Appeal No. UKEAT/0248/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 November 2013

Before

THE HONOURABLE MR JUSTICE MITTING

(SITTING ALONE)

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(1) BIRMINGHAM CITY COUNCIL
(2) GOVERNING BODY OF BENSON COMMUNITY SCHOOL APPELLANTS

MS C L EMERY RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR J MEICHEN (of Counsel) Instructed by: Birmingham City Council P O Box 15992 Birmingham B2 2UQ
For the Respondent	MS H WILLIAMS (of Counsel) Instructed by: Thompsons LLP The McLaren Building 46 Priory Queensway Birmingham B4 7LF

SUMMARY

CONTRACT OF EMPLOYMENT

Whether decision by governors of a community school to dismiss a teacher had the effect of giving her notice to terminate her contract of employment. No.

THE HONOURABLE MR JUSTICE MITTING

1. Benson Community School is, as its name implies, a community school. Community schools are creatures of statute. They were established by Part 3 of the **Education Act 2002**. It is maintained by funds provided by Birmingham City Council but it has a delegated budget, administered by its governing body, its board of governors. Special provision is made by the **School Staffing (England) Regulations 2009** for the employment and dismissal of teaching staff at such a school. The Regulations are made under section 35(4) of the **Education Act 2002**, but those Regulations are subject to section 35(2), which provides that:

> **"Any teacher... who is appointed to work under a contract of employment at a school to which this section applies is to be employed by the local authority."**

2. Under Regulation 12(1) of the 2009 Regulations,

> **"12.—(1) Where a governing body approves, identifies, selects or recommends a person for appointment under regulation…16(3)…, it must determine whether that person is to be appointed—**
>
> **(a) under a contract of employment with the authority;**
>
> **(b) by the authority otherwise than under a contract of employment; or**
>
> **(c) by the governing body otherwise than under a contract of employment."**

By Regulation 16(1), Regulation 16(3) applies to any post of teacher other than the head or deputy head. Regulation 16(3) provides:

> **"... where a person is selected by the governing body for appointment, the authority must appoint that person, unless the governing body has determined that the person is to be appointed by the governing body otherwise than under a contract of employment pursuant to regulation 12(1)(c)."**

Thus, where a teacher at a community school is to be employed under a contract of employment, he or she must be appointed and employed by the local authority.

3. Dismissal is dealt with by Regulation 20:

> **"Dismissal of staff:**
>
> **(1) Subject to regulation 21, where the governing body determines that any person employed or engaged by the authority to work at the school should cease to work there, it must notify the authority in writing of its determination and the reasons for it.**
>
> **(2) If the person concerned is employed or engaged to work solely at the school (and does not resign), the authority must, before the end of the period of fourteen days beginning with the date of the notification under paragraph (1), either—**
>
> > **(a) terminate the person's contract with the authority, giving such notice as is required under that contract; or**
> >
> > **(b) terminate such contract without notice if the circumstances are such that it is entitled to do so by reason of the person's conduct.**
>
> **(3) If the person concerned is not employed or engaged by the authority to work solely at the school, the authority must require the person to cease to work at the school."**

4. Thus it is the governing body which determines if a teacher employed by the local authority should cease to work at the school, and if he is employed to work solely at the school and does not resign the local authority must, within 14 days of receipt of written notice from the governing body, either terminate the teacher's contract of employment on due notice or dismiss summarily if entitled to do so. This is a simple scheme. The governing body decides whom to appoint and dismiss. The local authority must give effect to the governing body's decision in both respects, but it is the local authority which is throughout the employer.

5. Into this simple scheme an exception has been introduced, with the approval of Parliament, by the **Education (Modification of Enactments Relating to Employment) (England) Order 2003**. Regulation 2(2) contains the basic definition of "employment powers" of the governing body.

> **"In this Order references to employments powers are references to the powers of appointment, suspension, conduct and discipline, capability and dismissal of staff conferred by the 2003 Regulations."**

This definition was clarified and expanded by Regulations 3 and 4:

"General modifications of employment enactments

3.(1) In their application to a governing body having a right to a delegated budget, the enactments set out in the Schedule 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;

(b) in relation to the exercise of the governing body's employment powers, employment by the authority at a school were employment by the governing body of the school;

(c) reference to employees were reference to employees at the school in question;

(d) references to dismissal by an employer included reference to dismissal by the authority following notification of a determination by a governing body under regulation 18(1) of the 2003 Regulations;

(e) references to trade unions recognized by an employer were references to trade unions recognized by the authority or the governing body.

