Appeal No. EAT/1407/98

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 16 October 2000
Judgment delivered on 13 November 2001

Before

THE HONOURABLE MR JUSTICE LINDSAY (PRESIDENT)

MRS J M MATTHIAS

MR S M SPRINGER MBE

MR J CADBURY — APPELLANT

SOUTH THAMES COLLEGE — RESPONDENT

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For the Appellant	MISS LOUIS CHUDLEIGH (of Counsel) Messrs Dean Wilson Solicitors 95 Church Street Brighton East Sussex BN1 1UJ
For the Respondent	MR NEIL VICKERY (of Counsel) Messrs Eversheds Solicitors Senator House 85 Queen Victoria Street London EC4V 4JL

MR JUSTICE LINDSAY (PRESIDENT)

1. This is an appeal by Mr Jethro Cadbury against a decision of the Employment Tribunal that he had been fairly dismissed by South Thames College Corporation. Mr Cadbury has been represented before us by Miss Chudleigh and the College by Mr Vickery.

2. In 1997 Mr Cadbury was employed at the College as a lecturer on computing in the Faculty of Business. Subject to oversight by an outside academic, he was responsible for setting some examination questions for his second year degree students. Amongst the other questions he set, one came from a 1980's "A" level paper. It was not disapproved by the outside academic (although that is not to suggest that she knew its provenance). Mr Cadbury did not keep secret that he had done as he had but nor, at first, was any publicity attracted to what he had done. However, on 14th February 1997, after, as it would seem, other members of the College had been in contact with the Times' Education correspondent, that correspondent, Mr David Charter, telephoned Mr Cadbury. On 17th February 1997 the Times carried an article which, inter alia, read:-

> **"A" level question is used in degree course exam**
>
> **by David Charter, Education Correspondent**
>
> **A degree examination included a question from a nine-year old "A" level paper, it emerged yesterday, highlighting fears that University standards are failing. The lecturer who set the examination for London Guildhall University admitted that he chose it because he did not think his students could cope with a greater level of difficulty ..... London Guildhall University, the former City of London Polytechnic, promised an urgent investigation into its computing examination at the centre of the row. The Times has learnt that among the three questions students had to answer was one from a 1988 A-level computer science examination. Last month's examination was for second-year students who had completed part of a modular degree that counted towards the final grade. The students are at South Thames College in Wandsworth, South London, which teaches the degree's first two-years under a franchise agreement with the University ..... The questions were set by Jethro Cadbury, a lecturer at South Thames College. He said the A-level question came from a period when there was greater content demanded of sixth-formers. "In my opinion the content [of A-level] is being watered down every year. In the early Eighties there was some heavy maths in the [computing] A-level but now that has all gone. You will find quite a lot of degree papers test at about the standard of A-level in the 1980's. If you took a lot of second-year students and gave them an A-level paper from the mid-eighties they would not have a chance". Mr Cadbury said his question paper had been passed by the course's external examiner, a professor at the University of Ulster".**

The tone of the article was serious and included comment from a former Higher Education Minister and from the Higher Education Quality Council.

3. The Principal of the College appointed Heather Barton, Vice-Principal, to report upon the matter, which had become a talking point on the very day of the publication in the Times. She interviewed Mr Cadbury on the evening of the 17th February. He confirmed he had set the A-level question referred to and had spoken to Mr Charter along the lines quoted in the article. He said that some complimentary comments he had made about the College had not been quoted.

4. On 18th February Mr Cadbury was suspended on full pay. Heather Barton's report concluded that:-

> **"..... a potential act of Gross Misconduct, "committing an offence within or outside the College's employment, which, by its nature, would have a damaging effect upon the reputation and integrity of the College" has taken place and ..... a sub-committee of Governors should be convened to reach a decision in the matter".**

5. It took some time for that Disciplinary Sub-Committee to be set up though the delay was by no means all the College's fault. In September 1997 Mr Cadbury submitted a Medical Certificate suggesting that he should stay off work for 2 months. There was then another that ran to mid-December. The College's own occupational health physician, however, having met Mr Cadbury on 5th November, felt that he was fit to attend a hearing fixed for 21st November 1997. Mr Cadbury's union representative advised the College that it should not continue with the plan for a hearing on 21st November but, presumably preferring the medical opinion of its own physician to that of Mr Cadbury's, the College, although told Mr Cadbury would not be attending, decided to go ahead on 21st November 1997. The Sub-Committee was made up of 3 Governors.

