Appeal No. UKEAT/0312/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 May 2014

Before

HIS HONOUR JUDGE SHANKS

MS V BRANNEY

MR S YEBOAH

MS ZOHRA PATHAN — APPELLANT

SOUTH LONDON ISLAMIC CENTRE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CHRISTOPHER MILSOM (of Counsel) Direct Public Access Scheme
For the Respondent	MR DAVID STEPHENSON (of Counsel) Instructed by: Simons Muirhead & Burton 8-9 Frith Street London W1D 3JB

SUMMARY

JURISDICTIONAL POINTS – Extension of time: just and equitable

UNFAIR DISMISSAL – Reason for dismissal including substantial other reason

VICTIMISATION DISCRIMINATION

SEX DISCRIMINATION – Burden of proof

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

The Claimant/Appellant worked as a teacher in the girls' section of the Respondent's Madrassah. She took on extra duties with the encouragement of the Respondent. Later she was given a letter which in effect removed these extra duties. She brought an Employment Tribunal claim for sex discrimination in response. Later she was suspended. She brought two further claims in the ET alleging victimization. The ET rejected all the claims on the merits and the sex discrimination claim on limitation.

The ET made the following errors of law:

(1) they rejected the sex discrimination claim on the basis there was objectively speaking no "demotion" but failed to consider whether a reasonable employee might have taken the view that her treatment was to her detriment;

(2) in considering limitation in connection with the sex discrimination claim, they wrongly failed to take into account relative prejudice, concentrating only on the reasons for the lateness of the claim, and thus failed to consider what was "just and equitable";

(3) on the victimization claims, they appear wrongly to have considered the primary cause of the decision to suspend the Claimant rather than whether her sex discrimination claim was a "significant factor" in the decision and in any event they omitted to deal with the notes of a meeting of the Respondent's board from which a strong inference could have been drawn that the claim did cause or influence that decision.

The claims were remitted to a differently constituted ET.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal by the Claimant against a decision of the Employment Tribunal in London (South), relating to six claims which she brought. The decision was sent out on 20 March 2013 and followed 13 days of hearing and three days of deliberation in chambers. Apart from the three days from 23-25 January 2013 the Claimant acted in person before the Employment Tribunal. This appeal was allowed to proceed by the President on five grounds following a preliminary hearing on 19 December 2013.

Facts

2. The background facts relevant for the appeal are these. The Respondent is a mosque in Streatham, which has a Madrassah attached, which is attended by both boys and girls between 5pm and 7pm. The Claimant is a qualified teacher. She started work as a teacher in the girls' section on 17 January 2007.

3. The Employment Tribunal found that the Claimant became the lead teacher in the girls' section and that she took on extra work in relation to syllabus, discipline and administration. The Employment Tribunal said she was encouraged to do this and supplied with office space and a computer to help her. However, although she was encouraged and although she called herself "Head Teacher" and was indeed referred to as such in a letter dated June 2007, which is referred to at paragraph 51.10 of the decision, the Employment Tribunal found that she was never formally appointed as Head Teacher of the girls' section.

4. On 22 October 2009 the Claimant was given a letter, which was referred to by the Tribunal as the "roles letter", which said as follows:

"Re: Definition of roles in the Madrassah

As the education committee we would like to thank for your input to date and recognise your efforts in adding stability to the Girls madrasah classes, however, we are now at the stage where we need to move to the next level and firmly believe the guidelines below will help move us towards our common goal.

As the Madrasah moves on and evolves it is important the roles and duties are re-clarified as to avoid confusion and a repetition of work. Our six monthly reviews are conducted to ensure that the Madrasah is run efficiently, both financially and education-wise. We feel it is important that a uniform syllabus is taught throughout the whole of the Madrasah and [we] act as one entity with one focal point and one lead.

As a result of our current review, we thought it was important to redefine your role in our organisation so that your skill-set can be sufficiently utilised.

Below we have defined your role and that of Imam Ubaid [he had joined as the imam of the mosque in 2008].

- **Imam Ubaid is the head of the WHOLE Madrasah and any education related activity.**
- **The title of Head must only be attributed to Imam Ubaid as to avoid confusion among teaching staff and parents.**
- **Sister Zohra** [that is the Claimant] **to be a representative of the female teachers.**
- **Sister Zohra to run a class during Madrasah time** [the Tribunal had found that she had stopped running classes because she was involved in administration]**.**
- **Any prospective teacher, including temporary, needs to be cleared by the Head. ...**
- **All administrative duties from Girls side to be passed to the Head and the Centre office."**

Then there are further bullet points dealing with letters, suspension of children, syllabus and staff holidays, and so on.

