Appeal No. UKEAT/0214/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 November 2013

Before

HIS HONOUR JUDGE PETER CLARK

MR A HARRIS

MR T STANWORTH

MS L RUSTAMOVA — APPELLANT

THE GOVERNORS OF CALDER HIGH SCHOOL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MATTHEW PASCALL (of Counsel) Instructed by: Messrs Lester Morrill Solicitors 27 Park Square West Leeds LS1 2PL
For the Respondent	MR ANDREW McGRATH (of Counsel) Instructed by: Calderdale Metropolitan Borough Council Legal Services Westgate House Westgate Halifax HX1 1PS

SUMMARY

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

Case remitted to same Employment Tribunal for **Meek** compliant reasons, the original ET decision being that of the majority lay members, by first EAT.

Further reasons then produced, following a further ET hearing and signed by lay members but not the Employment Judge. No Judgment/reasons complying with requirement they should be signed by EJ (ET Rules 2004, rr29(1); 30(4)).

Case sent back under **Burns-Barke** procedure for further reasons to be drafted and signed by EJ, with approval of lay members.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the Leeds Employment Tribunal. The parties, as we shall describe them, are Ms Rustamova, Claimant, and the Governors of Calder High School, Respondent. The Claimant was employed at the school as an English teacher from 1 September 1998 until her summary dismissal on 31 May 2009. She then brought a claim of unfair dismissal before the Tribunal. The claim was resisted before an Employment Tribunal chaired by Employment Judge Burton, sitting with Mr R Stead and Mrs V G Hanlon in January 2011. By a reserved Judgment with Reasons promulgated on 17 March 2011 the Tribunal dismissed the complaint by a majority, the Employment Judge dissenting.

2. Against that Judgment the Claimant appealed to the EAT (EAT/284/11/ZT). On 2 November 2011 a full division of the EAT presided over by HHJ Birtles allowed the appeal on the basis that the majority's reasons, drafted by the Employment Judge, at paragraphs 53 to 54 were not "**Meek** compliant". A perversity challenge was rejected. In essence, the EAT appear to have concluded that the majority lay members of the Tribunal had failed to explain why dismissal fell within the range of reasonable responses. The appeal was allowed and the case was remitted back to the same Tribunal for a further hearing in the light of the EAT Judgment (see order seal-dated 4 November 2011). Paragraph 21 of the EAT Judgment reads as follows:

> **"Remedy**
>
> **21. Mr Pascall asks us to dispose of this case by remitting it to the same Employment Tribunal to give its Reasons in the light of our Judgment. Mr McGrath agrees, and so the order we are going to make is that the case be remitted for a further hearing before the same Employment Tribunal, to be read in the light of this Judgment. It does not mean that further evidence can be called, but we would expect the Employment Tribunal to receive submissions from both parties before it reaches its Judgment."**

3. In response, following a hearing on 2 May 2012, the Tribunal provided what are described as supplementary reasons running to some 17 pages under cover of a letter from the ET administration dated 28 June 2012. Those "reasons" are signed by the two lay members of the Tribunal but not the Employment Judge.

4. Against the further "decision" this second appeal (EAT/214/13/SM) is brought by the Claimant. The appeal was accepted by the Registrar and was originally rejected on the paper sift by Mr Recorder Luba QC under EAT rule 3(7). However, at a rule 3(10) oral hearing Singh J permitted the appeal to proceed to this full hearing, again before a full division.

5. The background to the case is that in the academic year 2007/08 the Claimant embarked on a project with a group of troubled pupils known as the Commie Boys. The upshot was a book called "Stop. Don't Read This". It contained bad language, sexual fantasies and identified the school, certain pupils and teachers.

6. A copy of the first four chapters of the book was shown to the Head Teacher, Mr Ball, together with a covering letter from the Claimant dated 9 September 2008. He was then supportive of the project. Copies of the book were printed and provided to the Commie Boys and members of staff. Without authority, a copy was also placed on the internet for some five months.

