Miss L Rustamova v The Governing Body of Calder High School

Appeal No. UKEAT/0284/11/ZT

Employment Appeal Tribunal

2 November 2011

2011 WL 5077828

Before His Honour Judge Birtles Dr B V Fitzgerald MBE LLD FRSA Mr P Smith

At the Tribunal on 2 November 2011

Representation

For the Appellant Mr Matthew Pascall (of Counsel) Instructed by: Davies Gore Lomax LLP 63 Great George Street Leeds LS1 3BB.

For the Respondent Mr Andrew McGrath (of Counsel) Instructed by: Calderdale Metropolitan Borough Council Legal Services Westgate House Westgate Halifax HX1 1PS.

Judgment

Summary

UNFAIR DISMISSAL – Reasonableness of dismissal

Employment Tribunal held (by a majority) that a school teacher was guilty of gross misconduct and the dismissal was fair. The EAT held there was an absence of reasoning in the majority reasons (two paragraphs) which made their Judgment not Meek compliant.

His Honour Judge Birtles

Introduction

1 This is an appeal from the decision of an Employment Tribunal sitting in Leeds in January and February 2011. The majority view of the Employment Tribunal was that the dismissal of Miss Rustamova was fair, and the claim was therefore dismissed. This was the Judgment of the two lay members; the Employment Judge dissented. Today the Appellant, Miss Rustamova, is represented by Mr Matthew Pascall of counsel, and the Respondent, the governing body of Calder High School, by Mr Andrew McGrath of counsel. We are grateful to both counsel for their written and oral submissions.

The factual background

2 This is set out in detail in paragraphs 3–46 of the Judgment of the Tribunal. The Appellant was a teacher at Calder High School, which is located in Hebden Bridge. Her employment commenced on 1 September 1998 and was brought to an end by her summary dismissal on 31 May 2009. Prior to the events that give rise to her dismissal, her career at the school was a successful one. The Tribunal record that in September 2002 she was promoted to a temporary pastoral role as Head of Year, and in September 2006 she progressed to the upper pay spine. In September 2008 she was appointed on a one-year temporary contract to the position of Social

Cohesion Co-ordinator. Her principal subject for teaching was English. The Headmaster of the school at all relevant times was Mr Stephen Ball.

3 In the academic year 2007–2008 the Claimant was asked to take responsibility for a group of young men who had had a very troubled school career; they were known as the “Commie Boys”. They were low achievers and their behaviour had led to repeated exclusion. The Tribunal record that in simple terms, as Miss Rustamova saw it, her responsibility was to endeavour to get them through to the end of their academic careers at the school without facing permanent exclusion and achieving some level of success either academically or in terms of personal development. She was successful at that. The Tribunal record that Miss Rustamova enjoyed the professional challenge that these young men presented her with, recognised that conventional schooling had failed them, and that to some extent unconventional means were required to gain their support and re-engage them within the school. It appears that her efforts in doing so were appreciated within the school and particularly by the Headmaster, Mr Ball.

4 One method or technique that Miss Rustamova adopted was to engage these young men to begin writing a story. Ultimately that story was turned into a book entitled “Stop, DoN't ReAD tHiS!” The Tribunal describe the novel as being “racy” and “risky” [sic]. It adopts many of the cultural perspectives or references of the young men. The Tribunal record that the book is littered with bad language, with reference to drug-taking and to criminal behaviour. The principal characters within the book are the Commie Boys, who are named as such by their first names. The story is based at Calder High School and the Claimant is also featured under her nickname, “Miss Rusty”. Some members of staff are named and others, it is said, are recognisable. In particular, one member of staff, who had long-standing professional difficulties with disciplinary issues concerning pupils in the school, was readily recognisable; two other pupils were recognisable through sexual innuendo.

5 The process of writing the novel by a chapter at a time commenced. The intention was to get the involvement of the group because the novel was essentially about them. In early March 2008 Miss Rustamova gave the Headmaster, Mr Ball, the first four chapters of the book. He wrote a note to Miss Rustamova, which is recorded in paragraph 8 of the Judgment. He said this:

> “Leonora, thanks for letting me read this (an R.S. mock exam invigilation provided the rest of the time I needed). Initially, I wasn't sure about how it would work as a concept, but I think it is a triumph. After the first chapter, I began to feel really engaged and was fascinated by the idea of the school break-in. How I wish we really could have a CCTV tape of ‘CHS greatest hits’; we wouldn't have to come up with such a funny idea! I'd like to come along and talk to the lads about this (in a positive way, of course) to have a conversation and to pass on my congratulations – a very different conversation from those I have often had with them previously. You've done a superb job with this. Let me know if I can help.”

