Appeal No. UKEAT/0194/17/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 March 2018

Before

THE HONOURABLE MR JUSTICE LAVENDER

(SITTING ALONE)

MS K KILRAINE — APPELLANT

LION ACADEMY TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS-APPEAL

APPEARANCES

For the Appellant	MR THOMAS CROXFORD (of Counsel) Bar Pro Bono Scheme
For the Respondent	MS ELAINE BANTON (of Counsel) Instructed by: ASB Law LLP Origin Two 106 High Street Crawley West Sussex RH10 1BF

SUMMARY

CONTRACT OF EMPLOYMENT - Implied term/variation/construction of term

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

UNFAIR DISMISSAL - Automatically unfair dismissal

The Claimant was employed under a fixed-term contract and was not entitled to notice of termination of her contract. The decision not to renew her contract was taken because she was assessed and her performance was judged to be extremely poor. The decision was not made on the ground that she made protected disclosures.

THE HONOURABLE MR JUSTICE LAVENDER

1. This is an appeal against the Judgment of an Employment Tribunal. The Judgment was sent to the parties on 9 June 2016. That Judgment, which ran to 54 pages, followed a seven-day hearing which took place on 14 to 18, 21 and 22 September 2015, with further consideration in chambers on 22 and 28 January 2016. The Claimant represented herself at that hearing, with assistance from a trade union representative. She was ably represented today by Mr Croxford, who acted pro bono, for which the Tribunal is extremely grateful.

2. Four issues arise for decision on this appeal: two concern the Employment Tribunal's decision as to the notice required to terminate the Claimant's employment; one concerns the Tribunal's decision that the Claimant's seventh alleged protected disclosure was not a protected disclosure; and the final issue concerns the Tribunal's decision as to the reasons for what is to be treated as the Claimant's dismissal. I begin with the issues concerning notice.

3. The Claimant worked at the Thomas Gamuel Primary School. She worked there as an agency supply teacher in the summer term of 2013. She was then employed there on a fixed-term contract from 1 September 2013 to 31 August 2014. A letter from her then employer, dated 22 April 2013, offered her employment for a fixed term until 31 August 2014. On 19 September 2013 the Claimant counter-signed this letter to indicate her acceptance of this offer in accordance with the stated terms and conditions. The Claimant was also given a starter and leaver form dated 19 September 2013. This stated that her contract type was fixed-term and that its end date was 31 August 2014.

4. In paragraphs 36 and 37 of his judgment in **Department for Work and Pensions v Webley** [2005] IRLR 288, Wall LJ said as follows about a fixed-term contract: (1) "*It is of the essence of a fixed-term contract that it comes to an end at the expiry of the fixed-term*" (paragraph 36); (2) "*The termination of the contract is an inevitable consequence of it being for a fixed term*" (paragraph 37). Wall LJ also referred to "*the termination of such a contract by the simple effluxion of time*".

5. It is also relevant to note that section 95(1) of the **Employment Rights Act 1996** ("the Act") makes separate provision for fixed-term contracts for the purposes of the law of unfair dismissal. It provides as follows:

> **"(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) … only if) -**
>
> > **(a) the contract under which he is employed is terminated by the employer (whether with or without notice),**
> >
> > **(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, …"**

6. It will be noted that, whereas paragraph (a) concerns termination of a contract by the employer, paragraph (b) concerns a limited-term contract which terminates without action by the employer. In the latter case, the dismissal consists of a failure by the employer to renew the fixed-term contract.

7. The Tribunal found that the 2000 edition of the *Conditions of Service for School Teachers in England and Wales* ("the Burgundy Book") formed part of the Claimant's contract of employment. This finding is not challenged. Section 3 of the *Burgundy Book* is entitled, "*Appointment: Resignation: Retirement*". Part 2 of that section is entitled "*Teachers resigning their appointments*". Part 4 of that section is entitled "*Period of notice and termination of contract*". Paragraphs 4.1 and 4.4 provide as follows:

> **"4.1. All teachers shall be under a minimum of two months' notice, and in the Summer term three months', terminating at the end of a school term as defined in paragraph 1 above.**
>
> **…**
>
> **4.4. The provisions of paragraphs 4.1 to 4.3 apply to the termination of a teacher's contract for any reason other than gross misconduct, including dismissal for ill-health and redundancy."**

