



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT
MR SNYMAN

V RESPONDENT
(1) THE GOVERNING BODY OF
YSGOL FRIARS
(2) GWYNEDD COUNCIL

HELD AT: MOLD ON: 11, 12 AND 13 OCTOBER 2017

BEFORE: EMPLOYMENT JUDGE W BEARD
MEMBERS MR J D WILLIAMS
MS S D ATKINSON

REPRESENTATION:
FOR THE CLAIMANT:

MR C ADKINS (UNION
REPRESENTATIVE)

FOR THE RESPONDENT:

MR G BRYTHON-EDWARDS
(SOLICITOR)

JUDGMENT

The unanimous judgment of the Tribunal is:

- (1) The claimant's claims of sex discrimination and unfair dismissal are dismissed upon withdrawal.
- (2) That the claimant's claim of detriment on the grounds of trade union membership and activities pursuant to section 146 TULR(C)A is not well founded and is dismissed.

REASONS

Preliminaries

1. The claimant was represented by Mr Adkins a full time union officer; both the respondents by Mr Brython-Edwards a Solicitor.
2. The tribunal heard oral evidence from the claimant on his own behalf; the claimant also called Mr Adkins, the claimant's trade union representative, and Mr Lunn a teacher; neither of the latter was made subject to cross examination. The respondents called oral evidence from Mr Foden, the head teacher at the first respondent's school. The respondent also relied on a witness statement from Doctor Mair Edwards, a former chair of the first respondent.

3. We were provided with a bundle of documents running more than 350 pages, we were taken to only a small proportion of those documents.
4. The following issues were identified by the parties.
 - 4.1. The claim is based on the Mr Foden's conduct, which it is said was motivated by the claimant belonging to a different union than that to which Mr Foden belonged. The claimant contended that Mr Foden influenced the conduct and actions of others where he did not act himself. The following were detriments relied upon by the claimant:
 - 4.1.1. Intimidatory acts against members of the union to undermine industrial action short of strike action taken by the NASUWT;
 - 4.1.2. Hostile reception from the headteacher, Mr Foden, towards that industrial action;
 - 4.1.3. That the claimant was prevented from attending union courses.
 - 4.1.4. That capability proceedings were pursued against the claimant based only on numerical data, when no difficulties had been raised in his performance reviews or in lesson observations;
 - 4.1.5. That the claimant was suspended from work;
 - 4.1.6. That a grievance raised by the claimant was not dealt with by the first respondent;
 - 4.1.7. That an appeal against a disciplinary sanction was not heard by the respondent, despite this having been lodged in time and where more than a year has passed since the claimant asked for an appeal.
 - 4.1.8. That, after his employment had ended, the respondent deliberately gave a misleading reference to the claimant's current employer.

The Facts

5. The claimant was a teacher at Ysgol Friars, the first respondent's school (hereafter "the school"). The claimant commenced his employment on 1 September, 2000. His employment came to an end when he took voluntary redundancy in August 2016. The first respondent is the governing body of the school and was the claimant's deemed employer for employment matters under the provisions of the **Education (Modification of Enactments Relating to Employment) (Wales) Order 2006**. The second respondent, Gwynedd Council (hereafter "the LEA") was his actual employer.
6. The claimant was the NASUWT representative at the school, he had taken up this role in 2011. Mr Foden, headteacher at the school, was a member of the NUT and was on a national executive committee of that union. In early 2012 NASUWT began industrial action. Part of that industrial action involved limiting the number of lesson observations and limiting the circumstances under which such observations could take place.
7. Mr Foden, introduced additional lesson observations over and above the former limit and, the claimant believed, allowed them to take place outside the relevant limits placed on the circumstances of such observations.