6. Mr Cadbury's use of the earlier "A-level" exam question could have been attacked for one or more of several reasons. It was plagiaristic; it might have been a breach of copyright.

It could have been an academic offence to set an "A-level" question for a second year degree course. All such complaints were disavowed by the College. Nor was it the College's case either that Mr Cadbury's comments (as reported by The Times correspondent) about the abilities of his students were untrue or that Mr Cadbury did not believe in their truth or that he had been malicious in the sense of his deliberately intending thereby to damage the College.

7. At this point it is necessary to examine the terms of Mr Cadbury's contract. The College's "Professional Academic Contract of Employment for Lecturers" contains provisions to which we need to refer. Clause 14, headed "Confidentiality" provides:-

> **"14.1 Employees shall not disclose or make use of for their private advantage any information not available generally to the public which they may acquire in the course of their duties**
>
> **14.2 Notwithstanding the above, the Corporation affirms that academic staff have freedom within the law to question and test received wisdom relating to academic matters, and to put forward new ideas and controversial or unpopular opinions about academic matters without placing themselves in jeopardy or losing the jobs and privileges they have at the Corporation".**

The words "for their private advantage" would seem to qualify only "make use of" so, although this cannot be said to be beyond doubt, a disclosure does not escape the prohibition of clause 14.1 simply by not being for the employee's private advantage. But 14.2, beginning, as it does, with "Notwithstanding the above" is plainly intended to save from being a breach of 14.1 some disclosures which would otherwise fall within 14.2. 14.2 contains within itself no prohibitions.

Clause 17, headed "Disciplinary Procedure" provided:-

> **"The Corporation expects a reasonable standard of performance and conduct from its employees. Details of the Lecturers' Disciplinary Code will be issued to you separately. The Procedure may be varied from time to time by agreement with the recognised Trade Unions".**

Clause 21.4 reads:-

> **"21.4 The Corporation may terminate your employment without notice if you are guilty of gross misconduct .... following the use of the Disciplinary Code".**

Clause 10 of the Lecturers' Disciplinary Code provides:-

> **"10. Major Offences - Dismissals**
>
> **A major offence for the purpose of this Code shall be any single act of gross misconduct i.e. misconduct or inefficiency serious enough to undermine the employment contract, which calls into question the lecturer's fitness to continue in employment .... Any such matter shall be referred .... for consideration by the Disciplinary Sub-Committee of the Governing Body. Examples of gross misconduct are provided in Appendix Three".**

8. In relation to hearings by the Disciplinary Sub-Committee clause 12 provided in mandatory terms that:-

> **"The lecturer shall be informed in writing giving at least 10 clear working days' notice of the disciplinary hearing with sufficient detail to convey the nature of the disciplinary allegation, identifying the level of the alleged offence under this code ....".**

9. An appendix setting out "Hearing Procedures" reiterated the requirement of written notice being given to the lecturer; "The notice shall state the nature of the offence, giving sufficient detail to allow the lecturer to prepare for the hearing ....".

10. Appendix 3, identified earlier by clause 10 as providing examples of gross misconduct, specifies, under a number of headings, acts which are plainly offences in themselves - theft, wilful damage to College property, unlawful discrimination and so on and at paragraph 10 provides:-

> **"10. Offences within or outside the college's employment which, by their nature:**
>
> **(a) prevent the lecturer from continuing to do the job for which he/she was employed; or**
>
> **(b) seriously call into question the lecturer's fitness to continue in the job which he/she was employed to do; or**
>
> **(c) have a damaging effect upon the reputation and integrity of the College".**