8. It is not disputed that the Claimant was a teacher for the purpose of these paragraphs.

9. The Respondent became the Claimant's employer pursuant to a transfer of undertaking with effect from 1 January 2014. Her employment ceased on 31 August 2014. Mr James, the Respondent's Chief Executive Officer, had written to the Claimant on 10 July 2014 notifying her that her fixed-term contract would not be renewed. He wrote:

> **"I am writing to you to notify you that your current fixed term contract at Thomas Gamuel Primary School will end on 31st August 2014. During May 2014 you were given the opportunity to apply for both Teaching and Phase Manager positions to commence from 1st September 2014. As you are aware you applied for the Phase Manager position but, following the interview and teaching observation, were unsuccessful in obtaining that position.**
>
> **…**
>
> **I would like to add that the decision to not renew your fixed term contract is no way related to your current grievance against the Head of School but as a result of you not being successful in obtaining a Teaching position at Thomas Gamuel Primary School."**

10. The Respondent contended that no notice was required to terminate the Claimant's employment. The Claimant contended that she was entitled to three months' notice, relying on paragraph 4.1 of the *Burgundy Book*. The Tribunal found that the Claimant was entitled to three months' notice. However, she had only been given seven and a half weeks' notice on 10 July 2014. It awarded damages in respect of the period from 1 September to 10 October 2014.

11. The Claimant appeals on the basis that the Tribunal erred in finding that she could be dismissed with effect from 10 October 2014, rather than at the end of a school term (which, in this case, means 31 December 2014). If she was entitled to three months' notice pursuant to paragraph 4.1, it is common ground that the Claimant is right that that notice had to expire at

A the end of a term and that the Tribunal erred in law in finding that she could be dismissed by notice terminating on 10 October 2014.

B 12. However, the Respondent has cross-appealed. The Respondent contends that the Tribunal erred in that it ought to have found that the Claimant was not entitled to notice of the termination of a fixed-term contract, alternatively that adequate notice was given when she was informed at the outset of the terms of her contract, including that it was for a fixed-term C expiring on 31 August 2014.

13. In my judgment, on its true construction, paragraph 4.1 of the *Burgundy Book* was D inapplicable to the facts of the present case. Part 2 of section 3 of the *Burgundy Book* concerned the termination of a teacher's employment by his or her decision to resign. Part 4 of section 3 of the *Burgundy Book* concerned termination of a teacher's employment contract by E notice given by his or her employer. Neither of them dealt with the situation where the teacher and the employer agreed when the employment should come to the end. In this case, the Claimant's contract was not terminated by the Respondent. It expired in accordance with its terms as agreed by the Claimant and her employer.

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14. Moreover, paragraph 4.1 of the *Burgundy Book* was plainly not intended to convert a fixed-term contract into an open-ended contract, yet that is, in effect, what the Claimant G contends. She agreed to a fixed-term contract ending on 31 August 2014, but she says that the one-year fixed-term was really only a minimum term and that the Claimant was obliged to employ her beyond that date unless and until it gave her three months' notice of termination. H Much clearer provisions will be required to demonstrate that the parties intended to bring about that result. The parties' agreement that this was to be a fixed-term contract was contained in a

A brief letter which both the Claimant and her employer signed. It would be an unusual thing for general provisions contained in another document to override the parties' express and specific written agreement.

B

15. Alternatively, if notice was required, it was given when the Claimant's employer wrote to her on 28 April 2013 and/or gave her the starter and leaver form on 19 September 2013. Both of those documents notified the Claimant that her fixed-term contract would expire on 31 August 2014. The Tribunal erred in not considering this point.

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16. I turn next to the Claimant's third ground of appeal, which concerns her seventh alleged protected disclosure. Subsection 47B(1) of the **Act** provides that:

D

> **"(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."**

E

17. Section 43A provides that:

> **"In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."**

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18. Subsection 43B(1) provides that:

> **"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following -**
>
> **…**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
>
> **…**
>
> **(d) that the health or safety of any individual has been, is being, or is likely to be endangered,**
>
> **…"**

G

H

19. It will be noted that what is required here is the disclosure of information. The making of an allegation is not the disclosure of information: **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38.

