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When are Article 8 rights engaged in the context of an unfair dismissal claim and how should the engagement of such rights be approached by the tribunal?

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Q v Secretary of State for Justice UKEAT/0120/19/JOJ

Facts

The claimant was employed by the respondent from 1994 until November 2014 as a Probation Service Officer ("PSO"). In 2014 there was an incident at the claimant's home involving the claimant, her then partner, and her daughter, who was then a teenager. It was alleged that the claimant had been violent towards her daughter, something she had always vehemently denied. Social Services became involved and her daughter was placed on the Child Protection Register ("CPR").

Social Services contacted the respondent about this incident (given the nature of the claimant's role) and advised that they had told the claimant that she should raise this with the respondent herself, which she did not. The claimant had also refused to engage with Social Services in relation to the matter. This led to a disciplinary process. The claimant argued that she had advised the head of the National Probation Service ("NPS") cluster about the altercation with her daughter (albeit not the involvement of Social Services), she had given Social Services permission to advise her employer of the situation, and that there was no change in circumstance because her daughter had been on the at risk register before the incident, and simply remained on it. However it was found that she had advised the head of the NPS shortly prior to the incident that her daughter had been removed from the CPR and thus the respondent did not know following the more recent incident that her daughter was once again at risk. The claimant was dismissed.

The claim

The claimant brought a claim for unfair dismissal, alleging (inter alia) that the dismissal constituted a breach of her Article 8 Convention right to respect for private and family life.

Article 8 provides that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ET decision: the dismissal was fair. It was found that the claimant would have been aware of the need to tell her employer everything about the incident, bearing in mind that she had been given a final written warning previously about an almost identical incident, and that she was aware of the respondent's code of conduct which required her to have a high standard of integrity and personal conduct.

In respect of her Convention rights, the tribunal found that the claimant's article 8 rights were engaged, in that her personal life at home including very private issues surrounding domestic violence, the welfare of her children and her interactions with social services were considered by her employer when dismissing her. However they considered that the respondent's interference with her private life was proportionate, relying on the case of Pay v Lancashire Probation Service ECtHR 32792/05. The Tribunal found that, as in the Pay case, the respondent had demonstrated that the probation service "*is an integral part of the criminal justice system and therefore its employees can be held to account for relevant matters occurring in their private life. The respondent is required to work as a statutory partner with social services and to ensure that its staff behave in a way which is commensurate to their obligations to the public in terms of safeguarding the vulnerable and children. The information from the claimant's private life (that she was not cooperating with social services and that social services had judged that her daughter was at risk from the claimant's behaviour) was clearly capable of bringing the respondent into disrepute and if known to the public could undermine public confidence in the probation service. The respondent was therefore justified in considering these private matters when considering whether it could continue employing the claimant*".

The claimant appealed, arguing that the tribunal had erred in its consideration of the impact of her Article 8 rights when finding that it was proportionate (and hence within the band of reasonable responses) to have dismissed her for not informing the respondent sooner than she did that she was accused of wrongful conduct by social services and that her daughter was once again on the CPR, having regard to the intensely private and sensitive nature of the subject matter, the finding that it was not in the public domain, and hence the implications for whether it could adversely affect the respondent's reputation.

EAT decision

The claimant argued that the Tribunal had failed to properly identify what was the degree and nature of the interference with the claimant's Article 8 rights, properly to analyse the justification, and consider which part of Article 8(2) applied to it, by reference to its actual words, including consideration of whether it was prescribed by law and necessary in a democratic society, and whether it answered a pressing social need. It had then failed to identify the specific aim falling within Article 8(2), or what the pressing social need was, and had not properly balanced the aim or justification against the interference. The Tribunal then failed properly to carry out, for itself, the balancing exercise between the two, and whether the interference was no more than proportionate and necessary to the aim.

The EAT considered the wording of section 3 of the Human Rights Act 1998, which provides that *"So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."* Reference was made to the decision of <u>Pay v Lancashire Probation Service</u> [in which a probation officer, who dealt with sex offenders, was dismissed due to running a BDSM website], in which the EAT held that, where the employer is a public authority, the Tribunal should interpret section 98(4) ERA as requiring it, when deciding whether the employer acted reasonably or unreasonably, to do so "*having regard to the applicant's Convention rights*." Further, a public employer would not, for those purposes, be acting reasonably, if it had violated the employee's Convention rights.

The EAT then considered <u>Pay v United Kingdom</u> [2009] IRLR 139, a case before the European Court of Human Rights, in which it was found that:

"An interference with the rights protected by that Article can be considered justified only if the conditions of its second paragraph are satisfied. Accordingly, the interference must be "in

accordance with the law", have an aim which is legitimate under this paragraph and must be "necessary in a democratic society" for the aforesaid aim. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a pressing social need and, in particular, is proportionate to the legitimate aim pursued."