"A letter will soon be going out to all staff members confirming the above information so that all roles, procedures and practices are clearly defined.

We would be grateful if you could make a photocopy of this letter and sign below to confirm you have received this letter and understand the contents and roles therein defined."

The Claimant regarded this letter as a demotion. Having complained about this internally, she brought a claim which the Employment Tribunal described as "Claim 1" for gender discrimination on 25 June 2010. That was five months out of time.

5. On the same day as she brought that claim, there was a meeting of the management committee of the mosque, which included a discussion of education. The note of the meeting

recorded that "WM", Waseem Misar, reported to the committee that the Claimant "is taking her grievance to the Employment Tribunal as her grievances have been going on for more than three months". It was agreed, according to the note, that "we need to get legal advice" and "TN", Tahir Noor, was to get the advice. It was then recorded in the note that there was a proposal that, subject to legal advice, the Claimant be suspended. That motion was carried by eight votes, with one vote against and one abstention. It was then agreed by all that any information regarding the Claimant discussed in the meeting would not be divulged to anyone outside the management committee.

6. The note of the meeting of 25 June 2010 only emerged very late in the day during cross-examination of one of the Respondent's witnesses by counsel who had taken over the case on behalf of the Claimant. It is not referred to anywhere in the Employment Tribunal's decision

7. Shortly after 25 June 2010 the holiday period began; four working weeks later, on 16 September 2010, the Claimant was suspended from duty. The letter of suspension said this under the heading "Suspension pending disciplinary investigation":

> **"Following your refusal to attend a meeting, I am writing to confirm that, as of the date of this letter, you have been suspended from work until further notice pending an investigation into an allegation of gross misconduct and failure to follow reasonable instruction to produce your CRB clearance. Your conduct has caused potential irreparable damage to your employment relationship with the Madrasah. We reserve the right to change or add to these allegations as appropriate in the light of our investigation."**

8. In response to that, the Claimant brought another claim in the Tribunal, referred to as Claim 3, to the effect that she was being victimised. She relied as a comparator on another teacher called Maryam Bham, who was suspended on the same day but apparently later reinstated when the Respondent received her CRB clearance. The existence of Miss Bham's suspension was clearly an important part of the factual matrix, but to name her as a comparator was clearly misconceived. That claim, no. 3, was presented on 16 December 2010. In the

original list of issues, it was accepted by the Claimant that that claim ought to have been presented on or before 15 December 2010: i.e. within three months of the suspension. But it is now common ground that, when counsel acted for the Claimant on 23 January 2013, that concession was withdrawn on the basis that a suspension of this nature was a continuing act.

9. By claim 4, which was presented on 24 February 2011, the Claimant contended that she was further victimised by the continuation of the suspension to that date.

10. On 9 June 2011 the Claimant was dismissed. The Employment Tribunal found that the reason for the dismissal was that the Claimant had removed and retained confidential information from the mosque and they also found that the dismissal was fair. There is no appeal against that part of the Employment Tribunal's decision. There was no dispute that the Respondent had only discovered that information had been taken by the Claimant in January 2011 in the course of a disclosure exercise in relation to one of the earlier claims.

11. Returning to the CRB certificate, in fact a certificate was issued some time before January 2011, but the Claimant did not for some reason contact the Respondent about that, and the Employment Tribunal found that the Respondent's own internal administration was such that, although a copy of the CRB certificate was sent to the Respondents, they did not realise that was the case until March 2011, by which time events had been overtaken by the discovery that the Claimant had removed the confidential information.

The appeal

12. With that background, we turn to the appeal. It relates only to Claims 1, 3 and 4, as we have described them. The Employment Tribunal found that claims 1 and 3 were barred by section 123 of the **Equality Act** or the equivalent, and the Claimant appeals against both those

findings. But the Employment Tribunal also rejected all three claims on their merits, for various reasons, against which the Claimant also appeals.

