

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

At the Tribunal
On 12 November 2013

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

MS K BILGAN

MR S YEBOAH

MS J C LANGFORD

APPELLANT

EAST SUSSEX COUNTY COUNCIL

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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(One of Her Majesty's Counsel)
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For the Respondent

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SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

MATERNITY RIGHTS AND PARENTAL LEAVE

The decision of the Employment Tribunal that the dismissal of the Claimant for redundancy was fair was based on an erroneous view of the content of jobs that may have been available to be offered to her. Further, in assessing the fairness of her dismissal, the ET failed to consider whether or reached a perverse conclusion that there had been adequate consultation with the Claimant. The dismissal by the majority of the claim under Regulation 10 of the **Maternity and Parental Leave Regulations etc 1999** was undermined by the misapprehension of the content and availability of alternative posts.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Ms Langford appeals from the dismissal by a Judgment sent to the parties on 18 March 2013 ('the Judgment') of her claims of unfair dismissal, breach of Regulation 10 of the **Maternity and Parental Leave, etc Regulations 1999 (MAPLE)** and unlawful discrimination under s.18 of the **Equality Act 2010**. The parties will be referred to by their titles before the Employment Tribunal as Claimant and Respondent.

Outline facts

2. The Claimant, who is a qualified teacher, commenced employment with the Respondent Education Authority on 1 September 1999 as a primary school teacher. In September 2004 she started work as a PE consultant. In January 2006 she assumed duties as a PE and Sports Leadership and Learning consultant in the Respondent's school Standards and Learning Effectiveness Service (SLES).

3. The Employment Tribunal found that:

"This role involved promoting sports within schools and community colleges, ensuring statutory guidelines were followed, particularly in relation to Health and Safety, providing training in relation to PE education, implementing the Respondent's priorities in relation to sport, supporting failing schools, and working to ensure a high standard for PE and sport provision across the country."

4. On 9 January 2011 the Claimant gave formal notice of pregnancy and her intention to take 12 months maternity leave. On 10 January 2011 staff were notified that SLES was to be restructured and on 22 January 2011 the Claimant was advised that her post was likely to be deleted. On 27 January 2011 a 90-day consultation period commenced. All posts in the department were to be deleted and staff were to apply for vacancies. On 28 January 2011 a redeployment form was circulated to all affected staff.

UKEAT/0275/13/DM

5. The Claimant attended with her union representative a meeting with Ms Siddall and Mr Mottershead of HR. At the meeting the Claimant asked whether her redeployment application could be deferred until she returned from 12 months maternity leave. She considered that she would be at a disadvantage in being considered for a post when she was about to go off on 12 months maternity leave. The Claimant maintained that she was told by Ms Siddall not to put in her redeployment form. This was denied and on this issue the Employment Tribunal found, in one part of their Judgment, that the Claimant misunderstood what she had been told by Ms Siddall, although later on in their Judgment the indication was that the Employment Tribunal did not accept that the Claimant had been told not to put her application in at that time.

6. However, the Employment Tribunal in their Judgment recognised that a main question which the Claimant raised at the meeting of 1 February was whether her redeployment could be deferred until the end of her maternity leave. The answer to that question was not given until 6 April 2011, some two months after it was posed. The Respondent did not agree to deferring her redeployment. Two days after being so notified, the Claimant submitted her redeployment form on 8 April. However, this was not processed until 27 April.

7. Interviews for all vacant posts were held during April and the application process had been in train for some time before that. As for the progress of identifying vacancies and the filling of posts is concerned, on 23 March a list of vacancies was published by the Respondent, which included Consultant Key Stage 1 and Key Stage 2 Maths posts. There were also two part-time PE Consultant roles, which at a later stage, were merged into a fulltime role. There were also 155 teaching posts. The Claimant commenced her maternity leave on 26 April 2011.

On 27 April 2011 she was sent a letter of dismissal with an effective date of termination of 31 August 2011.

