Appeal No. UKEAT/0367/05/MAA

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 1 September 2005
Judgment handed down on 19 December 2005

Before

HIS HONOUR JUDGE PUGSLEY

MR C EDWARDS

MR I EZEKIEL

MRS J L CRADDOCK — APPELLANT

(1) CORNWALL COUNTY COUNCIL
(2) THE GOVERNING BODY OF INDIAN QUEENS CP SCHOOL & NURSERY — RESPONDENTS

Transcript of Proceedings

JUDGMENT

Reserved Decision

APPEARANCES

For the Appellant	MRS HILARY WINSTONE (of Counsel) Instructed by: Messrs Graham Clayton Solicitors 1 Lower Avenue Heavitree Exeter EX1 2PR
For the First & Second Respondents	MR JAMES PALMER (of Counsel) Instructed by: Cornwall County Council Legal Services New County Hall Truro Cornwall TR1 3AY

SUMMARY

Sexual Discrimination: Direct & Unfair Dismissal: Reason for Dismissal

Justification of discrimination condition.

Constructive Dismissal: Ambit of constructive dismissal amounting to a breach of mutual trust and confidence.

HIS HONOUR JUDGE PUGSLEY

1. This is an appeal from the majority decision of the Employment Tribunal sitting at Exeter dismissing the Applicant's claim for unfair dismissal and sex discrimination. The case arises out of the Applicant's employment by the First Respondent at the primary school at Indian Queens as a teacher. The Second Respondent, the County Council, played no part save to give advice but as Tribunal observed they are a relevant party since they are ultimately liable for any compensation.

2. The Applicant was employed from the 1st of September 1997 as a primary school teacher. There may be a minor factual error in the decision which seems to suggest that she had been at the school at Indian Queens all her teaching career whereas the application to the Employment Tribunal states that the Applicant only commenced teaching at Indian Queens in the year 2000. Nothing turns on this since it is common ground that the Applicant taught for the years 2000/01 and 2001/02 in a combined reception and year 1 class and in 2002/2003 she taught in years 1 and 2 classes. She commenced maternity leave on the 1st September 2003 and on 24th September her child was born.

3. On the 21st of January 2004 the Applicant had a meeting with the head teacher. The Applicant brought a letter with her in which she requested to be considered for part-time working. There was also a discussion concerning job share with a Miss Stroud who expressed interest although, as she was only a temporary teacher, the post would have to be advertised.

4. The Tribunal set out the various objections there were to the Applicant returning on a part time or job share basis and these are set out in Paragraph 20-40 of the Decision.

"20.The first objection was that there would have to be Changes to the class and staffing structure which the Governors concluded were not reasonable. The claimant was to return the following September in a year 1 *I* 2 class working parallel to another year 1 *I* 2 class which was to be taught by Miss Gladding who was in her second year of teaching. It is not mentioned in those minutes that it was the practice of the school to provide mentoring in the second year of teaching which would not be statutory but this was a matter raised later. It was thought to be undesirable to change the system of parallel teaching with one teacher per class.

21. The evidence of the head teacher and Mrs Bragg one of the governors who is also a head teacher in another school enlarged on this objection. Their evidence is that the parallel class teaching system is an important feature of the school's work. It requires the two classes to operate on an equal basis and the tead1ers work closely together to plan, share resources, problem save and evaluate their work. Parents are assured that whichever class their child happened to be in would be operating on precisely the same basis as the other class to which their child might have been allocated. The Governors did not consider it desirable that this successful arrangement should be disturbed.

22. Nor did they want to take what might have been an alternative course transferring the Claimant to teach a higher age group. There had been some difficulties over the higher age groups and the deputy head and assistant head were to take over classes 3 and 4 where the respondents wanted strong teachers to raise standards in those classes. There were also apparently behavioural problems in the higher classes.

23. The head teacher's view was that neither the Claimant nor Miss Stroud were appropriate teachers for that particular group. We appreciate that both were fully qualified teachers but We .accept that it is within the head teachers reasonable purview to allocate teachers where she finds them most appropriate having regard to the children to be taught.

24. In short the first objection by the governors was to a change in the structure for the above reasons.

25. The next problem they saw was that continuity and consistency would be affected. They concluded that there would be a lack of opportunity for the various meetings between teachers and parents and there were concerns as to the reasonableness of expecting both job share teachers to give up an extra half day unpaid to -ensure opportunities for communication.

