hearing.

18. Mr Gloag, who has represented both Cornwall Council and the interim executive board, says that the position here is straightforward. He says that the interim executive board was in place on 23 August 2012. That is the date of the constructive dismissal. The Interim Executive Board is the only possible Respondent and the local authority has got to be dismissed from the case.

## **Conclusion**

19. In my view, there were errors made by the Judge to which I have already referred, the position both factually and in law is far from straightforward, and the best course is that the facts are first established before anything else happens. The Court of Appeal in the **Jones** case made it clear that in such circumstances it is right for a local authority to remain in a case, and I am therefore minded to allow the appeal in relation to Cornwall Council as well.

20. Although normally matters like this should be remitted for a decision by the Employment Judge, it seems to me that, given the grounds on which I have allowed the appeal, it makes no sense to remit anything to the Employment Judge because the issue is now whether, on facts which require to be found at a hearing, and in the light of the 2003 Order, Cornwall Council are indeed liable to any extent for any of the Claimant's claims. It seems to me that

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establishing the facts will require a full hearing so that the Council will have to remain a party to the proceedings so they can participate in such a hearing.