8. The Claimant was not offered the Consultant Key Stage 1 and Key Stage 2 posts. She considered that the part-time PE Consultant post, which was for 11 hours a week, was not suitable for that reason. After the termination of her employment she was approached by the Respondent with the possibility of applying for the merged two part-time PE posts, but that was after her employment had terminated. There is no finding of fact as to when the Respondent considered that the two part-time PE Consultant posts could be or were to be merged into a full-time post. Accordingly the Judgment does not show whether that decision was taken before or after the termination of the Claimant's employment.

9. When she was on maternity leave and shortly after the birth of her child on 16 May 2011, the Claimant was included on a circulation list for applications for various posts. Those invitations gave a very short deadline of a few days for responses. The Tribunal observed that the response required was expressions of interest rather than a formal application.

The decision of the Employment Tribunal

10. The Employment Tribunal held that the Respondent had a policy that a salary differential of 10% or more than that of a redundant post rendered a vacancy unsuitable. They held that the PE Consultant post was not suitable for the Claimant as the pay differential would be in the region of 13.5% less than the post from which the Claimant was being made redundant.

11. The Employment Tribunal held at paragraph 56:

“The Tribunal accepts the Respondent's policy is a reasonable method by which to objectively identify suitable vacancies or to disregard them. The policy was qualified by referring to

exceptional circumstances and therefore, potentially, if an employee wanted to make a case that a vacancy was suitable she could do so. The Tribunal therefore found that the merged PE role cannot have amounted to a suitable available vacancy for this Claimant, based upon the differential in salary.”

12. The Employment Tribunal then considered both Maths KS1 and KS2 roles. The Employment Tribunal was not unanimous in regard to those roles. The majority found that both Maths roles were not suitable vacancies for the Claimant for reasons that they thereafter set out. The terminology of “suitable vacancies” is, in our view, likely to be more directed to the claim based on Regulation 10 of MAPLE than on the other claims made in the ET1.

13. The Employment Tribunal set out the Respondent’s reason for holding that the KS1 and KS2 Maths roles, as they described them, were not suitable for the Claimant. These included in paragraph 58:

“[...] the Respondent was not convinced that either of the Maths vacancies were suitable for the Claimant and it did not take the step, which the policy said it would do, which was to make a recommendation to the appropriate Head Teacher and to facilitate the employee to filling the vacancy.”

14. The majority of the Employment Tribunal reached the same conclusion by “alternative reasoning”. That reasoning went as follows: the Claimant had not been in a classroom environment for six years and the Claimant’s current role focused on PE and not on Maths.

They held:

“60. Whilst it is accepted that the Claimant had previously been employed as a teacher and had taught both primary key stages over a five-year period, that experience was six years earlier. [...] This lead to a finding that the Claimant was not in a position to simply slot back into a teaching role and therefore, these vacancies were not suitable for her.”

15. The Employment Tribunal then went on to consider whether any of the teaching vacancies were “available”. This terminology is taken from Regulation 10 of MAPLE. The Employment Tribunal accepted that the vacancies were not “available” to the Respondent. All

the Respondent could do was to facilitate drawing the vacancy to the Claimant's attention and then contact governing bodies of the school to introduce the redeployed employee. At paragraph 71 the Employment Tribunal held:

"Based upon the reasoning above, the Employment Tribunal finds that none of the 155 teaching vacancies were available for the Respondent to offer to the Claimant. Furthermore [...] were not suitable for the reasons set out above."

16. While it is not absolutely clear from the structure of this Employment Tribunal Judgment which posts are being spoken about at which stages, it appears that the Employment Tribunal held that the Consultant Key Stage 1 and Key Stage 2 Maths posts were not suitable for the Claimant and that the teaching posts were not "available" to be offered by the Respondent. It appears that the Tribunal not only concluded that the teaching posts were not available to the Respondent to offer but also that they were not suitable for the Claimant.

17. The Employment Tribunal found in paragraph 74 that the reason for the Claimant's dismissal was:

"[...] the service-wide restructure as a result of funding issues. The Tribunal found that many employees were affected by the restructure and as a result some of them, including the Claimant, were dismissed by reason of redundancy."