- 7.1. Mr Foden's evidence before us was that he had introduced these additional observations because of shortcomings identified by the school inspection. There was an expectation that a further review of that inspection would take place, and these observations were to allow an organisation which assisted schools to improve, to gain the necessary information to provide that assistance.
 - 7.2. The claimant's impression was that Mr Foden had introduced these lesson observations in order to undermine the industrial action. Part of the reason for this impression was because Mr Foden had confronted a teacher, a member of NASUWT, about a refusal to take part in these observations.
 - 7.3. The claimant was only able to point to one occasion involving this one individual, where such confrontation took place. Mr Foden accepted that a discussion with the teacher had occurred, although he denied that his conduct amounted to intimidation. Mr Foden said that this occurred on one occasion only because this was the only teacher that had refused to take part in such observations.
 - 7.4. Mr Foden, in his oral evidence, indicated that he disapproved of the industrial action involving lesson observations. In our judgement, this disapproval related to the impact on the running of the school in the manner in which Mr Foden wished.
 - 7.5. The tribunal's impression of Mr Foden is that he was a powerful figure within the school who expected his decisions to be followed. In our judgement, his approach to this teacher was based on that expectation rather than membership of a particular trade union.
 - 7.6. Similarly, in our judgement the introduction of lesson observations was because Mr Foden wanted the forthcoming inspection review to show improvement in the school's status, rather than any specific animus towards a particular trade union.
8. There were documents in our bundle which demonstrated that the claimant had attended trade union courses with the consent of the school. In addition, records showed that he had engaged in other trade union activities also with permission; the claimant accepted that the records were accurate.
 - 8.1. The claimant complained about one occasion when he was refused permission to attend a union course. The claimant could not remember the nature of the course, the date of the course or anything which would identify this course.
 - 8.2. In those circumstances, it was impossible for the respondent either to accept or refute the claimant's evidence.
 - 8.3. Similarly, if the tribunal accept the claimant's evidence, there is no other evidence before us, which would allow us to conclude that the reason for refusal on that occasion was the claimant's particular trade union membership.
 - 8.4. In our judgement, it appears unlikely that refusal on this one occasion would arise out of the claimant's membership of NASUWT, because it was such an isolated event.
 9. In 2014, Mr Holdsworth, the claimant's head of Department prepared a report on the claimant in respect of his performance.

- 9.1. That report indicates that certain criteria of underperformance set out in a school policy document had been met in the claimant's case.
 - 9.2. In consequence, the claimant was placed in a capability improvement process. The claimant accepted that the performance policy was in operation, that the report made by Mr Holdsworth was based on the policy and that the criteria set out within the policy were met.
 - 9.3. The claimant contends that he should not have been placed in this process. His argument is that all other indicators collected by the school demonstrated a good level of performance and, therefore, that the numerical indicators relied upon should have been seen in that context. The claimant said that because of the small numbers of pupils in his group the statistics were exaggerated and this was the reason for meeting the criteria.
 - 9.4. The capability process, ongoing from 2014, was under the control of Mr Holdsworth.
 - 9.5. The claimant was given targets, he complains that the targets were changed along the way. We heard no evidence which indicated that Mr Foden specifically set these targets or assessed the claimant under them.
 - 9.6. The evidence pointed toward a conclusion that Mr Holdsworth initiated and controlled the capability process, albeit that he reported to Mr Foden.
 - 9.7. In our judgement, there is insufficient evidence to indicate that Mr Foden was the prime mover behind this process.
10. On 6 November 2015 Mr Foden called the claimant to a meeting. The claimant was not warned about the purpose of the meeting, nor was he given the opportunity to obtain representation before the meeting. The meeting was also attended by Mr Parry, the deputy headteacher he and Mr Foden questioned the claimant about the security of assessed coursework. The claimant was quizzed about information given by a pupil that assessed coursework had been taken home by pupils. At the end of the meeting the claimant was suspended with immediate effect, he never returned to work.
11. The tribunal heard evidence about two other teachers, (hereafter teacher A and teacher B) neither of these teachers were suspended from duty when investigated for misconduct.
- 11.1. Teacher A, was accused of a series of safeguarding issues, involving pupils or former pupils of the school.
 - 11.2. Teacher B had incorrectly recorded five pupils as having passed a BTEC course in science when the records showed that they had not.
 - 11.3. Mr Foden told us, in respect of teacher A, that some of the matters had been investigated previously and that there was no foundation to any of the more current matters because of that teacher A had not been suspended.
 - 11.4. Mr Foden evidence in respect of teacher B was that the accusation made against her was one of maladministration and not malpractice.
 - 11.5. We found Mr Foden's evidence in these matters unconvincing. At the outset of events, the circumstances described in each case, had

the potential to be very serious misconduct. In those circumstances, it is difficult to understand why, if suspension was appropriate in the claimant's case, it was not appropriate in these two cases. In each case the potential outcome of the investigation was gross misconduct, it would not be until the investigation was undertaken that the level of seriousness or whether the conduct was misfeasance, malfeasance or without foundation could be established.

