Appeal No. UKEATS/0006/20/SS (V)

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 24th March 2021

Before

THE HONOURABLE LORD FAIRLEY

SITTING ALONE

MORAY HAMILTON APPELLANT

FIFE COUNCIL RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING)

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APPEARANCES

For the Appellant	MR COLIN EDWARD (Advocate) Instructed by Livingstone Brown 775 Shettleston Road Glasgow G32 7NN
For the Respondent	MR BARRY NICHOL, (Solicitor) Anderson Strathern LLP 1 Rutland Court Edinburgh EH3 8EY

SUMMARY

TOPIC NUMBERS:

11B - CONSTRUCTIVE DISMISSAL; Incorporation of collectively agreed terms.

30 – TIME BAR; Extension of time.

12 – DISABILITY DISCRIMINATION; Remedy.

The appeal was refused for the following reasons:

1) A collectively agreed term regarding the advertisement of permanent vacancies, though incorporated into an individual contract of employment, was truly collective in nature and did not give rise to enforceable individual rights on the part of the employee.
2) On the facts found by the Tribunal in this case, advertisement of such a vacancy did not amount to a breach of the **Malik** implied duty of trust and confidence.
3) There was no obligation on a Tribunal to consider an extension of the primary time limit under section 123 of the **Equality Act, 2010** where no evidence or argument in support of the exercise by the tribunal of that discretion was presented by the claimant. In any event, the Tribunal found that the alleged acts of victimisation and harassment to which the time bar would have applied had not been proved.
4) Where parties had produced to the Tribunal an agreed schedule of loss including agreed figures for compensation for hurt feelings, it was neither necessary nor appropriate for the Tribunal further to uprate such figures for inflation.
5) In awarding compensation for hurt feelings, the Tribunal had correctly addressed its mind to the question of causation and had properly considered the extent to which the Appellant's feelings were hurt by the proven act(s) of discrimination.

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THE HONOURABLE LORD FAIRLEY

1. Moray Hamilton ("the Appellant") appeals against certain aspects of a Judgment of an Employment Tribunal at Edinburgh (Employment Judge J. G. d'Inverno) dated 12 September 2019. The Respondent to the appeal is Fife Council ("the Respondent"). The appeal was heard at a sitting of the Employment Appeal Tribunal in Edinburgh on 24 March 2021. Due to Covid restrictions, the hearing was conducted by video conference. The Appellant was represented by Mr Edward, Advocate. The Respondent was represented by Mr Nichol, Solicitor.

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Background facts

2. Prior to September 2017, the Appellant worked for the Respondent as a teacher of Religious and Moral Education ("RME") at Queen Anne High School in Fife.

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3. The Appellant has the protected characteristic of disability for the purposes of the **Equality Act, 2010**. The particular disability is High Functioning Autism (also known as Asperger Syndrome or Asperger's).

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4. In the period until March 2016, the Appellant enjoyed a good working relationship with the head teacher at Queen Anne High School. In the period between March 2016 and the termination of the Appellant's employment in 2017, however, that relationship deteriorated significantly.

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5. The genesis of the deterioration in the relationship seems to have been a discussion between the Appellant and the Head Teacher on 2 March 2016. On that day, the

Appellant asked for discretionary leave because her daughter (then aged 11) was ill. The Tribunal found that the appellant erroneously construed a conversation with the Head Teacher as a refusal to allow her to go home to care for her daughter.

6. On the following day and, as the Tribunal ultimately found, unconnected to the events of 2 March, the Appellant was advised by the Head Teacher that there was a surplus of staff within the RME department at Queen Anne High School and that the Appellant, as the member of staff with the shortest service in that department, was the teacher liable to be transferred to another school pursuant to the applicable collective agreement (LNCT 06). The Appellant wrongly took this discussion to be linked to the discussion about her daughter the previous day.

7. Matters then deteriorated further in April 2016, when the Appellant wrote to the Respondent indicating that it had failed, in respects which she did not then specify, to comply with the LNCT 06 policy and indicated that if her concerns were not addressed, she would consider taking the matter to an Employment Tribunal.

8. In an effort to seek clarification of the respects in which the Appellant thought that the policy had not been complied with, the Head Teacher sought an impromptu meeting with the Appellant on 26 April 2016. The meeting did not go well. It turned heated, and voices were raised on both sides. The Appellant went home and, the next day, initiated the first of several grievances. She was thereafter absent due to stress or anxiety from April 2016 until her ultimate resignation in September 2017, with the exception of two days immediately prior to the end of the 2015/16 school year.