6 The Tribunal record that at this stage the novel was perceived only to be part of a school project. At the beginning of May 2008 the Commie Boys were, no doubt along with others in the final year, no longer bound to attend the school, having completed their studies. There was a barbeque at the home of another teacher that involved the Appellant. On 27 June 2008 some of the Commie Boys spent the night at the other teacher's house. The name of that other teacher was Mr Stephen Cann; he was a friend of the Appellant. By August 2008 the Appellant had completed the book. She obtained the assistance of her husband, who was in the publishing business, to publish it by means of a website printer, lulu.com. The Appellant's husband arranged to be printed 12 copies of the book. At the same time the book was accessible on the internet. The publishing method was unknown to the Appellant at that time.

7 On 9 September 2008 a copy of the book was left with Mr Ball, together with a letter from the Appellant. By October 2008 copies of the book were printed and provided to the Commie Boys and to members of staff. Further printed copies were obtained. In the same month Mr Cann and the Appellant had a reunion with some of the Commie Boys, and on 19 December 2008 Mr Cann and the Appellant took the Commie Boys to Whitby for the evening. It would appear from the evidence that there were 22 hits on the website for the book.

8 We turn to 2009. On 19 January 2009 the Appellant had a meeting with Mr Ball and she was

asked a series of short questions that had been prepared before the meeting. The request to remove the book from the internet was made at that meeting and done on the same day, so the effect was that the book had remained on the internet for some five months. On 4 February 2009 there was a pre-disciplinary meeting attended by Mr Ball as investigator. The Appellant was represented by Ms Beverley Marshall, her union representative. We have seen some of the notes of that session. On 13 March 2009 the Claimant was invited to attend a disciplinary hearing at which six allegations were to be considered. They were as follows:

> "(1)– failing to observe confidentiality in a manner consistent with legal requirements.
>
> (2)– failing to take reasonable care of pupils under your supervision, with the aim of ensuring their safety and welfare: forming and maintaining inappropriate relationships with pupils/ex-pupils, contrary to established Safer Working Practice.
>
> (3)– deameaning or undermining pupils, parents and colleagues.
>
> (4)– undermining the authority of the Head Teacher.
>
> (5)– bringing the teaching profession into disrepute.
>
> (6)– bringing the school into disrepute with pupils, parents, partner agencies, within its local community and, potentially, more widely."

9 The disciplinary hearing was held by three Governors of the school, presided over by Mrs Jean Bradbury, the Chair of the Disciplinary Committee. They sat on 20 April, 5 May and 19 May 2009. By letter dated 22 May 2009 Mrs Bradbury wrote to the Appellant setting out the panel's conclusions. The letter appears at appeal bundle pages 66–72. In each case of the six charges the panel found the charge proved. At page 72 the letter goes on to say this as regards sentence:

> "In summing up the headteacher told us that 'trust has to be the basis of the relationship between employee and employer and, in his view, that relationship has been breached beyond repair by (you)'. Having heard your evidence he told us that in his view there was no hint of recognition that many of the things you have done cannot be justified and far from offering an apology or expressing regret you seem convinced that you are correct and that others around you do not match your high standards of excellence. You told us that in your view rather than failing professional standards you far exceed them. Mr Ball remained deeply troubled by your failure to understand that there are boundaries around your professional role that exist to safeguard you and the rights of children and parents. It is in these areas that you have demonstrated repeatedly a failure of judgement. He told us that your behaviours have had to be investigated and challenged to ensure that children are safeguarded and that the integrity of our school is maintained. He had begun believing that you had very seriously fallen short of the required standards of professional conduct and was more convinced of this having read and heard your defence than when he took the decision to suspend you.
>
> He told us very clearly that your manifest failings in meeting the required standards of professional conduct are wholly unacceptable in our school, and that your ongoing employment within it now has become completely untenable.
>
> What your representative has asked us to do is to consider your 'good intentions', and your past contribution to the school, and to consider any alternatives to dismissing you.
>
> We did this, but find that we accept the headteacher's case for your dismissal. Given our findings above concerning the allegations, we also take the view that they amount to gross misconduct, and a breach of trust and confidence, and we are therefore dismissing you with immediate effect from the employment of the school. Your last day of employment will therefore be 31 May 2009."

10 Against that decision Miss Rustamova appealed to a separate panel of governors presided over by Mr Robert Good, the Chair of the Disciplinary Appeal Panel. There was a hearing on 25

June 2009 and by letter dated 29 June 2009 Mr Good wrote to Miss Rustamova dismissing her appeal. The letter appears at appeal bundle pages 73–76. The Tribunal simply noted the existence of the letter; no point appears to have been taken at the Employment Tribunal hearing about the hearing before the Appeal panel, and we say no more about it.