Claim no 1

13. We deal first with claim no 1 in relation to the merits. The issue, so far as claim 1 was concerned, was described by the Employment Tribunal in this way:

> **"The Claimant contends that the Respondent directly discriminated against her on grounds of gender contrary to s1(1)(a) [of the Sex Discrimination Act] by demoting her to the role of representative of female teachers on or around 22.10.09."**

The Employment Tribunal found that the Claimant was never appointed as Head Teacher of the girls' section and that there was never any such position, and that there was therefore no demotion and hence no act of discrimination.

14. Grounds 2 and 3 in the Notice of Appeal are summarised in the Claimant's skeleton argument under the heading "The Employment Tribunal erred in determining that the roles letter did not constitute a demotion". In fact the Claimant's argument is more subtle than that. What she is saying is that the real issue was whether she had been subjected to a detriment and that the test for this was whether "a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her detriment". What the Claimant says is that the Employment Tribunal ought to have focussed on the Claimant's own perception of the events and the letter in particular, and whether it was reasonable for her to conclude that she had been subjected to a detriment rather than on the objective question of whether she had been demoted. There is no dispute that that was indeed the legal test for a detriment, and it cannot be disputed that the Employment Tribunal do not address the question of the Claimant's perception of how she had been treated and whether it was reasonable in express terms.

15. Mr Stephenson for the Respondent says that the Employment Tribunal have made an implied finding, mainly at paragraphs 51.21-51.23, that any perception of detriment which the Claimant may have been under was unjustified and therefore unreasonable. Looking at those paragraphs, however, it is clear that they are analysing matters from the Respondent's point of view and do not address matters from the Claimant's point of view. We accept that, on a proper analysis of the Claimant's state of mind, there was material, not least the letter of 22 October 2009 which we have quoted at length itself, from which the Employment Tribunal could have come to the view that she did indeed reasonably perceive that she was being demoted and we further consider that the Employment Tribunal has erred in failing to address that issue.

16. The Tribunal's decision is therefore deficient in relation to the question of whether a detriment was suffered. They do not address at all the issue of whether that detriment involved discrimination and, although it is not entirely clear how the Claimant puts the discrimination part of this claim, it seems to us that, subject to the limitation question, which we now need to consider, claim no 1 should be remitted for consideration of both detriment and discrimination.

17. The Tribunal's approach to the question of limitation started at pages 4 and 5 of their judgment with a recital of various cases. At paragraph 19 they refer to **Robertson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434 CA and they state that in that case:

> **"It was noted that, while Tribunals have a wide discretion to extend time in discrimination cases, it should only be exercised in exceptional circumstances."**

We are satisfied that that is not an accurate statement of the law. It does not require exceptional circumstances: what is required is that an extension of time should be just and equitable. The Tribunal at paragraph 51.3 then address the question of extending time in this way:

> **"It is for the Claimant to give reasons and show why the Tribunal should exercise its discretion to extend time. An extension of time on that ground that it just and equitable is the exception and not the norm. The case law cited above clearly states that time limits in employment matter should be strictly enforced."**

The Employment Tribunal then go on to find that the Claimant had no good reason for leaving it until 25 June 2010 to start her proceedings, that she was an intelligent woman and had taken advice and ought to have known about the time limit. However, the Employment Tribunal did not consider the relative prejudice which would have been caused by extending time. That is undoubtedly an important factor in the question whether it is just and equitable to extend time beyond three months and should, in the normal course, by considered by an Employment Tribunal. The Claimant says that if the relative prejudice had been considered the result may well have been different and a number of points are made at paragraph 11 of her skeleton argument in this connection.

18. We accept that, on a proper consideration of the limitation issue, the result may have been different and we cannot accept that the Tribunal have approached the limitation question in the right way. In those circumstances, we allow the appeal in relation to claim no 1. That claim will therefore need to be remitted to an Employment Tribunal.

Claims 3 and 4

19. That brings us to claims 3 and 4. The Employment Tribunal found that claim 3 was out of time, but Mr Stephenson sensibly conceded that the appeal on that point is bound to succeed and we say no more about it.

