

Marriage discrimination: Gould v St Johns Downshire Hill UKEAT/0002/20/BA

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Background

1. The Claimant, Mr Gould, was a vicar of an evangelical Christian church, St Johns, Downshire Hill, in Hampstead, London (the Respondent). In August 2016, he was dismissed from his role. The reason given by the Respondent was an irretrievable breakdown in relations between the Claimant and the Trustees, the Leadership Team, certain members of staff and other members of the congregation. The Claimant alleged that the reason for his dismissal was the breakdown of his marriage in May 2015. He brought a claim to the ET, alleging direct marriage discrimination, and that his dismissal was for a discriminatory reason and procedurally unfair.
2. This is the second time this case has reached the EAT. Previously, the Respondent made an application to strike out the Claimant's claim on the basis that the pleaded case was misconceived in law. This was accepted by ET but overturned on appeal by the EAT, which held that, on a reasonable reading of the Claimant's pleaded case, the facts gave rise to an arguable case that it was his married status and his marital difficulties as a married man that led to his dismissal (see *Rev J Gould v Trustees of St John's Downshire Hill* [2017] UKEAT 0115/17/0510). Permission to appeal to the Court of Appeal was refused.

Employment Tribunal Decision

3. Having considered the evidence, the ET agreed with the Respondent that the reason for dismissal was a loss of trust and confidence in him over a period of two years. This included his authoritarian and controlling leadership style, not responding to concerns when they were raised (including when the Leadership Team resigned *en masse*), not resigning as a trustee when conflicts of interest arose, failing to acknowledge and resolve governance issues within the church, preaching publicly about his marriage

difficulties and ostracising those who took his wife's 'side', undermining the other trustees, and failing to engage with processes to mend relationships. It also found that, despite his marriage difficulties, the Respondent had tried to assist the Claimant in his employment in a number of ways, for example offering mediation and a sabbatical. It was found, therefore, that although his behaviour in the context of his marriage breakdown formed part of the context and background, the breakdown itself did not form part of the reason for dismissal.

4. The marriage discrimination claim therefore failed. The ET went on to find that the Claimant's dismissal was for 'some other substantial reason', that the correct procedure was followed, and therefore his dismissal was fair. It also said that, if it had upheld either of the claims, compensation would have been reduced by 100% on grounds of contributory fault and on the basis that he would have been dismissed in any event.
5. The Claimant appealed to the EAT.

Employment Appeal Tribunal Decision

6. The EAT accepted that, in theory, a claim for marriage discrimination could be successful in this context. In particular, it held that:
 - a. If the ET had concluded that behaviour of the Claimant which was a significant reason for his dismissal would not have been a significant reason in a case where the circumstances were materially the same, but the Claimant was not married to his wife, his claim ought to have succeeded (applying *Hawkins v Atex Group Ltd* [2012] ICR 1315) [93-101];
 - b. If the ET had found that a significant reason for the dismissal of the Claimant was that the Trustees believed that the nature of marriage is such that a vicar whose marriage broke down or had marital difficulties could not continue in office, the discrimination claim would likely have succeeded (assuming that their belief was about marriage in particular rather than breakdowns in sexual relationships in general) [102];
 - c. It was noted that in some circumstances, a religious organisation could rely on the Occupational Requirement defence in Schedule 9 EqA 2010 [113-115].
7. However, on the facts found by the ET, this was not the case. The EAT therefore dismissed the appeal for the following reasons:

- a. The ET did not apply the wrong test in deciding the ‘reason why’ question. It was aware and appreciated that the protected characteristic only need be a significant influence on the decision to dismiss in order for there to be a finding of direct discrimination. Nevertheless, it found on the facts that the reason for dismissal was not, in any way, because of the Claimant’s marriage, his marriage difficulties or his potentially imminent separation/divorce [124-132].
- b. The ET’s finding that “*fact of the Claimant’s marriage and its breakdown (a composite reason) was one of the reasons for the irretrievable breakdown in the relationship of trust and confidence*” did not mean that the decision to dismiss was ‘because of’ the Claimant’s marriage. The EAT noted the distinction between a protected characteristic being an important part of the context or a ‘but for’ cause of the treatment complained of, and it being a subjective reason for that treatment. In this case, the fact that the issues to some extent arose in the context of the breakdown of his marriage did not mean that in law the decision to dismiss was ‘because of’ marriage [133-137].
- c. The ET did not fail to apply the two-stage approach to the burden of proof in s136 EqA 2010. It accepted (although did not spell out) that there was a prima facie case of marriage discrimination and went directly to consider the Respondent’s reasons for dismissal; finding that the Claimant’s marriage had not formed part of the decision to dismiss [138-145].
- d. The ET had not made the “*Anya error*” (i.e. failing to consider any potential sub-conscious bias of an honest witness, a point emphasised in *Anya v Oxford University* [2001] ICR 847 CA). It found on the facts that only one of the trustees who had been involved in the decision to dismiss held the view that “*broken marriage ought to equal broken ministry*” and accepted his evidence that, even though he held this view, this did not influence his decision, or the overall decision, to dismiss [147-151].
- e. As the Claimant’s claim for unfair dismissal was solely based on his claim for unlawful discrimination, the EAT did not need to consider the challenge to the ET’s findings on the claim for unfair dismissal and its alternative findings on remedy [152-155].

Comment

8. The protected characteristic of marriage and civil partnership is not one commonly relied upon in discrimination claims. While the ultimate decision in this case was fact specific, the thorough analysis of the case law in the judgment provides a useful guide to the circumstances where such a claim may succeed, emphasising that the correct comparator is a person in the same or materially similar circumstances who is not married [100].

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