It is important to note that this paragraph does not begin "Acts or omissions within or outside the college's employment" but "Offences". One therefore has to find the act or omission to be an "offence" before it becomes material to examine whether it has consequences falling within 10 (a), (b) or (c). There is no free-standing offence consisting simply of an act or omission which by its nature has a damaging effect upon the reputation and integrity of the College but, conversely, if an act or omission could be shown to be a breach of some other provision - such, for example, as the contractual requirement to devote full time, attention and abilities to the

lecturer's duties during working hours (clause 13.1 of the Contract) - then, if it had the damaging effect required by 10 (c), it would become a potential act of gross misconduct. Not only is that plain from the use of the word "offence" rather than of the phrase "Any act or omission" but that acts or omissions not otherwise offences do not fall within paragraph 10 is obvious if one supposes the position of a lecturer seriously injured in a car accident outside the College's premises and outside working hours. He is responsible for an omission - failing to brake for a corner - and is so seriously injured that he is prevented from continuing to do the lecturer's job for which he was employed. One might think he had problems enough but if, as Mr Vickery asserts, "Offences" in paragraph 10 really means nothing more than "Acts or omissions", he could be called to a Disciplinary hearing and be capable of being dismissed by the College for Gross Misconduct. The improbability of that underlines the conclusion that clause 10 describes no independent offence and that its language requires there to be shown an "Offence" under some other provision before it becomes necessary to examine its consequences as falling within (a), (b) or (c).

11. As we mentioned, the Disciplinary Sub-Committee met on 21st November 1997 in Mr Cadbury's absence. We asked both Miss Chudleigh and Mr Vickery whether there was a document sent to Mr Cadbury giving notice in writing "with sufficient detail to convey the nature of the disciplinary allegation" (Clause 12 of the Disciplinary Code) or one which "state[s] the nature of the offence giving sufficient detail to allow the lecturer to prepare for the hearing" (the Hearing Procedure appendix). The only paper either could produce, and the records we have suggest no other, is a letter of Heather Barton's of 6th November 1997. It totally fails to convey the nature of any disciplinary allegation. Moreover, earlier communication shewed the College acting on the mistaken view that <u>any act or omission</u> which had consequences within paragraph 10 (c) of the Appendix of examples of Gross Misconduct

was itself an offence within that paragraph. Nowhere is a separate offence described as the subject of investigation.

12. When the Disciplinary Sub-Committee opened on 21st November its Chairman is recorded (in the Minutes seen by the Employment Tribunal) as beginning by saying:-

> **"As Mr Cadbury is not here can I ask the Director of Human Resources whether the correct procedure has been followed. Has Mr Cadbury been informed in writing, with 10 working days notice, of the nature of the offence and the date, time and place of the hearing?".**

Heather Barton answered "Yes" but she could have done so only by entertaining the mistaken view we have described as to the construction of paragraph 10, a mistake which the Chairman of the Disciplinary Committee then adopted by saying:-

> **"We have noted the nature of the offence using Heather's letter written on 6th November: an alleged major offence and a potential act of gross misconduct which has had a damaging effect on the reputation of the College".**

The letter of 6th November not only does not refer to any separate offence, it does not even refer to any allegation of a damaging effect on the reputation of the College. It will be important for us to see how the Employment Tribunal deals with these defects.

13. The hearing at the Employment Tribunal at London (South) was on the 17th and 30th January 1998 under the Chairmanship of Mr B.J. Stanfield. The unanimous decision with Extended Reasons was sent to the parties on 25th September 1998; it was that Mr Cadbury had been fairly dismissed. Mr Cadbury's Notice of Appeal was received by the EAT on 5th November. Its final form is as it was amended to be on 26th January 2000.

14. Chief among the arguments deployed by Miss Chudleigh for Mr Cadbury is firstly, that the Employment Tribunal either failed to consider whether the College had reasonable grounds, based on a reasonable investigation, for believing that Mr Cadbury had been guilty of gross misconduct or, alternatively, that the Tribunal failed adequately to explain how it arrived at a conclusion that the investigation had been a reasonable one. Miss Chudleigh was thus

invoking firstly **British Home Stores Ltd -v- Burchell [1978] IRLR 279** or, alternatively, **Meek -v- City of Birmingham D.C. [1987] IRLR 250**.