20. That brings us to the merits of claims 3 and 4. It is common ground that the issue was whether the fact that the Claimant had brought claim no.1 was a "significant factor" in the

decision to suspend her on 16 September 2010 and to continue with the suspension thereafter. The Tribunal's findings about the cause of the suspension are at paragraphs 53.8. 53.9 and 54.4. At 53.8 they say this:

> **"Whilst the letter suspending the Claimant is perhaps not expressed in the clearest terms, the Tribunal find some balance** [that is presumably meant to say 'on balance'] **that the main motivation for suspending the Claimant was the lack of a CRB certificate which meant she was not able to teach unsupervised."**

At paragraph 53.9 they say:

> **"The Tribunal does not find that the Respondent suspended the Claimant because she had made a protected act. The Tribunal is satisfied that the suspension was primarily because she was unable to undertook her duties without a valid CRB certificate."**

Then at 54.4 the Tribunal said this:

> **"...the reason for her suspension and her continued suspension was because...the Respondent believed that the Claimant was unable to teach because she did not have a CRB certificate. That is not to do with her gender. The Tribunal finds that any male teacher in a similar situation would have been similarly treated."**

21. It will be apparent that the findings that the "main motivation" for the suspension was the lack of the CRB certificate and that it was primarily because she was unable to undertake her duties without a CRB certificate did not reflect the proper legal test as we have already described it. A question was therefore sent to the Tribunal by the President following the preliminary hearing and it was asked, by reference to paragraphs 53.8 and 53.9 what other factors may have caused the suspension. The Tribunal Judge replied as follows:

> **"I have reviewed paragraphs 53.8 and 53.9. The Tribunal considered whether the Claimant was able to work as a teacher without a valid CRB certificate and whether this led to her suspension. It decided that it did. On reflection the language used in the paragraph is misleading in that it infers that there were other considerations. There were not. I believe that when drafting the Judgment I erroneously imported the language of s103A, which refers to 'the reason (or if more than one the principal reason)". The Tribunal's finding was that the reason for the Claimant being suspended was because she did not have a valid CRB certificate."**

We are bound to say we do not find that a very satisfactory answer. The Tribunal clearly said on two occasions that the CRB matter was the primary or main motivation. The letter of suspension itself refers to other matters. And we are not clear that the Tribunal members were consulted before the answer was given. We think it may amount really to a rewriting of the decision.

22. In any event, the thrust of the appeal, as presented today, is that the Employment Tribunal have just failed to mention at all the note of the meeting of 25 June 2010, which was relied on heavily by the Claimant and which, on its face, gave rise to an inference that the suspension was caused by a protected act. In our view, that was a glaring omission in the judgment.

23. Mr Stephenson says that it is an omission that does not matter and that the Employment Tribunal's decision is one of fact, which is perfectly supportable. He points out (1) the delay before any suspension was put into effect; (2) the fact that Miss Bham was reinstated once her CRB certificate turned up whereas the Claimant never even contacted the Respondent when hers did; and (3) the fact that the Claimant was not dismissed until August 2011 and then she was dismissed for other, extraneous reasons (accepting, apparently, in the course of her cross-examination, that she would have been reinstated at an earlier stage if she had returned the documents containing the confidential information which she had taken from the Respondents).

24. We do not think that any of those points deal with the glaring omission we have mentioned: (1) given the summer holidays, the delay between the meeting in June and the decision to suspend in September is perhaps not very significant; (2) so far as Miss Bham's suspension is concerned, we in this Tribunal really know very little about the circumstances of this or the terms of any letter of suspension sent to Miss Bham; (3) suspension and dismissal are of course quite different things; there is no dispute that the suspension in itself amounted to a

detriment; the issue was whether the protected act was a material factor in the suspension in September. We consider, as we have already said, that the Employment Tribunal's Reasons are deficient in not dealing with the meeting in June 2010 and that that deficiency is such that it amounts to an error of law. We therefore allow the appeal in relation to claims 3 and 4, which will also have to be remitted.

Disposal

25. We were addressed on whether the matter should be remitted to the same or a differently constituted Employment Tribunal. In view of the three errors of law that we have identified, the somewhat unsatisfactory response to the "**Burns/Barke**" request and the Employment Tribunal's comments relating to the Claimant's credibility, which are rather tacked on to the end of the decision, we are all three firmly of the view that it would not be right to remit this case to the same Employment Tribunal and that the Claimant may have a sense of injustice if we were to take that course. We recognise, of course, that this is unfortunate given the amount of evidence that has already been given, but we would hope that matters will be considerably narrowed.

26. The appeals are therefore allowed in relation to claims 1, 3, and 4 with a direction that they be remitted to a newly constituted Tribunal.