26. There were similar objections to disturbing the current pattern of school meetings which included breakfast briefings, key stage meetings, curriculum meetings and planning meetings. All teachers attend those and they were found to enhance the management of the school.

27. If the job share were to be manageable there would have to be discussions between the two job share teachers which would entail additional teachers having to be available to cover the times of those discussions.

28. It was recognised that other schools managed job shares and according to the head teacher her researches had identified two which were positive and encouraging but three in which the head had been very dissatisfied with the quality of provision for the class and school as a whole. The positive examples put forward by the claimant were also recognised and discussed.

29. There were two other matters which had relevance. Apparently the school had a number of emotionally vulnerable children, (incorrectly identified in correspondence as special needs children) and it was thought that one teacher to one class was important. The school was developing as a nurturing school in line with the current implementation of the Nurture Group which was the first in Cornwall.

30. A further concern was that it was proposed that Miss Gladding who was to be in charge of the class parallel to the claimant's would be mentored by the teacher in the parallel class. She would have day to day support and participate in joint planning. Though fully qualified and requiring no <u>statutory</u> mentoring she was nevertheless a junior member of the staff and the respondents regarded mentoring whether statutory or not a desirable requirement.

31. There was also concern over an arrangement they have with Roehampton University for placing trainee teachers. That is to the benefit of both the school and the trainees. It was not considered possible for successful placements where the job was being shared.

32. The conclusion that the respondents reached at that meeting was that a share in the current context 'i.e. with this class, in this class structure 2004-2005 at this time, would have a detrimental effect on the quality of education provided'.

33. Those reasons were included in less detail in the letter to the claimant dated 2 April giving her the respondents' decision. She was told of her right to appeal against the decision "and put forward any other information for consideration in response to this letter". She was invited should she wish to discuss the matter further with the head teacher. She did not take up the offer.

34. In accordance with the provisions of the Flexible Working Regulations a right of appeal was arranged by the respondents. A different set of governors dealt with the appeal. The Claimant was represented by her union official and there was an opportunity to deal with the various points raised in the respondents' earlier refusal.

35. We note that whilst the claimant in January was interested in reducing her hours and mentioned the question of part time working. Within a very short time .the proposal put forward by her was in respect of a job share only and both parties then concentrated on the merits or otherwise of that proposal. The question of any other part time working was not pursued either by the Claimant or by the respondents.

36. The appeal took some time. We do not have the time noted but from the hand written and typed notes which we do have, it is clear that there was a full discussion of the various difficulties in implementing the proposal. The full outcome was set out in a document recording what had occurred:

37. The respondents were concerned that the arrangements for hand over were totally inadequate. This was a repetition of the communication issue we have referred to before. They did not consider that any voluntary arrangement .for extra time for handover would be enforceable nor could it be monitored. Availability of other teachers could not be required. Arrangements for liaison and joint planning could not be guaranteed or required. Two parallel teachers or three in the case of a job share arrangement could in theory plan together but the full time teacher must not be prevented from having a midday break (which would be the case arising from the course envisaged). It was concluded that proper time would have to be set aside for liaison and communication and that would result in disrupting other classes and there would be cost implications. The proposals would require major changes to [be] **established and planned working patterns of other staff. It was concluded that would be detrimental to the current .effective arrangements.**

38. There would be an impact on professional development and lack of attendance at inset sessions. There would be impact on co-ordination of core subjects, on work routines and workload. A job share arrangement would not be an acceptable placement for trainees and that would affect the availability of the school to receive trainees.

39. Although it was acknowledged that job sharing occurred elsewhere the evidence was only anecdotal as to the positive effect. The respondents emphasised that quality of educational' provisions should be equivalent in parallel classes and that could not occur if there were different arrangements for planning and delivery of the curriculum in each of the two classes.

40. The current proposals put forward by the claimant would be different. In short they concluded that the system would not work in the particular circumstances of the school".