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The Claims to the Employment Tribunal

9. Prior to the termination of her employment the Appellant brought claims against the Respondent under the **Equality Act, 2010** ("**EA**"). Following her resignation, she brought a further claim of constructive unfair dismissal.

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10. The claims were all heard together by the Employment Tribunal. Given the number of issues involved, the evidence was extensive and was heard over 14 days between September 2018 and February 2019. The Tribunal then deliberated over 4 days and finally issued a reserved Judgment extending to 170 pages on 12 September 2019. The Tribunal found that in two respects the claims succeeded. The Tribunal concluded that the Respondent had failed to make a reasonable adjustment for the Appellant in its application of the LNCT policy to her. It also found that the Respondent had failed to make a reasonable adjustment for the Appellant in its conduct of the meeting of 26 April 2016. The Tribunal awarded compensation for hurt feelings in respect of both of those matters and dismissed all of the remaining claims. The claims that were dismissed included *inter alia*:

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a) the claim of constructive unfair dismissal
b) various claims of victimisation; and
c) various claims of harassment.

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11. The claim of constructive dismissal failed principally because the Tribunal found that the events said to constitute breaches of the underlying contract either had not been proved to have happened or, to the extent that they had been proved to have happened,

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did not constitute breaches of the contract. In one single respect the Tribunal found that the Respondent had breached the contract of the Appellant. That was by failing properly to apply paragraph 29 of the LNCT policy to her. The tribunal found, however, that such breach had not caused the Appellant's resignation, and further concluded that the Appellant had, in fact, affirmed the contract following that breach.

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12. The claims of victimisation under section 27 of the **EA** failed principally because the Employment Tribunal found that the alleged acts of victimisation had not been established on the facts. In any event, the Tribunal Found that, even if they had been so established, the claims in respect of those matters would have been time barred having been presented outside the primary time limit of section 123 of the **EA**.

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13. The claims of harassment (in terms of section 26 of the **EA**) failed, again principally because the ET found that the alleged acts of harassment had not been established on the facts. In any event, it concluded in respect of one of those allegations that, as it was said to have happened on 3 March 2016, and was not mentioned in the first ET1 (claim form to the Employment Tribunal) which was presented in late July 2016, the claims in respect of that matter would, in any event have been time barred having been presented outside the primary time limit of section 123 of the **EA**.

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<u>The Grounds of Appeal</u>

14. There are five grounds of appeal.

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15. The first (Ground A) is that the Employment Tribunal incorrectly construed the terms of the LNCT policy by failing to hold that paragraph 2 of that policy contained within it an obligation on the Respondent which was enforceable by the Appellant and which had been breached. Specifically, it is said that by advertising a vacancy in the RME department at Queen Anne High School during August 2017, the Respondent breached paragraph 2 of the LNCT policy. It is further argued that the same action constituted a breach of the **Malik** duty of trust and confidence (**Malik v. Bank of Credit and Commerce International SA (In Liquidation)** [1997] ICR 606).

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16. The second ground of appeal (Ground B) is that the Tribunal should have considered extending the primary time limit for the victimisation claims but failed to do so.

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17. The third ground (Ground C) is that the Tribunal mistakenly held that the ET1 presented in July 2016 did not include reference to the one element of the harassment claim which the Judge held, was time barred. Again, it is contended that is that the Tribunal should have considered extending the primary time limit for this aspect of the harassment claim but failed to do so.

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18. The fourth ground (Ground D) is that the Tribunal failed to uprate for inflation the compensation awarded in each case for hurt feelings in accordance with the Employment Tribunal's Joint Presidential Guidance of 5 September 2017.

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19. The fifth and final ground (Ground E) is that the decision to reduce the award in respect of the 26 April 2016 incident by 50% was perverse.

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Summary of Submissions for the Appellant

20. In relation to Ground A, Mr Edward submitted that by advertising a full-time position in the RME department in August 2017, the Respondent had breached paragraph 2 of the LNCT 06 policy in such a way as to entitle the Claimant to treat her contract with them as having been repudiated and so to resign.

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21. Clause 2 of the LNCT 06 policy states:

> "**Unless there are teachers who have been designated surplus, any permanent post will normally be advertised**"

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22. Mr Edward submitted that since the Tribunal had found (at paragraph 68 of its Reasons) that the LNCT 06 policy was contractual, the advertisement of the RME post at a time when the Appellant had been designated surplus at Queen Anne High School was a breach of her individual contract of employment. He submitted that the clear implication of paragraph 2 was that, where an individual teacher had been designated surplus, a permanent post would not be advertised.

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23. He further submitted that the advertisement of the position was, in the circumstances, an act which was objectively likely to undermine the relationship of trust and confidence between the parties in terms of **Malik**.