20. Subsection 43C(1) provides that:

> **"(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure … -**
>
> **(a) to his employer, …"**

21. The Tribunal dealt with the Claimant's seven alleged protected disclosures in paragraphs 230 to 257 of its Judgment. It concluded that she made four protected disclosures, on 31 January, 4 or 5 February and 8 and 21 March 2014. It decided that she did not make protected disclosures on 23 January, 25 February and 26 March 2014. It is the alleged protected disclosure on 26 March 2014 which is the subject of appeal. The Tribunal dealt with this in paragraphs 139, 140, and 251 to 253 of its Judgment.

22. In its careful and thorough Judgment, the Tribunal dealt with and carefully distinguished between a host of issues which arose between September 2013 and March 2014. There were concerns about bullying in the Claimant's class. There were issues about the Claimant's capability as a teacher. There was an allegation that the Claimant had improperly required the pupils in her class to change their answers to a pupil questionnaire. There were complaints about the Claimant from parents of pupils in her class. There were allegations by the Claimant that the complaints against her were the product of an orchestrated campaign led by one parent, Mrs D, and another teacher at the school, Mrs Khan. The Claimant also said that she had child protection concerns, although with a few exceptions she did not document or detail these concerns.

23. The Claimant's third alleged protected disclosure, which the Tribunal found was a protected disclosure, concerned her allegation that she was being bullied by Mrs D. A parent, referred to in the Judgment as Z's mother, spoke to the Claimant, and told her that Mrs D had been speaking to other parents about the Claimant and that Z's mother no longer wanted to be a part of it. On 4 or 5 February 2013, the Claimant told the Head Teacher, Mr Mitchell, about her conversation with Z's mother. The Tribunal found that this was a protected disclosure because the Claimant was passing on information which she believed supported her earlier complaint that Mrs D had been bullying her and that this information fell within paragraphs (b) or (d) of subsection 43B(1) of the **Act**.

24. The Claimant's fifth alleged protected disclosure arose when she went to the police on 8 March 2014 and formally reported that she had been the victim of bullying by Mrs D and the Head Teacher. The Tribunal found that the issue which she reported to the police was similar to that which she reported to the Respondent on 4 or 5 February 2014.

25. That is the background against which the Tribunal found as follows in paragraphs 251 to 254 of its Judgment in relation to the Claimant's seventh alleged protected disclosure:

> **"251. On 26 March the Claimant did tell Mr Mitchell the substance of her report to the police. In his email on 20 March Mr Mitchell asked the Claimant questions about her visit to the police. The Claimant replied on 26 March and also visited his office to provide further details.**
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> **252. In our judgment the Claimant did not report something that had happened or that she witnessed but gave an explanation of her reasons for going to the police station. She had already complained verbally to Mr Mitchell about Mrs D. The Claimant did not inform Mr Mitchell that she had reported him to the police as a harasser. That would have been new information. She did not provide him with any new information in this conversation. She gave details of what she had told the police and what she had told him previously.**
>
> **253. In our judgment the information that the Claimant gave to Mr Mitchell on 26 March 2014 was not a qualifying disclosure.**
>
> **254. It is our judgment that the Claimant made four qualifying disclosures."**

26. In short, the Tribunal found that the seventh alleged protected disclosure was no more than a repeat of the third. This was confirmed by the Tribunal in paragraph 274 of the Judgment when it said:

> **"274. In our judgment the Claimant did not make a protected disclosure in her conversation or in her email to Mr Mitchell on 26 March 2014. She repeated information she had already given him."**

27. On the following day, 27 March 2014, the Claimant sent an email which was treated as a grievance. Mr James of the Respondent decided to investigate her grievance and to suspend her while the investigation took place. The Tribunal said as follows in paragraph 145 of its Judgment:

> **"145. On 31 March Mr James decided to suspend the Claimant from work. The reason for the suspension was the contents of the Claimant's email to Mr Mitchell on 27 March. Mr James wrote to the Claimant confirming the terms on which she had been suspended. He stated that the Respondent considered that there were four key points to her grievance which were: that the school had failed in their duty of care towards her in relation to her perceived harassment from parents; that the school had inappropriately used its internal procedures against her and therefore treated her unfairly; that the school had encouraged complaints against her; and that she had lost trust and confidence in the school's internal procedures to address any concerns that she may have as an employee."**