4. 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 determination as is mentioned in article 3(1)(d) --

(a) section 92 of the 1996 Act has effect as if the governing body had dismissed him and as if references to the employer's reasons for dismissing the employee were references to the reasons for which the governing body made its determination; and

(b) Part X of the 1996 Act has effect in relation to the dismissal as if the governing body had dismissed it 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."

There is a mistake in Regulation 3(1)(d). The reference to Regulation 18(1) is erroneous. That deals with the prohibition of employment of supply teachers unless appropriate criminal records checks have been carried out. The reference is clearly intended to be a reference to Regulation 20(1) and should be so construed.

6. The enactments set out in the Schedule to which the opening words of Regulation 3(1) refer include section 66-68, 70, 71, 92, 93 and Part X of the **Employment Rights Act 1996**. Those deal with paid and ordinary maternity leave (section 66-68, 70 and 71), the right to a written statement of the reasons for dismissal (sections 92-93) and the right not to be unfairly dismissed (Part X) The governing body is not deemed to be the employer for other purposes dealt with in the 1996 Act, for example the right to statements of employment particulars, and to an itemised pay statement (Part I), not to suffer unauthorised deductions (section 13), the

rights to adoption, parental and paternity leave (Part VIII, chapters 1A, 2 and 3) or the right to a redundancy payment (Part XI). Nor do Regulations 3 and 4 purport to affect common law rights. It is the Claimant's right at common law to a minimum period of notice to terminate her employment, save in the case of gross misconduct, which is at the heart of this claim.

7. The Claimant started work as a teacher at Benson Community School on 13 October 2003. She was appointed under a contract of employment and therefore, by Regulation 12(1)(a) of the 2009 Regulations, she was the employee of the local authority. She had numerous lengthy periods of absence due to illness. The governing body contemplated her dismissal. At a meeting with a panel of governors chaired by the chairman of governors, Sue Beardsmore, attended by Nicola Taman, an officer of Birmingham City Council employed in their human resources department, it was decided that she should be dismissed. In her findings of fact, in her first judgment and reasons of 11 October 2012, Judge Findlay found that at the conclusion of the hearing Miss Beardsmore stated:

> **"We have considered the paperwork and all of the evidence given today, and I am afraid we have come to the decision to dismiss for some other substantial reason. Contractual notice will be given and full reasons will be given in writing."**

8. Judge Findlay found that Nicola Taman said that the date of dismissal was the date of the hearing and that the Claimant's notice period would end on 30 April 2012. I have now been shown Miss Taman's witness statement on which that finding was made and I propose to set it out a little more fully than did Judge Findlay in her summary. Miss Taman said as follows:

> **"I attended a hearing as the Technical Advisor to the Committee on 28 February at Benson School. At the end of the Hearing the Chair of the panel announced that the Claimant was dismissed from her teaching post. I confirmed that the date of dismissal was the date of hearing itself (28 February) and the Claimant was entitled to her contractual notice pay.**
>
> **The Claimant's father then asked me when her notice pay would end and I confirmed it would be 30th April. He then told me that the decision was 'harsh'. I then confirmed that the letter would be completed as soon as possible but the date of dismissal was 28 February. The letter confirming the outcome of dismissal was sent out dated 29 February 2012."**

9. On 28 February the governing body sent the Claimant a letter which reached her on 29 February. It was in standard form and stated:

> **"The Local Authority will now be informed of this determination and within 14 days, as required by the Regulation, will terminate your contract with due contractual notice ending on 30 April 2012."**

10. On 29 February the local authority sent a letter to the Claimant, which reached her on 1 March. According to Judge Findlay's findings, which were clearly based on the terms of the letter, it confirmed that the governing body had concluded that the Claimant "should cease to work" at the school. The letter concluded:

> **"I am required by paragraph 20 of the School Staffing (England) Regulations 2009 to formally terminate your contract of employment. In accordance with your contract of employment your employment will terminate on 30 April 2012."**

11. Unfortunately, from the point of the employer, whoever that was, the notice given was one day short. The Claimant's contract of employment entitled her to two months' notice, expiring on 30 April 2012, or three months' notice, expiring on 31 August 2012, but not on any date in between. If the local authority letter of 29 February was the letter which gave notice of dismissal and so brought her contract to an end, it was one day too late because it was not received until 1 March. Judge Findlay concluded that it was too late and so made an award to the Claimant of the pay to which she should have been entitled in the four months from 1 May to 31 August, £8,104.