- 11.6. We do not accept the explanations provided by Mr Foden.
12. We developed a particular view about the evidence given by Mr Foden which undermined his credibility and/or reliability as a witness.
 - 12.1. Mr Foden was evasive during course of his evidence, in our judgement he intended to obscure answers to questions by means of lengthy monologues. He was quite able to answer questions shortly and straightforwardly where the answer did not undermine the respondents' cases, however, where evidence might prove damaging he would either provide a lengthy and convoluted explanation or, alternatively, give answers which were strictly accurate but incomplete.
 - 12.2. Further, Mr Foden was unable to accept any culpability for any failings on his part in the operation of the school's processes.
 - 12.3. Finally, in our judgement, Mr Foden demonstrated the hallmarks of an individual who was used to controlling situations and as a result, was attempting to control these proceedings during the course of his evidence.
 - 12.4. This led the tribunal, to an overall conclusion that the motivations of Mr Foden were connected with his control of the school and the avoidance of any culpability falling upon him rather than any connection with membership of a particular trade union.
13. The importance of the foregoing paragraph is in relation to the way in which Mr Foden dealt with the suspension of the claimant.
 - 13.1. We have no doubt that, as someone who is an executive member of the NUT, Mr Foden is fully cognisant with the ACAS guidance which provides that where a trade union representative is to undergo disciplinary processes or to be suspended there should be early involvement of senior trade union officers. We consider that Mr Foden deliberately avoided these safeguards in the claimant's case.
 - 13.2. We further take the view that Mr Foden was fully aware of the guidance provided by the Welsh government in respect of these matters. He was aware that the school's internal disciplinary policy was based on that guidance and therefore that interpretation would follow the guidance.
 - 13.3. That guidance indicates that in circumstances where a trade union representative was to be suspended, a full-time trade union official should be approached before the suspension meeting.
 - 13.4. Again, in our judgment, despite Mr Foden, being aware of that approach he chose to ignore it.
 - 13.5. However, there is no specific indication that the reason that he chose to ignore these matters is because the claimant was a member of the NASUWT, or that he was engaging in a particular trade union activity.

- 13.6. There is of course the indication that Mr Foden disapproved, in 2012, of the lessons observation restrictions. However, by September 2012 Mr Foden's own union had agreed a joint approach with the NASUWT. These events took place in 2016 when the action had been underway for a number of years.
 - 13.7. Teacher A, and teacher B both left their employment.
 - 13.7.1. There is some indication in respect of teacher A that he "jumped before he was pushed." Text messages indicating that he was being encouraged to resign.
 - 13.7.2. It is informative in our judgement, that teacher B left before the formal report of her failings was made to EdExcel.
 - 13.8. In our judgement, the evidence supports a conclusion that Mr Foden would begin to consider an individual to be a problem and would create the conditions for that problem to go away. This would be done in order to protect his and the school's reputation and not because of any trade union reason.
14. We do consider that there is an element of vindictiveness in the actions of Mr Foden in the manner in which he provided a reference about the claimant.
- 14.1. When giving that reference, as he did before us, Mr Foden provided incomplete information to the claimant's prospective new employer.
 - 14.2. At the time when he provided the reference, Mr Foden was aware that the complaint of malpractice against the claimant in respect of controlled assessments had been overturned vindicating the claimant.
 - 14.3. Despite being aware of this. He told the prospective employer that there had been "allegations of malpractice" against the claimant without providing the additional information that he had been cleared of that allegation.
 - 14.4. In our judgement, the motivation behind this was the fact that, despite having resigned, the claimant was still seeking to have grievances and an appeal against the disciplinary finding dealt with by the first respondent. It was not connected with trade union activity.
 - 14.5. Our conclusion on this is because there was a risk in respect of both the grievance and the appeal that there would be adverse findings against Mr Foden or the school.
15. We are left to deal with the claimant's complaints about having raised a grievance in June 2016 and an appeal against a finding where he was given a final written warning after the termination of his employment.
- 15.1. In respect of the former there is no evidence that Mr Foden was involved at all in dealing with that grievance.
 - 15.2. Whilst it is clear that the grievance was not dealt with appropriately within a school's procedures, there is nothing in the evidence which would allow us to conclude that the reason this was done was because of the claimant's trade union activity.
 - 15.3. On the face of the documents a more likely reason is that the claimant had been asked to provide information by the then chair of governors and did not do so.