5. Ms Winstone on behalf of the Appellant has argued that the conclusions which the tribunal reached were based on a very selective view of the evidence. In particular she notes that the reasons canvassed at the governor's meeting for refusing the application:

a) Reasonable time required for hand over and communication between teachers and the fact that teachers could not be required to work out of classroom hours;

b) Attendance at meetings, including breakfast meetings, key stage meetings, curriculum meetings and planning meetings;

c) PPA (not contact) time to allow teachers to plan classes;

d) Traditional "one teacher to one class" approach preferred;

e) The taking of SA Ts test. to be carefully managed and planned with the teacher of the parallel tests;

f) The presence of "emotionally vulnerable " and "special needs" children requiring continuity of support;

g) The possibility of additional administrative and personnel costs;

h) The desirability that the teacher in the parallel class would require mentoring and that job share teachers could not provide this support;

i) The assumption that it would be impossible to have trainee teachers placement in a school with job share teachers and that it would jeopardise their relationship with teacher training colleges who pay the school to provide placements.

would effectively mean that the school would never have a job share or part time teacher and that contrary to the assertion at paragraph 32 of the decision which suggests that this was a decision linked to a particular set of circumstances these objections were in fact objections in principle which would mean that there would never be a job share or part time teacher. ′

6. Ms Winstone has suggested that many of the premises upon which the objections were based were not justified by the evidence that was before the Tribunal. The Respondents suggestion that personal attendance at the school for various matters throughout the entire week

was obligatory and necessary ignores, claims the Appellant, all the arguments that the outcome ~ if attended by one job sharer, could be conveyed by telephone, e mail or by word of mouth, as would take place in the case of normal absence from work. The tribunal found that such meetings enhance the management of the school.

7. Ms Winstone has submitted that it is impossible in this decision to identify what unique circumstances pertained in this school, as opposed to other schools and other places of work throughout the country, that such problems that did arise could not have been catered for by the expedients suggested. The suggestion that this would require staff to work outside school hours ignores the evidence before the tribunal- if evidence is needed -that in teaching there is an expectation that teachers will work out of school hours.

8. It is the Appellant's case that the problems which a job share might entail be they in parallel teaching, in providing continuity of teaching, in maintaining a lucrative teaching training contract have not been subject to the scrutiny which it is submitted are essential when an employer is seeking to impose a discriminatory condition.

9. We are well aware of the propensity of an appellate tribunal to usurp the role of the fact finding tribunal and not to give proper weight to the fact that the tribunal hearing a case has the opportunity, denied to any appellate tribunal, of hearing the evidence and evaluating its significance. This tribunal has in mind the criticisms made by Lord Hoffman in **Piglowska v Piglowske** 1999 3 All ER 632 of appellate courts judging decisions of first instance by an unrealistic yardstick. Moreover we note what Ward LJ called the besetting sin of appellate tribunals to subject a decision of a tribunal to too narrow a textual analysis (noted in **Hardy and Hanson PLC v Lax** [2005] IRLR 726 at Paragraph 25).

10. Mr Palmer has rightly reminded us of such cases **Retarded Children's Aid Society Ltd v Day** [1978] ICR 437 and **Jones v Mid-Glamorgan County Council** [1997] IRLR 685 which warn that the Employment Appeal Tribunal should avoid concluding that an experienced tribunal by not expressly mentioning something has overlooked it and should avoid an over myopic scrutiny of every part of a decision when the main outline is clear.

11. Mr Palmer submits that this appeal is an attempt to re-argue issues of fact in the false garb of an issue of law. He rightly points out that there is no allegation of bias. It is his submission that the Tribunal were entitled to reach the evidence it did on the evidence before it.

12. However what concerns each of the members of this tribunal is the absence of any balancing act between the discriminatory effect of the Respondent's actions and the justification for that action. At Paragraph 50 and 55 the Tribunal uses the word cogent of the reasons for imposing a justifiable requirement. In areas of indirect sexual discrimination there will often be cogent reasons for the imposition of the discriminatory requirement: indeed if there were no cogent reasons for a requirement a tribunal might well draw the inference of direct discrimination; The real issue, as was made clear by Lord Nicholls in Barry v Midland Bank PLC 1999 IRLR 582 at 587 is that:

> **"the ground relied upon as justification must be of sufficient importance for the national court to regard this as overriding the disparate impact of the difference in treatment, either in whole or in part. The more serious the disparate impact on women or men as the case may be, the more cogent must be the objective justification."**