15. The familiar **Burchell** test looks into whether the employer honestly believes that the misconduct alleged had occurred, into whether he had reasonable grounds upon which to sustain that belief and whether he had carried out as much investigation into the matter as was reasonable in all the circumstances - see **W. Weddel & Co. -v- Tepper [1980] ICR 286 C.A.**, the case to which a report of **Burchell** was added as a note at **[1980] ICR 303**. **Weddel** shows how an employer's failure to give the employee a proper chance to refute the misconduct allegations made against him and to defend his name is a form of unreasonableness in relation to the investigation that may render the disciplinary stages so defective as to cause the **Burchell** test to be failed. Moreover, it seems to us axiomatic that an employee does not have a proper chance to refute misconduct allegations made against him and to defend his name if he is not told with sufficient clarity the nature of the charge of misconduct made against him. Where he is not told, either, in the manner which his contract provides for, that is likely only to make the employer's conduct even less reasonable.

16. That the Tribunal had had **Burchell** supra in mind is clear; it specifically refers to it. It said:-

> **"As elaborated below a proper investigation was carried out by the Respondent followed by a proper disciplinary hearing as is required by the Burchell test".**

However, the Tribunal failed to notice that the Disciplinary Sub-Committee which had heard the matter on 21st November had been misled (albeit, no doubt, innocently) by Heather Barton, into believing that Mr Cadbury had been informed in writing, with 10 working days' notice, of the nature of the offence with which he had been charged. No such notice had been given. Few rules are more fundamental than that a man should be told with what offence he stands charged when gross misconduct is alleged against him and, of course, in this case such a

fundamental requirement was bolstered by the express contractual provisions to the like effect which we have cited above.

17. It may be said that this point as to the Disciplinary Sub-Committee's having been misled was not taken, at any rate in so many words, at the Employment Tribunal. However, it was submitted to the Tribunal that the procedures adopted by the College had been unreasonable and that the College had failed to follow proper or contractual disciplinary procedures - see the Tribunal's Extended Reasons paragraph 3 (d) and further paragraph (a). Moreover, Employment Tribunal Rule 9 (1) charges Tribunals with more than a merely passive rôle. Given the argument that the Tribunal did describe as put before it by or on behalf of Mr Cadbury, given Rule 9 (1) and given the fundamental importance of an employee being told with what offence he is charged where gross misconduct is alleged (especially if his contract so requires), we feel unable to excuse the Tribunal's oversight on the ground that the misleading of the Disciplinary Sub-Committee was not in terms developed before it (assuming it was not). Once the stage is reached that the Tribunal should have been alert to the point whether it was specifically put or not, one inevitably moves to a conclusion that no Tribunal properly instructing itself could have held the disciplinary process here to have been reasonably conducted. That process breached both a fundamental requirement of good procedure and an express term of the employee's contract. The Tribunal erred in law in not so deciding.

18. Nor was that the only defect in the College's procedure. The disciplinary investigation and the hearing proceeded on the basis, which we have shown to be false, of there being a free-standing offence wherever any act or omission by a lecturer had a consequence falling within paragraph 10 of Appendix 3 as having "a damaging effect upon the reputation and integrity of the College". Not only was Mr Cadbury not adequately informed of the nature of the charge against him and not only was the Sub-Committee misled on that point but the acts or omissions which the College had in mind as constituting an offence and which the Sub-Committee

therefore examined were not, in any event, capable of being an offence of gross misconduct. We would have preferred to think that the Tribunal should have noticed that, even if not prompted to do so by detailed argument as to the construction of Mr Cadbury's contract as this defect is quite as fundamental as the one as to Mr Cadbury not being adequately informed of the nature of the charge against him. What troubles us, though, is whether Mr Cadbury can complain on this score - the true construction of his contract - without his having raised the point at the Tribunal. To the extent that the answer to that depends on the degree to which a Tribunal can be expected to go unbidden into questions of construction it is far from certain. Given that we have already settled on one ground for the disciplinary process being capable only of being held to be defective we need not decide whether Mr Cadbury can rely on the true construction of paragraph 10 of Appendix 3 as being a further one. With some misgiving we leave the issue as to construction at that.