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24. In relation to Ground B, Mr Edward submitted that, where time bar has been brought into issue by a Respondent, the Tribunal must always consider the question of whether or not to allow an extension of the primary time limit on just and equitable grounds even

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where a claimant has presented no argument or evidence in support of the exercise by the tribunal of that discretion. Under reference to paragraph 333 of the Tribunal's Reasons, he further submitted that there were aspects of the merits of the victimisation claims that the Tribunal had failed to consider.

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25. Under Ground C, Mr Edward submitted that, in relation to the particular incident of harassment identified at paragraph 2.4(d) of the tribunals Reasons, the Tribunal was in error in concluding (at para. 305 of its Reasons) that such a claim had not been raised in the first ET1 which was presented in July 2016. He further submitted that the Tribunal was in error in concluding that that aspect of the harassment claim was first brought outside the primary time limit and, in any event, in failing to extend the primary time limit.

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26. Ground D raised the issue of whether the Tribunal ought, in making the awards for hurt feelings, to have uprated the compensation figures for hurt feelings in accordance with paragraph 11 of the Joint Presidential guidance of September 2017. Mr Edward submitted that the Tribunal was in error at paragraph 428(d) of its Reasons in concluding that the Presidential Guidance on uprating could not apply to the particular acts of discrimination that were proved in this case and had, accordingly, erred in failing to adjust the hurt feelings awards for inflation.

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27. Ground E relates only to the smaller of the two awards for hurt feelings. Mr Edward submitted that the Tribunal was in error in reducing the amount of compensation for hurt feelings by 50% by reason of contributory fault and thus in awarding only £2,300 instead of £4,600 in respect of the Respondent's breach of duty on 26 April 2016.

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Decision and Reasons

Ground A

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28. The LNCT 06 policy is a collective agreement. It is, of course, perfectly competent for the terms of a collective agreement to be incorporated into individual contracts of employment. That is what the Tribunal found happened in this case. Where there has been such incorporation, however, it remains necessary to consider whether any particular part of the collective agreement founded upon is apt to be a part of an individual contract of employment or whether, alternatively, it is essentially collective in nature between the employer and the relevant union. If this issue was canvassed to any extent before the Employment Tribunal, it has not found its way into the Judge's reasons. Since, however, that issue is one of contractual construction, it is a matter of law which I am at least as well placed as was the Employment Tribunal to consider.

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29. Collectively agreed terms which regulate matters such as pay, holiday entitlement and hours of work are all capable, if they have been incorporated into individual contracts, of giving rise to enforceable individual rights on the part of employees. On the other hand, collectively agreed terms which are truly collective in their nature are not. Agreements as to redundancy procedures will generally fall into that latter category (see **Alexander v Standard Telephones and Cables No 2 Limited** [1991] IRLR 286 and **Kaur v. MG Rover** [2005 IRLR 40).

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30. In the present case, paragraph 2 of the LNCT 06 policy does not seem to me to have been intended to confer the right on a particular employee to prevent the employer from advertising a vacant post or to entitle the employee to treat the employer's having done

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so as a material breach of contract. As with the redundancy procedures in **Alexander**, paragraph 2 is are no more than a broad statement of agreement between the employer and the union about what is expected to happen in a situation of surplus.

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31. That is clear from the use of the word "teachers" in the plural within paragraph 2 and, more importantly, from the total absence of specification in the paragraph of the situations in which an individual employee would be entitled rely upon its provisions. If Mr Edward's argument was correct, an employee in the position of the Appellant could prevent – potentially by interdict – the advertisement of a position for which they had no intention of applying simply because they (or possibly they and certain others) had previously been declared surplus. The vagueness of paragraph 2 and the lack of specification as to the circumstances in which it could be invoked by a particular employee lead inevitably to the conclusion that it was not intended to confer an individual right of the kind contended for by the Appellant. It follows that there can have been no breach of contract by the Respondent in advertising the position and the Tribunal's conclusion that it did not breach the contract by so doing was correct.

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32. Turning to the argument based upon **Malik**, and accepting for the moment the hypothesis advanced by Mr Edward that the advertisement of the vacancy would be objectively likely to damage the relationship of trust and confidence between the respondent and an employee such as the Appellant, a critical element of the Malik test that is often overlooked is the requirement that the action by the employer should have been *without reasonable and proper cause*. Here, the Tribunal plainly addressed that issue, not least at paragraphs 174-177 and 324 of its findings in fact and in its conclusion *inter alia* at paragraph 219 that the Respondent both acted in good faith and

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had reasonable and justifiable grounds for advertising the post. For those reasons any argument based upon **Malik** cannot succeed.