11 Against that appeal and the decision to dismiss her Miss Rustamova made a complaint of unfair dismissal to the Leeds Employment Tribunal. The hearing took place on 11–14 January and 22 February 2011. The Reserved Judgment of the Tribunal, which appears at appeal bundle pages 1–19, was sent to the parties on 17 March 2011. The Tribunal set out the facts, as I have indicated, in paragraphs 3-46 of the Judgment. At paragraphs 47-51 they consider the submissions of counsel and the relevant law. I should say that both Mr Pascall and Mr McGrath appeared before the Employment Tribunal. At paragraphs 52-71 the Tribunal set out their findings. They record in paragraph 52 that they have been unable to come to agreement, with the two lay members forming the majority. The majority's Reasons are essentially set out at paragraphs 53 and 54 of the Judgment; they say this:

> "53. The majority conclude that a teacher has very high standards of professional conduct to maintain. In particular, Miss Rustamova was an experienced teacher, post threshold, and had successfully demonstrated to her senior managers that she had the necessary professional knowledge and attributes for progression to the upper pay spine. Issues relating to confidentiality and propriety of professional conduct should be second nature to a teacher. In the circumstances of this case, Miss Rustamova repeatedly acknowledged her faults and acknowledged that, in many respects, she had failed to meet the standards that her profession that was entitled to require of her. The Governors formed a view as to the seriousness of that conduct and the majority did not differ from their view or, even if they privately did, they recognise their obligation not to substitute their view for a view reasonably held by the Governors. The acknowledgement of fault on the part of the Claimant demonstrates to the majority that the Governors beliefs were reasonably held.
>
> 54. As to the issue of sanction, we recognise that other employers may have imposed a lesser sanction. They accept the submissions made by Mr McGrath that, at both the disciplinary and the appeal hearing, an experienced Trade Union Officer conceded, on behalf of Miss Rustamova, that it was an open issue for the Governors to consider whether the Claimant's conduct amounted to such a fundamental breach of trust to mean that she could never work at the school again or, at the appeal, that a final written warning would have been a more appropriate sanction. The majority therefore conclude that the Governors cannot be criticised for forming the view that dismissal was the appropriate sanction and, at any event, could not conclude that dismissal was outside the band of reasonable responses."

12 There is then a reference in paragraph 55 to the involvement of Mr Ball, but that does not concern us today. The views of the minority Employment Judge begin at paragraph 56. He reminds himself of the words of section 98(4) of the Employment Rights Act , records further facts, and raises a number of points that have not troubled us today, in the sense that they have not been raised by counsel.

The grounds of appeal

13 We begin by reminding ourselves that we are not deciding the merits of the Respondent's case against the Appellant; we are confined to ascertaining whether or not there are any errors of law in the Judgment of the Employment Tribunal that justify this appeal being allowed. In this case the Judgment of the Employment Tribunal was of the two lay members. We remind ourselves that we must not substitute our views for the views of the majority of the Tribunal; neither, of course, must we substitute our views of the decision of the Respondent Governors either in respect of the disciplinary hearing or the appeal.

14 Before turning to the grounds of appeal we should indicate that we have been taken at some length by Mr McGrath and indeed by Mr Pascall through the notes of the pre-disciplinary meeting on 4 February 2009, as well as part of the notes of the disciplinary hearing itself in April and May

2009. We have also been referred to a few passages in part of the notes of the hearing before the appeal on 25 June 2009 but, as we have already indicated, we are concerned with the Judgment of the Tribunal.

15 There are effectively four grounds of appeal. The first, Ground 1, is that the reasoning of the majority does not comply with *Meek v City of Birmingham District Council [1987] IRLR 250* . We were referred by Mr Pascall, and there is really no challenge to the correctness of these authorities, to the decisions in Meek ; *Tran v Greenwich Vietnam Community [2002] IRLR 735* ; Sarwar v SKF UK Ltd [2010] UKEAT/0355/09 (an unreported decision of this Tribunal); *English v Emery Reimbold and Strick [2002] EWCA Civ 605* at paragraphs 6(3) and 19; and Greenwood v NWF Retail Ltd UKEAT/0409/09 , and finally *Fuller v The London Borough of Brent [2011] EWCA Civ 267* . The law is well known. Mr Pascall submits that if one looks at the two paragraphs dealing with the majority's reasoning, it is not Meek compliant, to use the phrase used by Sedley LJ in Tran and widely adopted thereafter. We agree. Reading that passage in paragraph 53, the critical part seems to us to be this:

> "The Governors formed a view as to the seriousness of that conduct and the majority did not differ from their view or, even if they privately did, they recognise their obligation not to substitute their view for a view reasonably held by the Governors."