- 15.4. In respect of the failure to hold the appeal this is an appalling and obvious failure of procedure. However the evidence is that this has been because of logistical difficulties in organising a meeting.
- 15.5. The appeal process was not under the control of Mr Foden, and the tribunal have heard no evidence to support a conclusion that the process was delayed because of any trade union activity.

The Law

16. The TULR(C)A 1992 provides at section 146:

- (1) *[A worker] has the right not to [be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place] for [the sole or main purpose] of—*
- (b) *preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so,*
- [(ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or]*

17. Whilst there is no specific authority on burdens of proof in this form of discrimination we consider that the guidance given in **KING v. GREAT BRITAIN-CHINA CENTRE - [1992] ICR 516** applies where it was held:

“Where a complaint of racial discrimination had been made on the basis of facts alleged to be consistent with the applicant having been treated less favourably than others on racial grounds, and the tribunal, when considering the inferences to be drawn from the facts, had found the existence of discrimination and a difference in race, it was permissible, and did not reverse the evidential burden of proof, for the tribunal to require the employer to give an explanation for that discrimination and, in the absence of any satisfactory answer, to infer that it had been on racial grounds.”

18. We consider that if we substitute trade union discrimination for race discrimination we would be approaching the matter correctly:

Analysis

19. The complaints of detriment begin in 2011 alleging intimidatory acts against members of the union to undermine industrial action short of strike action taken by the NASUWT.

19.1. The evidence was of one act against one member of the claimant's union. The requirement of section 146 TULR(C)A is that the treatment must be of the claimant personally *“as an individual”*.

19.2. The claimant complains of treatment to another member of his union. That is not treatment against him as an individual cannot amount to a detriment under the terms of section 146 in those circumstances.

20. Similarly, in terms of the complaint that there was a hostile reception from the headteacher, Mr Foden, towards that industrial action the section 146 provisions are not met.
- 20.1. Whilst Mr Foden did not approve of the industrial action that cannot be considered a detriment to an individual, he was disapproving the collective activity, he was not directing that disapproval against a particular individual in a particular manner.
- 20.2. Even if we were wrong about that and it is clear based on the evidence, that the disapproval shown was because of the school inspection difficulties rather than because the claimant belonged to or was acting on behalf of NASUWT.
21. The complaint that the claimant was prevented from attending union courses for trade union reasons is not well founded in our judgment .
- 21.1. Whilst we accept the claimant's evidence that there was a refusal, the complaint relates to only one course.
- 21.2. There are many reasons why the claimant might be refused permission to attend, the absence of other teachers and the need to provide cover on a particular day, for instance.
- 21.3. Without detailed evidence about the specific course, or supporting evidence as to the reason for refusal, it is simply not possible, on the balance of probabilities, to conclude that this was related trade union activity.
22. In respect of the complaint that capability proceedings were pursued against the claimant based on trade union activities we consider that this complaint is also not well founded'
- 22.1. Our concern here is that the claimant argues that the anti trade union motivation emanates from Mr Foden. The evidence is that is not the case in respect of the capability procedure.
- 22.2. There was an existing policy. The head of Department was following that policy. However unfair that policy may have been in the specific circumstances of the claimant's case that process was imposed because of the policy. Therefore, this treatment was not because of trade union activities.
- 22.3. In our judgement this simply no evidence to connect Mr Holdsworth's decisions with any dislike of the NASUWT or its activities on the part of Mr Foden.
23. The next complaint is that the claimant was suspended from work. The tribunal should look for an explanation for the claimant's treatment from the respondent because of the decision in **King**.
- 23.1. We found as a fact that Mr Foden and was deliberately not following guidelines relating to trade union representatives.
- 23.2. In constructing a comparator (neither teacher A or B being of direct comparison we must consider those matters which motivated the respondent's actions towards the claimant other than his trade union membership or activities. In our judgment, the appropriate comparator is someone accused of allowing assessed work to be taken home by pupils, where that person had been subject of a

