Appeal No. EA-2019-SCO-000113-SH
(Previously UKEATS/0008/20/BA)

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 29 July 2021

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

FIFE COUNCIL — APPELLANT

MRS DIANNE AITKEN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr Barry Nichol (*Solicitor)* Anderson Strathern LLP 1 Rutland Court Edinburgh EH3 8EY
For the Respondent	Mrs Dianne Aitken (*The Respondent in Person)*

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SUMMARY

TOPIC NUMBERS 11: Unfair Dismissal; 12: Disability Discrimination; 32A: Whistleblowing, Protected Disclosures

The Claimant brought a claim of unfair dismissal. The Tribunal allowed the claim. The Tribunal proceeded on the basis that the Claimant had stated a claim for whistleblowing detriment. The EAT held that this claim was not before the Tribunal. The Claimant had disclaimed this ground of action in a preliminary hearing before the full hearing. The EAT held however that the Tribunal had been entitled to uphold the Claimant's submission that she had been dismissed because she made protected disclosures. Even though she did not seek a remedy based on whistleblowing detriment, her evidence, which had been led without objection, was that her lack of capability was not the reason for her dismissal. The EAT held that the Tribunal was entitled to accept this evidence and reject the Respondent's explanation for her dismissal. The EAT likewise held that the Tribunal was not entitled to uphold her claim of discrimination in the absence of any basis for such a claim in the ET1 or the evidence led at tribunal.

THE HONOURABLE LORD SUMMERS

1. In this case the Respondents, Fife Council, were held to have unfairly dismissed the Claimant, Mrs Dianne Aitken. The Employment Tribunal (hereafter "the ET") held that the dismissal was automatically unfair because it considered the Claimant had been dismissed because she had made protected disclosures. The ET further held that the Claimant was unfairly dismissed because the Respondent had not satisfied the ET that the dismissal was because of capability, the reason given for her dismissal. It was satisfied her protected disclosures were the true reason for dismissal. The ET further held that she had suffered unlawful discrimination because of her disabilities.

2. The Respondents submitted that the ET had erred in entertaining the possibility that the Claimant had been dismissed because of "whistleblowing". It submitted that having regard to the decisions of the ET at Preliminary Hearings prior to the full hearing it was clear that the Claimant had decided not to advance a "whistleblowing" case. The critical ET Note is dated 17 May 2019. It states as follows –

> **When pressed the Claimant indicated that she was prepared to accept that the information contained in the email should be taken as further and better particulars and that she would not formally amend her claim to add in a claim for "whistleblowing/protected disclosure".**

3. I am satisfied in light of the fact that the ET recorded that the Claimant did not wish to add a claim based on s. 103A of the **Employment Rights Act 1996** that a "whistleblowing" claim was not before the ET. In that circumstance the ET should not have considered whether the Claimant had made a "protected disclosure" within the meaning of s. 103A.

4. I accordingly uphold the Respondent's submission that the ET should not have found for the Claimant under s. 103A of the **Employment Rights Act 1996**.

5. The ET further held that the Claimant had been unfairly dismissed. The ground for dismissal relied on by the Respondents was capability. It bore the burden under s. 98 of the 1996 Act of showing that her dismissal was for this potentially fair reason. In its judgement the ET held that the Respondents had not discharged its burden. At para 87 it held that -

> **The reason for dismissal was not to do with the Claimant's capability. The reason was the decision that the Claimant was not to be permitted to return to Newburgh Primary School.**

6. The Respondent's witness Ms Porter stated that the Respondents did not consider that the Claimant could return to the primary school. She gave evidence that this was a decision made by senior management. Thus although the Respondent's Occupational Health representative had suggested that the possibility of a return to school should be explored and although the Claimant had given evidence that she was willing to return to the primary school, the Respondents were not prepared to contemplate this option. The ET heard a substantial amount of evidence about the breakdown in the relationship between the Claimant and the staff at the primary school. This was sufficient in my view to entitle the Claimant to challenge the Respondents' decision. I consider that this evidence discharged the Claimant's evidential burden and put the matter in issue. Thereafter the statutory onus was on the Respondents to show that the dismissal was by reason of capability, a permitted reason under the Act. The ET was not satisfied the Respondents had discharged this onus. The Claimant submitted that her disclosures about the matters covered in Findings in Fact 7, 9, 11, 12, 13, 16 and 17 explained why she was not permitted to return to the primary school. In summary she considered that the antagonism she had engendered by her complaints to her management about the state of the heating at the school and the handling of an incident involving injury to a child were the causes of her dismissal. She gave evidence that because of these disclosures her head teacher and colleagues became antagonistic towards her and that this was why she was dismissed.

7. The Respondent argued that the ET was not entitled to rely on this evidence because it was evidence that supported a claim based on "protected disclosures". The ET should have appreciated that if no "whistle blowing" case was before it, it was not entitled to rely on this evidence. The Respondents submitted that when evidence to this effect was led it was submitted that the ET should have adjourned proceedings and given the Respondents a chance to decide what to do with the suggestion that capability was not the true reason for dismissal. I presume on the Respondent's view of matters it could also have refused to hear evidence about the Claimants difficulties with her colleagues and head teacher.