12. The question raised by this appeal is fundamentally whether Judge Findlay was right in reaching that conclusion. Mr Meichen, who appeared at one of two hearings before Judge Findlay (there was a review hearing convened at the request of Birmingham City Council because they had not been formally represented at the earlier hearing), submitted that the

Claimant's employment was effectively brought to an end on 30 April 2012 by the events which occurred on 28 February 2012. He first of all submitted that the governing body had brought to an end to her contract of employment. To do that, the governing body would have had to have had delegated to it the power which vested in the local authority as employer to terminate the Claimant's employment. Section 101 of the **Local Government Act 1972** authorises the local authority to arrange for the discharge of any of their functions:

> **"(a) by a committee, a sub-committee or an officer of the authority; or**
>
> **(b) by any other local authority."**

It does not confer power on a local authority to delegate the exercise of any of their functions to third parties, and I have not been referred to any statutory authority for the delegation of the function of dismissing an employee of a local authority to a third-party body such as the governors of a community school. Accordingly, that argument, it seems to me, must fail. Mr Meichen's argument is not aided by the deeming provisions of the 2003 Regulations, which are in terms confined to certain statutory provisions. I will return to their effect later.

13. Mr Meichen's next argument is that it can safely be assumed that by its standing orders Birmingham City Council delegated to Miss Taman authority to discharge its function of terminating the Claimant's employment. The council did not put in before the Tribunal its standing orders to demonstrate that that function had been delegated to her. Her witness statement did not expressly assert that it had been so delegated. What she said was that she was at the meeting as technical advisor to the committee. She did not in terms state that she had the power to terminate the Claimant's employment. If the case turned upon the issue, it would be possible for me to remit it to the Employment Tribunal to make an appropriate finding of fact on the production by Birmingham City Council of its standing orders and of any necessary

evidence of delegation to Miss Taman. For present purposes I am content to assume that she had such a delegated power.

14. A question then arises as to whether or not she exercised it. According to her statement, what she did was to confirm, erroneously, that the date of dismissal was the date of the hearing, 28 February, and also, in contradiction to that, that she was entitled to contractual notice pay. I do not understand her to be saying that she summarily dismissed the Claimant from her employment and did so wrongfully. If she had said that, it would not avail Birmingham City Council because there is no finding, and no evidence, that the Claimant accepted the summary and wrongful determination of her contract. Accordingly, if that had been the case, and **Geys v Societe Generale, London Branch** [2012] UKSC 63 had been available to Judge Findlay (which it was not), then she would have been bound to hold that the Claimant did not accept the repudiatory breach of contract that would have represented. Accordingly, it would have been of no effect.

15. Mr Meichen accordingly submits that, despite the confusion in Miss Taman's mind, as demonstrated by the words of her statement, what she must have meant, and been understood to mean, was that she was giving notice to terminate the Claimant's contract of employment on 30 April 2012, in other words due notice under her contract. I accept that she could have done so. Judge Findlay went on to reason that, because Regulation 20 of the 2009 Regulations provided for a statutory procedure, the giving of written notice by the governors to Birmingham City Council, and then the giving of notice by Birmingham City Council to dismiss, those terms were incorporated into the Claimant's contract of employment, so that she was entitled as a matter of contract to have the statutory scheme put into effect.