19. There are, though, yet further shortcomings in the Tribunal's examination of the disciplinary process. At the Tribunal the College sought to justify its action by saying that Mr Cadbury's action "was not in the best interests of the Respondent and contrary to clauses 2.4, 2.5 and 13.1 of his contract of employment". The Tribunal said it agreed with those submissions. But at no stage had Mr Cadbury been duly charged with or had been required to defend himself against allegations of breach of those provisions. At the outset of the disciplinary hearing the Chairman had said, by way of a question:-

> **"I want to clarify that the major offence is only relating to the issue of the article appearing in the Times and not relating to the fact that he used an A level question in a degree examination paper".**

That received an answer from Heather Barton "That is correct". Clauses 2.4, 2.5 and 13.1 were not referred to at all during the disciplinary hearing, nor specified in writing to Mr Cadbury ahead of the hearing. It is far from clear what the Tribunal had in mind in mentioning these provisions (provisions, broadly speaking, as to working efficiently, promoting the policies of

the College, ensuring efficient operation of the College's business and the interests of its students and devoting full time and attention to and acting in the best interests of the College) but there is at least a suspicion that the Tribunal was justifying the disciplinary decision as to Mr Cadbury's gross misconduct on one score by reflecting that he was in any event guilty of it upon other scores, neglecting to notice that the first score was mistaken (as we have explained) and that the others were never put to him.

20. Further, the Tribunal held that:-

> **".... in ignoring a direct instruction not to talk to the Press the Applicant was guilty of misconduct".**

21. Mr Cadbury had not been charged with that or with any other form of disobedience. He had had a discussion with Mr Munday, Deputy Head of the Faculty of Business some days before he spoke to the Times' correspondent. On a subject quite different to that of examination questions Mr Munday had (so Mr Munday said):-

> **"..... commented that I thought the continuing complaint could lead to legal action or worse still, something in the Press".**

That was the only evidence at the disciplinary hearing of a discussion concerning the Press before Mr Cadbury was approached by the Times and the reference there to "something in the Press" was to something in the Press in response to complaints from students rather than complaints from Mr Cadbury. Mr Vickery candidly accepted that evidence of an express instruction to Mr Cadbury not to speak to the Press is not to be found. In holding that Mr Cadbury had ignored a direct instruction not to talk to the Press the Tribunal was upholding a complaint that had never been previously made and was arriving at a conclusion of fact in respect of which there was no supporting evidence whatsoever. That represents, needless to say, an error of law.

22. That the Tribunal erred in law is a matter that is remediable; there could be a remission to the same or to a fresh Tribunal. However, Mr Cadbury was dismissed after a disciplinary

investigation into a charge he had not been adequately told of and after a disciplinary hearing which was misled as to the information he had been given as to that charge. Moreover, what he was intended to be accused of was not itself an offence. Where, as here, the disciplinary stage was so flawed that no Tribunal, properly instructing itself, could have concluded that it satisfied the **Burchell** test, then no amount of reconsideration by the same or a by a fresh Tribunal can overcome that antecedent defect. Finding, as we do, that the disciplinary stage was so flawed, we are obliged to hold that Mr Cadbury was unfairly dismissed. The appeal must therefore be allowed. In the circumstances we need not rule upon Miss Chudleigh's arguments under Article 10 (Freedom of Expression) of the Human Rights Convention although we might well have felt unease, at lowest, upon an academic being found to have committed an act of gross misconduct where, upon his being approached upon a subject of public and academic concern by a journalist he had no reason to think would be irresponsible, he had done no more than having given, without malice being shown on his part, honestly believed-in answers, answers not shown to be false, to the journalist's questions. That, though, we need not explore further; for the reasons we have given we allow the appeal and declare Mr Cadbury to have been unfairly dismissed. There will need to be a Remedies Hearing which is to be before a different Tribunal than that which ruled on the decision which has been appealed against.