13. Although never rising to an explicit statement we all consider that there is an implicit premise in this decision that the only proper work is full time work and that anything less than that is a matter for the grace and favour of an employer as an indulgence to an individual employee. At Paragraph 39 the Tribunal noted that it was acknowledged that job sharing

occurred elsewhere the evidence was only anecdotal as to its positive effect. It is not immediately obvious why anecdotal evidence should be rejected in such terms. The equality legislation is not solely concerned with conferring rights on those within specific groups: it is a recognition of the fact that there is a public interest in ensuring that society is not deprived of the abilities of those who have much to contribute by prejudice about colour, gender, disability or sexual orientation or religious belief. At Paragraph 55 the Tribunal put it in this way:

> **'We should consider whether the actions taken by the respondents in operating what is a discriminatory policy were justified. On the one hand the claimant is prevented from carrying on her career on a part time basis. There is clearly a detriment to her. On the other side the respondents are appointed to manage the school primarily in the interests of the children and the best education of the children is the object. They must however take into account the interests of the employees of the establishment".**

14. To say that employing part time employees can be inconvenient in that it requires an employer to make adjustments is a glimpse of the obvious. Yet the failure to make such adjustments to enable posts to be part time has a public as well as a private consequence in that it denies society the services of a wider pool of potential employees and in the context of school teaching reduces the number of parents; normally mothers, who can bring to their work the insight and experience which parenting can confer. In this case there is no audit trail whereby we can see in the decision that majority of the Tribunal has wrestled with the balancing act which is required rather than assuming that a cogent argument against the employment of a part time employee is to be equated with a finding that the ground relied upon as justification was of sufficient importance to over-ride the disparate impact of the difference in treatment, in whole or in part. Section 1(2) (b)(ii) requires an employer to show that the proposal is justified objectively notwithstanding its discriminatory effect. The general tenor of the decision was that it was up to the employee to put forward her proposals. The Tribunal's conclusion at Paragraph 50 (when considering constructive dismissal) that:

> **"Whilst the problem was not insurmountable, the reasons advanced by the respondents which we have referred to above were in our judgement cogent reasons"**

was an approach which permeated the decision on sex discrimination.

15. The issue of justification has recently been reconsidered by the Court of Appeal in **Hardys & Hanson PLC v Lax** 2005 IRLR 726 in which the authorities are reviewed, The Court of Appeal rejected the submission made on behalf of the employer that the tribunal needs to consider whether or not the employer's views were within the range of responses of a reasonable employer. The judgment of Pill LJ approved the judgment of Sedley LJ in **Allonby v Accrington & Rossendale College** [2001] IRLR 364 in which it was made clear that Employment Tribunals must apply the scrutiny which the law requires when a discriminatory condition is said to be justifiable and this requires a tribunal to weigh the justification against the discriminatory effect. The dissenting member of the tribunal, Ms Parkes, considered that the head teacher did not give sufficient help to the Applicant and does not consider that the issue of flexible working was properly considered. She considered if there had been proper discussions it is likely that a solution would have been found. Ms Parkes was severely critical of the competence and experience of those who handled the matter.

Conclusions

16. We consider that we should allow this appeal and direct that both the sex discrimination and unfair dismissal claims be reheard again by a different tribunal. We do not consider the Employment Tribunal submitted the Respondents objections to critical scrutiny and we do not consider that the requisite balancing act took place between weighing the discriminatory effect of the condition against the justification.

17. Although the issue of trust and confidence was clearly before the tribunal and considered by the dissenting member, the majority of the tribunal only seem to have considered whether the request for part time working was reasonably considered by the Respondent. The Tribunal do not analyse the case in terms of breach of mutual trust and confidence and

particularly in relation to the failure of the headmistress to support the Applicant. There is a marked difference in the approach of the dissenting member Ms Parkes who does deal with the issue in this way.

18. We consider that this decision is fundamentally flawed. We consider the two matters of sex discrimination and constructive dismissal are inherently connected. We do not consider it would be appropriate to remit this case under **Burke v Consignia plc** to obtain the Tribunal's further or more detailed reasons. The fact that one of the operators vigorously dissented from the decision of the others would be a further problem. We allow the appeal as to the dismissal of both the sexual discrimination and constructive dismissal actions and direct that they should be heard afresh by a different Tribunal.