8. I am not persuaded that this is so. The Claimant had referred to "whistle blowing" in her statement of further and better particulars. Although this reference did not metamorphose into a claim based on "whistleblowing" it was a warning that she intended to lead evidence designed to show that she was not dismissed because of any lack of capability. It ought to have been no surprise to the Respondent that she would allege that she was dismissed because of her complaints. The fact that she did not seek to advance a statutory "whistle blowing" case did not mean that the ET was bound to disregard evidence that might have supported such a claim.

9. In any event it was for the Respondents to show that capability was the reason for dismissal. The Respondent's own witness Ms Porter gave evidence that indicated that capability was not the true reason for dismissal. Ms Porter gave evidence that she had been dismissed because the management of the school did not wish to work with her.

10. I do not consider that the ET was bound to adjourn the hearing when this evidence was given. No motion that that effect was made. The Claimant was entitled to lead this evidence in order to demonstrate that the Respondents' defence was ill founded. She was entitled to prove that her alleged lack of capability was not the reason for dismissal. In doing so she was not obliged to state a case based on "whistleblowing" detriment. It may be that the solicitor who appeared for

A the Respondents thought that because there was no "whistleblowing" case before the ET evidence that the Claimant had made disclosures could not be relevant to the claim of unfair dismissal. That is not the case. Although the Claimant had not amended her claim to include "whistleblowing", her pre-hearing emails made it clear that she believed that her disclosures had influenced the decision to dismiss. The Respondents therefore should have appreciated that in seeking to discharge their burden under s. 98 they required to lead evidence designed to rebut this evidence.

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11. Although there was evidence in support of capability being the ground of dismissal, the ET was entitled to hold that the Respondents had not discharged its onus and that it was satisfied that the true reason for dismissal was not capability. I do not require to rehearse the evidence that the ET rejected. The Respondents did not seek to submit that there was no evidence that contradicted their position or that the ET was bound to reject the evidence it accepted. It was for the ET to decide which evidence it preferred. There is no sign of perversity in its decision.

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12. The Respondent also attacked the ET's decision to uphold the Claimant's claim for disability discrimination. I consider this ground of appeal is well founded. I am satisfied that the Claimant had not given notice of the claim adjudicated at paragraph 97 of the Judgement. The claim form and its elaboration in the paper apart and subsequent email documentation does not refer to s15 of the **Equality Act 2020** nor to facts that might be thought apt to fall under s 15. of the **Equality Act 2020**.

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13. The ET was asked under **Burns/Barke** procedure to indicate why it considered this claim was before it. The ET indicated that the claim was based on a statement of further and better particulars of 23 May 2019. A statement of further and better particulars is designed to amplify existing claims not to add further claims. If a new case was to be advanced an amendment of the claim would have been required. In any event the statement does not give fair notice of a s. 15

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claim. The relevant part of the statement states that the Claimant felt staff used her disability to "wear her down and bully her". This does not provide a basis for the ET's decision. The ET upheld her claim based on the failure of the Respondent to review their decision not to allow the Claimant to return to the primary school. On its face this is a different matter from that of which she complained in the statement of further and better particulars. In any event a failure to convene a review in the context of the case would not usually be seen as discriminatory conduct without evidence capable of supporting that conclusion. I accept that in the normal course of things employers would be expected to suspend disciplinary procedure when the employee to which the review relates is off on sick leave.

14. The ET also upheld the Claimant's claim under s. 20 of the **Equality Act 2010**. Although the section is not quoted at paragraph 99 of the Judgement it is evident that the ET thought that in refusing to meet with the Claimant they had failed to make a reasonable adjustment under s. 20 of the **Equality Act**.

15. I accept the submission of the Respondent that following **British Gas v McCall** 2001 ICR 60, a meeting in the context of this case could not be an adjustment within the scope of s20. It may be a means of identifying whether an adjustment should be made but it does not constitute an adjustment as such.

16. The ET heard evidence that the Respondents offered the Claimant employment at other Primary Schools (see Findings in Fact 31 and 36). The Employment Tribunal held that because the Claimant did not drive and would have transport difficulties these offers could not make any difference to the finding of unfair dismissal.

17. This issue was also subject to **Burns/Barke** procedure. The ET in its response reported that its notes did not disclose a basis for the finding that the Claimant could not drive. *Quantum*

valeat it would appear in the light of the submissions made on the Claimant's behalf at the EAT that she can drive. It would appear that the difficulty is that she does not have regular access to a vehicle. Be that as it may, the ET found that the primary schools suggested by the Respondents in their offers of alternative employment were not accessible to the Claimant. The ET expressed the view that the Claimant could not reasonably be expected to accept the offers of alternative employment in view of the fact that there were poor public transport links between her home and the locations of the primary schools in question.

18. The Respondents accepted that there was no point in remitting the matter back to the ET so that it could reconsider its position in light of its misunderstanding. If the true position was that she was able to drive but could not always get access to a car, the ET would be bound to adhere to its finding of unfair dismissal. The Respondents did not therefore move the EAT to overturn the ET's decision on the basis of its error in relation to the Claimant's ability to drive.

19. In light of these conclusions I do not need to vary the finding of unfair dismissal in order 1. But I shall vary the order so as to show that the claim based on s. 103A of the **Employment Rights Act 1996** has failed. I shall recall order 2 on the basis that the claim for disability discrimination has failed. Order 3 does not require to be varied.