- capability process, where the conduct in question was brought to the attention of the headteacher by a sudden disclosure of the information.
- 23.3. The claimant was treated less favourably than that comparator in our judgment. Teachers A and B were not suspended when faced with similarly serious allegations. A hypothetical comparator would not in the circumstances be treated more harshly than those two.
- 23.4. Mr Adkins asked us to reject the defence that Mr Foden would act unreasonably in all cases. To an extent the tribunal have accepted that submission in terms of the question of less favourable treatment. However, we are also required to consider the reason for the treatment when dealing with that aspect. and we cannot ignore Mr Foden's approach to dealing with what he considered to be problem staff.
- 23.5. We found that Mr Foden is an individual who dominates the school insofar as he can and takes action as and when he sees fit. We also consider that he can begin to see individuals as a problem. We took the view that when that happens he begins the process of attempting to ensure the removal of the individual.
- 23.6. In our judgement that is the explanation for the claimant's treatment in this case. It is often the case that, in circumstances where someone has held a leading position for a long time without challenge that they can develop an autocratic approach. It appears to us that this is the case here. On the balance of probabilities Mr Foden considered the claimant (without justification) to be a problem. Teachers A and B had left when he began processes against them, he was attempting the same with the claimant but through more direct means.
- 23.7. It is that autocratic approach along with what Mr Foden considered was misconduct likely to reflect badly on him and the school that led to the treatment of the claimant. It was not the fact that the claimant belonged to and represented a particular trade union.
24. The next complaint is that a grievance raised by the claimant was not dealt with.
- 24.1. We found as a matter of fact that the failure to follow the grievance procedure was nothing to do with Mr Foden. There is simply no evidence upon which we could conclude on the balance of probabilities that the decision not to continue the grievance was related in any way to trade union activities.
- 24.2. The evidence points a different way in that the claimant was asked to provide further information which he did not provide.
25. The complaint that an appeal against a disciplinary sanction was not heard where more than a year had passed is also worthy of complaint but is nothing to do with the claimant's membership of a trade union.
- 25.1. We used the word appalling in describing the failure of procedure in this aspect of the claim; that adjective was deliberately chosen.
- 25.2. However, this failure of procedure is not unique in the school and is already the subject of an adverse finding of the employment tribunal in another case.

25.3. The school is not operating anywhere near the standards in terms of dealing with disciplinary and grievance matters at the school. That should be considered a matter of great concern and one which needs to be rectified, fundamentally and swiftly.

25.4. However, that failure of processes does not lead to a conclusion that trade union activity is the reason for the failure in this case. The reality on the facts is that this state of affairs is systemic and unrelated to the claimant's individual case.

26. The claimant has a legitimate and important complaint about the reference that was provided by Mr Foden. It might be the case that in another jurisdiction the claimant would have a claim in relation to the way in which that reference was provided.

26.1. However, his claim before us is that this was at a deliberate action on the part of Mr Foden because of the claimant's trade union activity. We found that not to be the case and we have explained why.

26.2. We do consider the provision of the reference in the form it was given was a vindictive and deliberate act.

26.3. We do consider that the claimant is to that extent vindicated before us.

26.4. We are of the view that it is no surprise that this claim has been brought because explanations were needed for the multiple failings that we have noted and no honest explanation had been given previously.

27. In the final analysis there is no basis for concluding that the reason for the treatment of the claimant was his membership of or activities in support of the NASUWT.

Judgment posted to the parties on

6 November 2017



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For Secretary of the Tribunals



EMPLOYMENT JUDGE W BEARD

Dated: 26 October 2017