28. The Claimant contends that the Tribunal erred in law because it failed to have regard to subsection 43L(3) of the **Act,** which provides that:

> **"(3) Any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention."**

29. I do not accept this submission. The Tribunal found that the Claimant did not provide the Head Teacher with any new information on 26 March 2014. Instead, she gave him details of what she had told the police and what she had told him previously. In other words, as I have said, she repeated to the Head Teacher the third protected disclosure which she had made to the Respondent on 4 or 5 February and to the police on 8 March 2014.

30. In repeating the third protected disclosure, she was telling him something of which the Respondent was already aware. It may perhaps be said, in the terms of subsection 43L(3), that

she was bringing the same information to his attention again on 26 March 2014. It may be a question for decision in a future case whether repeating a protected disclosure is itself a separate protected disclosure, but that question does not matter on the facts of this case, because the Tribunal found in paragraphs 269 to 295 of its Judgment that the Claimant failed to prove that any of the detriments she relied on were done on the grounds that she made protected disclosures. The Tribunal reached that conclusion against the background of its findings that the Claimant had made a protected disclosure on 4 or 5 February 2014 and repeated it on 26 March 2014. That conclusion is not challenged on this appeal. Whether one views what happened on 26 March 2014 as a repetition of a previous protected disclosure or as a separate protected disclosure makes no difference of substance.

31. Mr Croxford advanced a further argument. He contended that because the email of 27 March 2014, which was not itself alleged to be a protected disclosure, referred to what the Claimant had said on 26 March, and, because the email was treated as a grievance, what was said on 26 March 2014 must have been a protected disclosure. This does not follow. What made the email a grievance was that it contained the allegations referred to in paragraph 145 of the Tribunal's Judgment. Allegations are not information. The email did not contain any information capable of constituting a protected disclosure.

32. Finally, I come to the Claimant's first ground of appeal. This concerns the Claimant's unfair dismissal claim. Pursuant to section 94 of the **Act**, the Claimant had the right not to be unfairly dismissed by the Respondent. I have already quoted section 95(1)(b) of the **Act** to the effect that an employee who is employed under a limited-term contract is dismissed if that contract terminates by virtue of the limiting event without being renewed under the same contract.

33. Section 103A of the **Act** provides that:

> **"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."**

34. Subsections 98(1) and (2) of the **Act** provide as follows:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it -**
>
> **(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
>
> **…"**

35. Section 98 applies in the present case: see **Kuzel v Roche Products Ltd** [2008] IRLR 530, at paragraph 61.

36. The Respondent considered whether to employ the Claimant after 31 August 2014 either in a phase leader or phase manager role or, as before, as a class teacher. There was an application process. This is described in paragraphs 155 to 162 of the Tribunal's Judgment. In particular paragraph 153 states as follows:

> **"153. Around this time, the Respondent in doing their due diligence on the personnel files noted that the Claimant was on a fixed term contract. On 12 May Andy Bocchi sent the Claimant an email to confirm this. The email stated that the Claimant was being alerted, as the Respondent was doing to everyone on a fixed term contract, of teaching vacancies that the school had for September. The Claimant was informed that the school was recruiting for a class teacher position as well as temporary Phase Manager roles from September. The Claimant was asked to notify the school directly if she wanted to apply for either."**

37. The Claimant was assessed and interviewed on 23 May 2014. On her assessment, she scored only 5 points out of a possible 80. She achieved no "outstanding" scores and no "good"

scores. She achieved 12 "requires improvement" scores and 7 "inadequate" scores. On her interview, she scored 18 out of a possible 30. The Tribunal said:

> **"161. The Claimant scored just over 50% on her interview but her teaching performance was judged to be extremely poor. The panel concluded that the Claimant had not been successful for the Phase Manager role. Mr Bocchi and Ms Mockford decided that they would also not be able to offer her a normal teaching position based on what they had observed of her teaching skills that day. Although Mr Scott had not taken part in the observation, he agreed with their assessment."**

38. Mr Bocchi was the school's Deputy Head Teacher, Ms Mockford was the school's Early Years Foundation Stage Phase Leader, and Mr Scott was the school's Assistant Head Teacher. They comprised the panel who interviewed the Claimant. All three of these individuals gave evidence before the Tribunal.