16 Two matters arise there. The first is that, "The Governors formed a view as to the seriousness of that conduct and the majority did not differ from their view." That is simply a bald statement of agreement with the disciplinary panel of Governors and the appeal panel of governors. In this case there were six separate charges. This Tribunal would have expected the majority to analyse, first, the charge; second, the evidence; and third, reach a conclusion. They have not done so in respect of any of the six charges. The second concern goes to the question of reasonableness. The sole reason given by the majority is that the acknowledgement of fault on the part of the Claimant demonstrates to the majority that the Governors' beliefs were reasonably held. Again, there is no analysis. In the course of his very cogent submissions Mr McGrath took us to what he called, "the admissions made by the Appellant," at the pre-disciplinary hearing, the disciplinary meeting and the appeal meeting, and we readily acknowledge that he made cogent submissions as to why the majority were entitled to reach the conclusions that they did. The difficulty with that submission is that it simply does not appear in paragraph 53 or indeed anywhere else in the Judgment; there is simply no analysis.

17 Ground 2 relates also to paragraph 53 and, indeed, grounds 1 and 2 really, we think, run together. For the reasons that I have just given, we think that the Appellant succeeds on Ground 2 as well.

18 Ground 3 relates to the reasonableness of the sanction of dismissal, and in essence is that the Tribunal were wrong in placing any or any significant weight to the submission made at the disciplinary hearing by the Appellant's trade union representative that the issue whether to summarily dismiss or issue a final written warning was open to the panel. Mr Pascall argues that the real issue is not what the trade union representative thought but that the Tribunal had a separate and free-standing duty to consider the options open to the Respondent in the light of its own disciplinary procedures. It is important to look at what the Tribunal said in relation to sanctions. Paragraph 54 says this:

> "As to the issue of sanction, we recognise that other employers may have imposed a lesser sanction. They accept the submissions made by Mr McGrath that, at both the disciplinary and the appeal hearing, an experienced Trade Union Officer conceded, on behalf of Miss Rustamova, that it was an open issue for the Governors to consider whether the Claimant's conduct amounted to such a fundamental breach of trust to mean that she could never work at the school again or, at the appeal, that a final written warning would have been a more appropriate sanction. The majority therefore conclude that the Governors cannot be criticised for forming the view that dismissal was the appropriate sanction and, at any event, could not conclude that dismissal was outside the band of reasonable responses."

19 I put to Mr McGrath at the close of his submissions that the Tribunal do not appear in that paragraph, which is the only one that deals with sanction, to have dealt with the reasons given by the Respondent; they are contained at the end of the letter written by Mrs Bradbury, the Chair of the Disciplinary Committee, and appear at appeal bundle page 72, which I have already read. There is simply no discussion of page 72 in paragraph 54 of the majority Judgment. We were told, and obviously accept, that Mrs Bradbury and Mr Good both gave evidence at the Tribunal about reasons for finding that this was a case of gross misconduct, and that therefore summary dismissal was appropriate, but there is simply no reference in the Judgment to that and indeed certainly no consideration in paragraph 54 of that evidence. Again, we would have expected a full analysis from the majority. On the face of it paragraph 54 seems to suggest that the only reason they found that the Governors could not be criticised for forming the view that dismissal was the appropriate sanction or that dismissal was not outside the band of reasonable responses was a concession or statement made by the trade union officer at the hearing. We have looked at what the trade union representative said at both hearings, but in effect she was leaving it to the Respondents to reach a decision. As we say, we allow the appeal on Ground 3 because of the lack of analysis of reasons. We do not accept Mr Pascall's submission that this Disciplinary Panel cannot consider the submissions made by a representative and take them into account; not to do so would negate the purpose of having a representative there at all. Likewise they are entitled to take into account the representations made at the disciplinary hearing by Mr Ball, but that is a matter of weight in both cases; it does not exempt the majority from carrying out a reasoned analysis of the reasons given by the employer for (a) finding gross misconduct and (b) finding that a dismissal was within the band of reasonable responses of a reasonable employer. This whole case, of course, has to be read against the background of *British Home Stores Ltd v Burchell [1978] IRLR 379* .

20 Ground 4 is a perversity challenge. The test for perversity is well known; see *Yeboah v Crofton [2002] IRLR 634* at paragraphs 93-95 (Mummery J). It is trite law that the hurdle is a high one and we have carefully considered the submissions made by Mr Pascall, but we do not think that the reasoning of the majority is perverse in any of the four grounds that he sets out; we do not propose to go through them in turn. This is a case not of perversity but of absence of reasoning. For those reasons we allow the appeal on Grounds 1, 2 and 3 and dismiss the appeal on Ground 4.

Remedy

21 Mr Pascall asks us to dispose of this case by remitting it to the same Employment Tribunal to give its Reasons in the light of our Judgment. Mr McGrath agrees, and so the order we are going to make is that the case be remitted for a further hearing before the same Employment Tribunal, to be read in the light of this Judgment. It does not mean that further evidence can be called, but we would expect the Employment Tribunal to receive submissions from both parties before it reaches its Judgment.

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