18. As for the claim under the **Equality Act** is concerned, the Employment Tribunal found at paragraph 75 that the Claimant was not excluded from consideration for alternative roles between 1 February 2011 and 27 April 2012. The Tribunal held:

"77. ... the Respondent did not exclude the Claimant from consideration of any roles either during the period from the 1-2-1 meeting to when the Claimant completed the redeployment form or thereafter."

19. Reference to the claim of unfair dismissal is to be found in paragraph 84 in which the Tribunal held:

“The Tribunal found that the Claimant was fairly dismissed by the Respondent. The reason for her dismissal was the deletion of her role as a result of the restructure. The Claimant was not dismissed as she intended to take maternity leave, went on maternity leave, her pregnancy or because of the fact that she had given birth.”

The grounds of appeal

20. The Notice of Appeal contains 13 grounds. However, it appeared to us on considering the papers that two fundamental issues were raised by the appeal. The first was that the Employment Tribunal failed to adjudicate on the claim of unfair dismissal (Ground 12) and second that the Employment Tribunal came to a perverse conclusion in dealing with the Key Stage Maths consultancy posts in that they erroneously proceeded on the basis that these were teaching posts rather than central consultancy posts in the County Council (Ground 5).

21. Mr Hogarth QC outlined these grounds of appeal and was to develop other grounds. However, it appeared to us that if these grounds were well founded, as they appeared to be from the Judgment, the decision of the Employment Tribunal could not stand. Accordingly, we invited Ms Davidson, for the Respondent, to make her submissions on these two grounds of appeal. Those submissions were as follows.

22. Unfair dismissal; Ms Davidson submitted that whilst the Employment Tribunal did not expressly set out the reasons for finding in paragraph 84 that the Claimant was fairly dismissed, those reasons are apparent on reading the Judgment as a whole. The reason for dismissal was redundancy. As for the fairness of dismissal, Ms Davidson contended that the findings of the Employment Tribunal were to the effect that there had been reasonable consultation with the Claimant, there was a one-to-one meeting with her on 1 February 2011, and there were group

consultation meetings. Whilst the Employment Tribunal criticised the Respondent for unaccounted and for unacceptable delay in responding fully to the Claimant's questions raised at the meeting of 1 February, in particular a prime concern whether she could defer redeployment, nonetheless, they found that the Respondent did not exclude the Claimant from consideration for any roles during the period from the date of the meeting to the date of completion of a redeployment form.

23. Further, Ms Davidson relied upon paragraphs 79 to 83 of the Judgment to contend that the Employment Tribunal considered whether the Respondent gave the Claimant a reasonable opportunity to apply for vacancies. In all those circumstances, Ms Davidson contended that the Judgment contained all the elements which the Employment Tribunal considered in concluding that the Claimant had been fairly dismissed.

24. As for the claim under Regulation 10 of MAPLE, Ms Davidson acknowledged that the Employment Tribunal misunderstood the nature of the two consultancy Key Stage 1 and Key Stage 2 Maths posts. The Judgment indicates that the Employment Tribunal regarded them as teaching posts. However, Ms Davidson contended that teaching content was relevant to those posts. In this regard Ms Davidson referred to paragraph 6 of the Judgment in which the Tribunal set out the content of the tasks to be performed by the Claimant in the post from which she was made redundant. Ms Davidson relied on that to show that teaching experience was relevant to the consultancy post. So, notwithstanding the fact that the Employment Tribunal appeared to have misunderstood the Key Stage 1 Consultancy post and the Key Stage 2 Consultancy post as teaching posts, nonetheless, teaching was relevant to those two posts as indicated by the content of the job which the Claimant had been performing.

25. Accordingly, Ms Davidson contended that teaching experience in mathematics was a relevant consideration for selection for the new posts. In this regard, the Employment Tribunal were not in error in considering that the Respondent was entitled to regard the Key Stage 1 Key Stage 2 Consultancy Maths posts as not suitable within the meaning of Regulation 10 of MAPLE. Ms Davidson accepts that the Employment Tribunal made mistakes but contended that reading the Judgment as a whole their conclusions should stand.

