Decision to remove magistrate for "pre-conceived beliefs" not religious discrimination nor victimisation

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Page v Lord Chancellor and ors [2021] EWCA Civ 254

Background

1. Mr Page was a magistrate sitting in Kent. Upon his appointment, he was required to make the following declaration and undertaking, which he signed in March 1999:

   > "I acknowledge and undertake that it will be my duty to administer justice according to the law, that my actions as a magistrate will be free from political, racial, sexual or other basis, that I will be circumspect in my conduct and maintain the dignity and good reputation of the magistracy at all times in my private, working and public life".

2. Advice was circulated in 2012 advising all levels of the judiciary not to communicate with the media and to avoid public comments either on general issues or specific cases which could cause others to doubt their impartiality.

3. Whilst sitting as a panel member on a Family case in July 2014, Mr Page expressed views about the appropriateness of the adoption of a child by a same sex couple based on his religious views and refused to sign the order approving the adoption.

4. A conduct panel hearing took place on 2 September 2014, which upheld the complaint against him and found him guilty of judicial misconduct, specifically that it was wrong for him to make a presumption that a same sex adoption was not in the best interests of the child, rather than reaching a decision based on the evidence before the court.

5. He was formally reprimanded by the Respondents and, following an interview to the BBC in March 2015 was the subject of disciplinary proceedings culminating in his removal as a magistrate in March 2016.

6. The contents of the letter informing the Appellant of the decision were set out in some detail by the Court of Appeal, and Lord Justice Underhill made the following observation:

> *"The Respondents do not say, and their reasons do not mean, that a magistrate is not entitled to hold strong beliefs which may have a bearing on issues that they have to decide: very many magistrates, and judges generally, hold such beliefs, often rooted in a religious faith. The essential point is that* ***they must in deciding such issues put those beliefs (so far as necessary) to one side and proceed only on the basis of the law and the evidence adduced****"*[1] [emphasis added]

The Employment Tribunal and EAT

7. Mr Page brought proceedings against the Respondents for discrimination and harassment in respect of religion or belief and victimisation. Those claims were dismissed by London South Employment Tribunal in March 2018. He appealed to the EAT but was only permitted to proceed in respect of his victimisation claim. His appeal, held in May 2019, was also dismissed.

The Court of Appeal

8. The sole focus for the CoA was on the question of whether "the second round of disciplinary proceedings against him were brought, and he was in due course removed, because he had complained that the first round (culminating in the reprimand) was discriminatory"[2].

9. The Grounds advanced were as follows:

Ground 1: That the ET had wrongly identified the protected act which Mr Page had relied upon (and this error had not been rectified before the EAT)

[1] Para 26 CoA Judgment
[2] Para 28 CoA judgment

10. The Court of Appeal considered that the issue being advanced was that the analysis should focus on the evidence of what the Appellant told the media, not what was broadcast and that the protected act (specifically making an allegation that he had been discriminated because of his religious belief) included his stating what his religious beliefs were.

11. Lord Justice Underhill agreed that in considering whether a protected act had been done it was important to look past the broadcast words, but in his view, that is exactly what the ET had done in this case. Furthermore the ET had found the Appellant's participation in the BBC report was a protected act, albeit that it had reached that conclusion by a different route.

Ground 2: That the ET had misapplied *Martin v Devonshires Solicitors* and the "severability" of elements of the protected act

12. Lord Justice Underhill had given judgment in the *Martin* decision when it was before the EAT. His position in *Page* was that the decision in *Martin* did not refer to a term of "severability" as suggested by the Appellant and that Ground 2 was not an apt way of expressing the principle which *Martin* established.

13. Lord Justice Underhill went through the *Martin* decision in some detail at paragraphs 54-55 of the CoA judgment, but focused in on paragraph 22 of the *Martin* decision where the EAT held as follows:

> "The question in any claim of victimisation is what was the 'reason' that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and if not, not. *In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable* [emphasis supplied]".

14. Therefore, dismissal (or some other form of detriment) in response to a discrimination complaint "does not constitute victimisation if the reason for it was not the complaint as such but some feature of it which can properly be treated as separable"[3].