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33. Mr Nichol in his submissions also referred to a further reason for refusal of this first Ground of Appeal, namely the absence of any finding in fact that the advertisement caused the resignation. Mr Nichol pointed to several findings in fact particularly at paras 220, 226 and 227 which were indeed contra-indicators to the existence of such a causal link. I saw considerable force also in that submission and, had I not already decided the matter on the basis that I have indicated, I would also have refused Ground A also on that basis.

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Ground B

34. I reject the Appellant's argument that a Tribunal must always consider a just and equitable extension of the primary time limit even where no evidence or argument in support of the exercise by the tribunal of that discretion has been presented. Such a proposition is wholly unvouched by authority and is implicitly contradicted by what was said by Judge Peter Clark in **Rathakrishnan v. Pizza Express** [2016] ICR 283. At paragraph 9, he stated:

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> **"[I]f the claimant advances no case to support an extension of time, plainly, he is not entitled to one."**

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35. I also reject the subsidiary submission that was made by Mr Edward that there were aspects of the merits of the victimisation claim that the Tribunal had failed to consider. It is quite clear from what was said by the tribunal that it considered all three of the alleged detriments founded upon and, in each case, found that they had not been proved.

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In that regard, I refer to paras. 332-334 of the Tribunal's Reasons. That the Tribunal, at paragraph 333, made a particular point in relation to a particular aspect of one of those detriments does not change that position.

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Ground C

36. I agree that the Tribunal was in error at para. 305 of its reasons in concluding that that the particular allegation of alleged harassment identified at paragraph 2.4(d) of its Reasons was not raised in the first ET1 in July 2016. I also accept that the Tribunal erred in concluding that the claim in relation to the particular incident of harassment described at paragraph 2.4(d) was brought outside of the primary time limit.

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37. Neither of those errors is, however, capable of affecting the ultimate decision because the Employment Tribunal made a very clear finding in fact at para 310 that none of the allegedly harassing conduct – including that referred to in paragraph 2.4(d) – had been proved. In these circumstances, there is no ground for interfering with the Tribunal's decision to dismiss all of the claims of harassment including the claim described at paragraph 2.4(d).

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Ground D

38. I agree with Mr Edward that the Tribunal erred in its interpretation of the Presidential Guidance. It is plain from the reading of the Guidance that it was intended to apply not only to cases raised after 11 September 2017 but also, in the circumstances described in paragraph 11 of the Guidance, to proceedings raised before that date.

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39. What the Tribunal was presented with in this case, however, was an agreed schedule of loss (Reasons at paras. 420-423). Specifically, a schedule had been prepared on behalf of the Appellant with full figures for hurt feelings which were agreed by the Respondent as being appropriate if all of the alleged instances of discrimination were proved. Had all of the allegations of discrimination been found to have been proved, those were the figures that the parties jointly invited the tribunal to award. Neither party ever suggested to the Tribunal that before it could make any award those agreed figures required to be further uprated.

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40. In these circumstances, the task which the tribunal required to undertake, having determined which instances of discrimination were proved and which were not, was simply to apply to the proven instances of discrimination the agreed compensation figures which had been presented to it. That is precisely what the Tribunal did. That exercise was not wholly straightforward given the global nature of the agreed figures for hurt feelings. On a fair reading of its Reasons, however, the Tribunal did what was required of it by pro-rating the agreed figures to the particular instances of discrimination that it found proved. On that view of matters, the only possible relevance of the **<u>Vento</u>** bands was as a cross check to that pro-rating. In the particular circumstances of this case, therefore, it was not an error of law by the Tribunal not further to uprate the agreed figures further. Where neither party ever asked it to do so, such an approach would have been inappropriate.

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41. The Tribunal's erroneous understanding of paragraph 11 of the Presidential Guidance does not, therefore, vitiate its conclusion on remedy.

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Ground E

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42. What the Tribunal did, at paragraph 427 of its Reasons, was correctly to apply its mind to the question of the extent to which the Appellant's feelings were hurt by the proven act(s) of discrimination. That was an issue of causation. Whilst the way in which the Tribunal expressed itself on that matter at paragraphs 432 and 433 was perhaps somewhat clumsy, on a fair reading of its Reasons as a whole, the Tribunal concluded that the hurt feelings which the Appellant experienced as a result of the meeting on 26 April 2016 were only partly caused by the Respondent's wrongful failures to make reasonable adjustments. Specifically, the tribunal found that the hurt feelings were only caused to the extent of 50% by those failures. Its ultimate decision on compensation reflects that conclusion on causation and, cannot be said to be perverse or otherwise wrong in law.

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<u>Disposal</u>

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43. For these reasons, the appeal is refused.

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