Discussion and conclusion

Unfair Dismissal

26. The only passage in this Judgment which refers expressly to the claim for unfair dismissal is that in paragraph 84 in which there is a finding that the Claimant was fairly dismissed by the Respondent. The Tribunal had found that the reason for the Claimant's dismissal was redundancy. In considering the fairness of a dismissal for redundancy, matters in addition to those which are relevant to MAPLE Regulation 10 and to those relevant to a claim under the **Equality Act**, come into play.

27. As for the elements upon which Ms Davidson relies to make good her argument that the Employment Tribunal did in fact consider all the necessary elements in dealing with the unfair dismissal claim, so far as consultation is concerned, in our judgment, it cannot be said that a consultation which took place on 1 February 2011 at which the key question, which the Tribunal recognised to be such, of whether an application for redeployment could be deferred until the end of the 12-month maternity leave was left unanswered for two months represents reasonable consultation for the purposes of an unfair dismissal claim.

28. The advertisement or circulation of posts was proceeding during the period after 1 February 2011. A major question raised by the Claimant on 1 February 2011 remained

unanswered for two months. Accordingly the Claimant was disadvantaged during that period as she had not been told whether she had to submit an application. The contention of Ms Davidson that adequate reasonable attempts were made to find suitable vacancy for the Claimant, comes against the undoubted misapprehension of the Tribunal as to the nature of the two Consultant Key Stage 1 and Key Stage 2 Maths posts. These may have been available to be offered to the Claimant but which the Tribunal, acting under a misapprehension, held that the Respondent reasonably viewed as unsuitable for her.

29. A very important part of the assessment of the reasonableness of a redundancy dismissal is a correct judgment of the reasonableness of the attempts of the employer to find alternative employment. In our judgment there has been a fundamental error by the Tribunal in assessing the nature of two posts, which were available for the Claimant and mistakenly accepting the Respondent's view that they were unsuitable. This undermines the decision of the Employment Tribunal that this dismissal for redundancy was a fair dismissal. In our view, the Employment Tribunal did not adequately or at all consider the fairness of this dismissal for redundancy and, accordingly, its conclusion in this regard must be set aside.

30. As for the claim under Regulation 10 of the **Maternity and Parental Leave Regulations 1999**, Regulation 10 provides as follows:

“10(1) This regulation applies where, during an employee's ordinary or additional maternity period it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment.

(2) Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer or his successor, or an associated employer, under a new contract of employment which complies with paragraph (3) (and takes effect immediately on the ending of her employment under the previous contract).”

31. The majority of the Employment Tribunal held that the Consultant Key Stage 1 and Key Stage 2 Maths posts were unsuitable. In our judgment they held those posts to be unsuitable on a wholly mistaken view of the facts. These were not teaching posts; they were central function consultant posts. That fundamental error undermines the conclusion of the majority as to the suitability of those posts within the meaning of Regulation 10.

32. The Employment Tribunal went on to consider the 155 teaching posts and came to conclusions on availability, which is also a necessary criterion for falling within Regulation 10. However, because of our conclusion on the principal basis of this Employment Tribunal's assessment of the claim under Regulation 10, we conclude that the dismissal of that claim must be set aside.

33. As for the claim under the **Equality Act 2010**, the Employment Tribunal concluded that the Claimant was not excluded from consideration for alternative roles between 1 February 2011 and 27 April 2012. However, in reaching that conclusion the Employment Tribunal, again, had in mind their erroneous view of the Consultant Key Stage 1 and Key Stage 2 roles. Their decision under the **Equality Act** is tainted by the same error as that which affects the other conclusions of the Tribunal in this case. Accordingly, in our judgment, the decision of the Tribunal under the **Equality Act** as its other conclusions cannot stand and is set aside.

34. Accordingly, the appeal is allowed and the Judgment of the Employment Tribunal in dismissing all three claims is set aside. The matter is remitted to another Employment Tribunal for hearing.