Consideration was also given to the case of Hill v Governing Body of Great Tey Primary School [2013] ICR 691, in which the EAT said that the correct approach in cases in which Convention rights were engaged was as follows:

> **(i) to ask whether what had occurred could fall within the ambit of the right to freedom of expression and;**
> **(ii) if so, then to hold that the school as a public body would be bound to respect the exercise of that right, unless it could be qualified by Article 10(2). That would have involved considering whether the restriction on the right to freedom of expression which was complained of could be justified in accordance with Article 10(2). Accordingly, the Tribunal would have to;**
> **(iii) identify the aim which the restriction on free speech sought to serve – which must be one or more of the aims expressly set out at 10(2) ("Interests of National Security" etc.). Here, two aims were potentially legitimate – the protection of the reputation or rights of others, and preventing the disclosure of information received in confidence;**
> **(iv) satisfy itself that the restriction or penalty imposed in the light of that aim was one prescribed by law. That does not mean, in the UK context, that it must be provided for by statute: a common law right will suffice. A contractual term requiring respect for confidential communications would, for instance, be sufficient. So, too, would a common law right to confidentiality;**
> **(v) if so, consider if the restriction or penalty was "necessary in a democratic society". This involves looking to see whether the measure concerned was appropriate to the legitimate aim to which it was said to relate, and that the extent of the interference which it brought to the exercise of the right was no more than proportionate to the importance of the particular aim it sought to serve. This balancing exercise was, in the first place, for the school to perform, or, in the Polkey context, to be considered as if it had performed. However, the test in the present case for the Tribunal is not whether the school would be entitled to take a particular view of the exercise of Article 10 rights but whether that was where the law actually strikes the balance. The Tribunal has to make its own assessment: it does not apply a review test.**

HHJ Auerbach found that whilst it was correct that Hill identified that, where the claim is against a public body, there is an additional legal consequence, (namely that in addition to the Tribunal having a duty to weigh the impact of the dismissal upon Convention rights, and whether it is proportionate, a public employer also itself has that same duty when taking its decision), in practice this feature is unlikely to make any real difference. This was because in a case involving a public or a private employer, the Tribunal must, in deciding whether the dismissal is fair or unfair, come to its own view as to whether the imposition of the sanction of dismissal involved a disproportionate and unjustified interference with Convention rights, or not. If it did, then this will take the dismissal outside the band of reasonable responses. If not, then this feature of the case will not do so. That will be the position regardless of whether the employer had a duty of its own, whether, if so, it applied its mind to the question, and, if it did, whatever conclusion it came to. It is always the Tribunal's conclusion that, ultimately, must decide the point. He found that the Tribunal had properly considered whether the Convention right was engaged and if so, whether the sanction was a disproportionate interference with them.

He found that the Tribunal properly considered that the respondent was not requiring the claimant to divulge every detail of the involvement of Social Services; rather they required her to divulge that they were involved, and that there was an issue regarding the claimant's own behaviour.

As regards justification, it was concluded that "*the fact that the Claimant was required to provide this information as part of her express or implied duties as an employee towards her employer, is sufficient to meet the need for any interference with her Convention rights to be "prescribed by law*". Further, the Tribunal had found that the imposition of this requirement was to safeguard the effective discharge of its functions, in particular by safeguarding its reputation and relations with the Local Authorities with which it worked. HHJ considered that it could not be said that these objectives fell outside those contemplated by Article 8(2).

As regards the argument that there was a disproportionate interference because the matters were not in the public domain, and as such, there was no real risk of reputational damage, the respondent was entitled to rely on the fact that whilst the claimant herself did not work with the specific Local Authority whom had been involved with her daughter, the respondent itself did. The Tribunal was entitled to conclude that there was a well-founded fear that the matters could damage their reputation with its statutory partners even if the general public

did not learn of them. Further, it could not be said that the Tribunal ought to have entirely discounted the risk of these matters becoming more widely known.

Commentary

The decision provides a fresh look at the extent to which a public sector employee's private life can be a matter of concern for their employer, and when a dismissal can be justified when an employee refuses to divulge certain private information. The judgment contains a helpful summary of the pertinent case law on this issue and sets out the stages which a Tribunal must go through when a question as to interference with Convention rights is raised.

As regards the applicability of Convention rights going forward, the fact that the UK have exited the EU on 31/01/20 does not have a direct impact on the application of such rights. The European Convention on Human Rights is an international treaty which was signed by the UK in 1950, in which numerous states signed up to upholding certain fundamental rights. The Human Rights Act enables citizens to bring cases in UK courts to uphold their ECHR rights and Brexit will have no direct impact on the UK's obligations under the ECHR.

However the European Charter of Fundamental Rights brings together the fundamental rights of everyone living in the EU, and this will no longer apply. Whilst the government has argued that this would not impact upon or reduce citizen's rights as the Charter does not create new rights but simply codified the rights that already existed, there is some question marks as to whether or not this is in fact correct. For instance, the Charter enables individuals to bring legal action to strike down domestic legislation that is incompatible with a fundamental right, which is not possible under the ECHR. Furthermore, the Charter has led to the development of new rights, which the UK would no longer have to adhere to. Time will tell.

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