16. I do not accept that submission. The statutory scheme seems to me to be established to govern the relations between the governors and the local authority and not to confer any benefit on the individual employee. However, it is apparent from the two letters which Judge Findlay cited, and which I have cited, that both the governors and the local authority were purporting to follow the statutory scheme. It is not clear from the material that I have seen, or from Judge Findlay's findings, whether the governors gave written notice to the local authority under Regulation 20, but it seems highly likely that they did. They certainly, in their letter of 28 February to the Claimant, stated their intention to carry out the statutory scheme, that is to say to inform the local authority of their determination and that that would have the consequence that within 14 days her contract would be terminated. It is what the local authority purported to do. Their letter of 29 February correctly recited that the governing body had decided that the Claimant "should cease to work" at the school and stated that the author was required by paragraph 20 of the 2009 Regulations "to formally terminate your contract of employment". In other words, from the correspondence which Judge Findlay cited, both the governors and the local authority were purporting to follow the statutory scheme. It therefore follows as a matter of fact that the governors made a decision that the Claimant's employment should be terminated, i.e. that she should cease to work at the school, which was then put into effect by them giving notice to the local authority and by the local authority in turn giving notice of termination of the Claimant's employment to her.

17. On that analysis, which is admittedly not precisely the analysis which Judge Findlay followed, but which seems to me to be an inevitable conclusion from the facts which she found, this contract was not terminated until the local authority gave notice to terminate it on 29 February, a notice which arrived one day too late to have effect. There was no suggestion that the Claimant waived the one day's short notice. She asserted her rights by bringing the claim before the Tribunal to a period of notice expiring on 31 August.

18. Mr Meichen points out, correctly, that that conclusion produces an anomalous outcome. For the purpose of an unfair dismissal claim it is the governing body which is deemed to be the employer and to have dismissed the Claimant. At common law, it is not the governing body which is the employer. I accept that there is an anomaly. It is an anomaly, however, which is created by express words of primary and secondary legislation. It does not produce an unworkable scheme, even though the scheme is anomalous. On the analysis which I have reached of the actions of the parties in this case, the Claimant's employment was terminated by the local authority by their letter of 29 February. That letter did not reach her until 1 March. Accordingly, it did not give her the contractual notice to which she was entitled. Following upon the authority of **Geys**, it may well be that the consequence is that the time limit applied by section 97 of the 1996 Act would not begin to run until the end of the contractual period of notice to which she was entitled, there being no suggestion that the employers, whoever they were, were entitled to terminate her employment summarily. In other cases, that might produce what would up to now have been regarded as an inconvenient extension of the time limit for bringing an unfair dismissal claim and an inconvenient obligation on Tribunals to enquire first of all whether employers were entitled to dismiss summarily. Those are issues which will have to be determined in cases as and when the issue arises. No such issue arises here. The issue here does not produce an anomalous outcome. All that has happened is that the Claimant's employment has not been terminated lawfully until 31 August. For the purposes of an unfair dismissal claim, there being none in fact, it is the decision of the governing body which would have to be scrutinised and not that of the local authority. To require the local authority's decision to be scrutinised would be futile because by statute the local authority had no choice but to dismiss.

19. I deal now with a case heavily relied upon by Birmingham at first instance in this case, **Hutchinson v Birmingham City Council**, case 1303038.11, in which Judge Monk determined that there could not be two different dates of dismissal for the purpose of the unfair dismissal issue and the wrongful dismissal issue. In that case, a teacher had been summarily dismissed, as she found, on one date and given notice of dismissal by the local authority six days later, expiring a further ten days later. She thought that there would be an unworkable anomaly if different dates applied, and accordingly held that the contract was effectively terminated by the first communicated decision to dismiss summarily and not by the subsequent letter. If she had had the benefit of **Geys**, then she would have had to have gone on to ask herself whether in that case the employers, be they the governing body or the local authority, were entitled to dismiss summarily, and if not whether the Claimant had accepted the wrongful termination of her contract. It is possible to envisage future circumstances in which the difficulty contemplated by Judge Monk might arise, but on the facts of the case as she determined it, her findings in the light of **Geys** did not adequately determine the issue.

20. Although I do not exclude the possibility that future facts will reveal an awkward anomaly there is none in this case. The anomaly, if it arises arises, from conflicting statutory schemes, which it is for Parliament to reconcile not this Tribunal. This Tribunal must attempt, and insofar as it can, succeed, in loyally applying Parliament's decisions. I believe that in the outcome of this case I have loyally applied Parliament's decision and arrived at a conclusion which fits as comfortably as can be within the difficult statutory schemes.

21. For those reasons this appeal is dismissed.