39. In paragraph 167, the Tribunal said as follows:

> **"167. On 10 July 2014, Mr James wrote to the Claimant notifying her that her fixed term contract would not be renewed. The letter confirmed that as the Claimant had been unsuccessful in her applications for the Phase Manager position, her contract would expire on 31 August 2014. She was informed of a right of appeal against that decision. He also stated that the decision not to renew her fixed term contract was not related to her current grievance against the Head [Teacher] but was as a result of her not being successful in obtaining a teaching position at the school."**

40. The Claimant did not appeal in time.

41. The Tribunal's conclusions on this issue were set out in paragraphs 265 to 268 of its Judgment:

> **"265. The Claimant was not appointed to the Phase Manager role. It is our judgment that she was properly assessed for that role. The evidence was that the recruitment process was fair and that the Claimant was not treated differently due to her disclosures or the outstanding grievance or disciplinary issues that she had with the Respondent.**
>
> **266. The panel took the decision that due to her poor performance in the lesson observation she was also not suitable to be considered for a classroom teacher position. The evidence was that the Claimant performed poorly and that the panel had assessed her fairly. The Claimant had been in the same position as the other applicants in that she had not seen the selection matrix before the assessment day. She had the opportunity to arrange with Mr Bocchi all that she needed for her lesson observation. It is our judgment that she had been fairly assessed and that she had not been disadvantaged because of her protected disclosures, her grievance or the disciplinary matters that were ongoing at the time.**

267. In our judgment the decision not to appoint her to a classroom teacher position was not due to her making protected disclosures. The failure to appoint her to the Phase Manager's position was not due to her protected disclosures. The Claimant's contract came to a natural end.

268. The Claimant was not dismissed because she made protected disclosures. Her complaint of automatic unfair dismissal fails."

42. The Tribunal then said as follows, in relation to the author of the 10 July 2014 letter, Mr James, in paragraph 286 of its Judgment:

> **"286. … In our judgment Mr James did not decide to terminate the Claimant's contract because [she] had made disclosures. He did so because her fixed term contract had come to an end and she had failed to secure any other employment within the school."**

43. In the circumstances, it is plain that the Tribunal found that the Respondent had discharged the burden imposed by section 98(1). The decision not to employ her as a class teacher after 31 August 2014 was taken by Mr Bocchi and Ms Mockford with the agreement of Mr Scott because she was assessed and her teaching performance was judged to be extremely poor. That is the reason given by the Tribunal for finding that there was no unfair dismissal. Mr James decided to terminate her contract, i.e. not to renew her contract because her fixed-term had come to an end and she had failed to secure other employment within the school.

44. There is no basis for the Claimant's allegation that the Respondent did not discharge its burden and that the Tribunal did not give adequate reasons for its decision. Mr Croxford submitted that there was a need for the Tribunal to focus closely on the identity of the decision maker and the nature of the decision not to renew the Claimant's contract because there were, at the time of that decision, ongoing disciplinary, capability and grievance procedures in place in relation to the Claimant. However, the Tribunal considered all of these matters. It found that the interview and assessment process in May was fair.

45. To some extent, the Claimant's complaint is that the Tribunal did not identify the person who decided to send the letter of 10 July 2014. However, what the Tribunal said about Mr James at paragraph at 286 of its Judgment is an answer to that point.

46. Mr Croxford also relied on the fact that there was a delay between 23 May 2014, when the Claimant was notified that she had been unsuccessful in her application for the phase manager role, and 10 July 2014, when she was informed that her contract would not be renewed. That was unfortunate, but there was nothing to suggest that the decision taken by the interview panel had been reopened. Indeed, it was referred to in the letter of 10 July which communicated that decision, and the Tribunal made its findings about Mr James' reasons for sending that letter.

47. In all the circumstances the Tribunal was entitled to conclude that there was no unfair dismissal. For all of these reasons, I dismiss the appeal and I allow the cross-appeal.