15. The decision to remove the Appellant was, in the Court of Appeal's view, not in "*Martin* territory", as with the recommendations of the Conduct Panel and Disciplinary Panel as the ET had "found in the case of both Panels that the reason for their recommendations had nothing to do with the fact that the Appellant had…complained about his having been disciplined previously"[4]. The Court of Appeal turned its attention to the decision that there was a case to answer made by Dr Taylor for the Respondents. In his witness statement, he had identified three reasons for the decision that there was a case to answer as follows:

    (a) that the Appellant had failed to follow the advice which he had been given regarding contact with the media,

    (b) that this had led to negative publicity, involving criticism of the Respondents, which could bring the judiciary into disrepute, and

    (c) that he appeared to be in breach of his judicial oath.[5]

16. The Court of Appeal focused on (b), as this aspect was "less straightforward" because criticism of the Respondents could "only be [Mr Page's] criticism of [the Respondent's] previous conduct in [which he says was discriminatory] reprimanding him"[6].

17. The Court of Appeal concluded however as follows:

    > *"[That there was an] essential finding…that Dr Taylor was genuinely not motivated by the Appellant having made a complaint, or by his having done so publicly, but by what he perceived as potentially a deliberate attempt to put illegitimate pressure on the Respondents of a kind inappropriate to a judicial office-holder. In my view it was open to the Tribunal to regard that a separate reason for his action, and there is no basis for our interfering with that assessment."*[7]

[3] Para 55 CoA judgment
[4] Para 61 CoA judgment
[5] Para 62 CoA judgment
[6] Para 65 CoA judgment
[7] Para 65 CoA judgment

Ground 3: That the EAT had conflated the "reason" for the detrimental treatment with the motivation for the treatment and that a benign motive for detrimental treatment is no defence to a claim under s13 or s27 EqA 2010

18. The Court of Appeal dealt swiftly with this ground. Lord Justice Underhill made the following observation:

> "the law in this area is well understood following a series of cases including the two to which Mr Diamond specifically refers – *Amnesty International* and the *Jewish Free School* case. His objection is apparently to the EAT's use of the word "motivation", which he treats as identical to "motive". It is indeed well established that, as he puts it, "a benign motive for detrimental treatment is no defence to a claim for direct discrimination or victimisation": the *locus classicus* is the decision of the House of Lords in *James v Eastleigh Borough Council* [1990] UKHL 6, [1990] 2 AC 751. But the case-law also makes clear that in this context "motivation" may be used in a different sense from "motive" and connotes the relevant "mental processes" of the alleged discriminator"[8]

Ground 4: the fact that a person has expressed discriminatory views does not necessarily mean that they will allow those views to affect their professional conduct (relying on the case of *R (Ngole) v University of Sheffield* [2019] and Article 10 ECHR)

19. The Court of Appeal gave short shrift to this ground:

> *"That [scenario] has no application to the circumstances of the present case. We are not concerned here with a mere "public perception" or an incorrect assumption that the Appellant's views about adoption by same-case couples would affect his conduct as a magistrate: the whole point is that he himself had said it would affect his conduct. I therefore see nothing in this ground."*[9]

Ground 5: That the EAT erred in law both in upholding the ET's original decision on justification and in holding there was no interference with Mr Page's Article 10 rights

20. The Court was satisfied in upholding the ET's findings on justification specifically that the ET was entitled to find that making the statement in respect of his views

[8] Para 69 CoA judgment
[9] Para 78 CoA judgment

compromised his judicial impartiality and that proportionate sanctions were justified in accordance with *Baka v Hungary* 20261/12, [2016] ECHR 568.

Comment

21. This is a perhaps unsurprising outcome but a useful restating of the law in respect of both victimisation and religious discrimination. In the concluding remarks of the leading judgment and in dismissing the appeal on all grounds, Lord Justice Underhill said as follows:

> "*The multiplicity of points advanced by Mr Diamond which I have had to address may make the case look less straightforward than it truly is. The Appellant was removed as a magistrate because he declared publicly that in dealing with cases involving adoption by same-sex couples he would proceed not on the basis of the law or the evidence but on the basis of his own preconceived beliefs about such adoptions.* ***He was not, which was the only issue on this appeal, removed because he had complained about the earlier disciplinary proceedings against him. The basis on which he was dismissed was entirely lawful and involved no breach of his human rights***."[10] [emphasis added]

22. It will be interesting to see if there is any further attempt to challenge to the decision reached in this case to the Supreme Court.

[10] Para 83 CoA judgment

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