7. Thereafter the Claimant was subject to disciplinary proceedings. She faced six charges listed at paragraph 25 of the Reasons. A panel of governors upheld those charges and imposed the sanction of summary dismissal. An appeal to a different panel of governors failed and was dismissed. I have referred earlier to paragraphs 53 and 54 of the Tribunal's Reasons which set out the majority's reasoning for their conclusion that the dismissal was fair.

8. That reasoning was criticised by HHJ Birtles' division in two respects (see his Judgment, paragraphs 16 to 19); first that there was no analysis of each of the six charges upheld by the governors; secondly, the Tribunal majority did not appear to have considered the Respondent's reasons for concluding that summary dismissal was the correct sanction.

9. Following remission the Tribunal lay members produced a lengthy document, analysing each of the charges and the evidence heard and expressing their opinion that, taken overall, dismissal fell within the range. That has prompted a further detailed challenge on both **Meek** and perversity grounds by the Claimant in amended grounds of appeal settled by Mr Pascall following the hearing before Singh J, to which Mr McGrath has responded.

10. During the course of argument this morning, it occurred to me that, technically, there is no Judgment following the remitted ET hearing held on 2 May 2012, nor any written Reasons, signed by the Employment Judge contrary to the then mandatory requirements contained in, respectively, rules 29(1) and 30(4) of the ET Rules 2004 (now rules 61(3) and 62(2) of the 2013 Rules).

11. Following a short break Mr Pascall submitted that this shortcoming could be dealt with by the Employment Judge under the slip rule, then rule 37(1), whereafter we could give our decision on the merits of the appeal having heard full argument today. Mr McGrath boldly submitted that we had no jurisdiction to consider the appeal since no valid Judgment or Reasons had been lodged with the appeal in accordance with rule 3(1)(c) of the **EAT Rules 1993** as amended. In these circumstances, he submitted, we should dismiss the appeal.

12. Following further discussion we rejected both submissions.

13. Dealing first with the jurisdiction point raised by Mr McGrath, we return to the primary legislation, **Employment Tribunals Act 1996**. Section 21 provides that:

> **"An appeal lies to the Appeal Tribunal on any question of law arising from any decision of, or, arising in any proceedings before an Employment Tribunal […]"**

14. Plainly the issue as to whether a Tribunal has properly discharged its duty to provide a Judgment and, where requested, written Reasons following a hearing, raises a question of law arising in those proceedings.

15. As to Mr Pascall's solution, it appears to us that the point about the Employment Judge signing the Tribunal's Judgment and Reasons is, in the present case, one of substance as well as form.

16. In the original reasons for Judgment at paragraph 52, the Employment Judge properly refers to the guidance of Mummery LJ in **Anglian Home Improvements Ltd v Kelly** [2004] IRLR 793; where the lay members of a Tribunal are in the majority the minority Employment Judge should, preferably, write the majority reasons with the approval of his members. That is plainly what happened first time around in this case.

17. Those reasons were not considered **Meek** compliant by the Birtles division. Rather than refer the matter back under the **Burns-Barke** procedure, the appeal was allowed and the case remitted to the same Tribunal for further hearing on submissions only.

18. It is not clear to us what the Tribunal saw as the purpose of that hearing. Was it simply for additional reasons for the majority opinion to be provided or was the whole Tribunal to reconsider the complaint afresh? We are not told.

19. What does seem clear is that following that hearing the Judge appears to have taken no further part in the process. The reasons now supplied were drafted by Mrs Hanlon on three separate occasions and signed by her and by Mr Stead. We are sure that Mrs Hanlon did her best to articulate their reasons but, on the face of it, without assistance from the Employment Judge.

20. What ought to have happened and will now happen is that the Employment Judge will produce and sign a Judgment following the hearing on 2 May 2012 together with the Reasons drafted by him with the approval of his lay colleagues and duly signed by him. We shall adjourn this appeal until those steps have been taken, if practicable, within 28 days of this order. Copies of the Judgment and Reasons will then be sent to the parties. The appeal will be re-listed before this same division for further hearing unless both parties indicate within 14 days of the Tribunal Judgment and Reasons being sent to them that the matter may be dealt with on paper, in which case I shall then give further directions on paper for written representations.