Neutral Citation Number: [2020] EWCA Civ 1526

Case No: A2/2019/1838

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HER HONOUR JUDGE EADY QC
UKEATPA/0734/18/JOJ

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/11/2020

Before :

LORD JUSTICE BEAN
LADY JUSTICE ASPLIN
and
LORD JUSTICE LEWIS

- -

Between :

IAN NWABUEZE	**Appellant**
- and -	
UNIVERSITY OF LAW LIMITED AND OTHERS	**Respondents**

- -
- -

The Appellant appeared in person
Charlotte Davies (instructed by **DLA Piper UK**) for the **Respondent**

Hearing date: 10 November 2020

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Approved Judgment

Lord Justice Bean:

1. The Appellant alleges that the University of Law Ltd and six members of its staff discriminated against him when he was studying for the degree of Master of Laws in Professional Legal Practice in 2017. He issued a claim in the employment tribunal. The Respondent applied to strike out the claim on the grounds that it was a university and that accordingly only the county court had jurisdiction. By a decision of 13 July 2018 Employment Judge Davidson granted the application and struck out the claim. On appeal to the Employment Appeal Tribunal Her Honour Judge Eady QC (as she then was) held that there was no reasonably arguable question of law raised by the appeal and accordingly dismissed it under rule 3(10) of the Employment Appeal Tribunal Rules 1993. With the permission of Arnold LJ the Appellant now appeals to this court.

Anonymity

2. The Appellant was granted anonymity in the ET and on appeal to the EAT, where he was described by the initials EV, and told us that he has likewise been granted anonymity in other claims brought in the county court and ET. He sought to maintain that anonymity in this court. As this court decided in *Curless v Shell International Ltd* [2020] ICR 431; [2019] EWCA Civ 1710, the grant of anonymity in a lower court is not binding on this court and application must be made for a further order. *Curless* was decided after the two judgments below in the present case.

3. The basis of the application is that the Appellant alleges that he has been the victim of discrimination amounting to persecution. He also told us that threats have been made against his life, though I did not understand this to have been by the present Respondents. We are of course in no position to decide on the merits of these allegations. But *Curless,* and the many appellate authorities cited in it, make it clear that "due to the importance of the principle of open justice, it will usually only be in an exceptional case, established on clear and cogent grounds, that derogation from the principle of open justice (including the freedom to publish court proceedings) will be justified". I do not consider that there are any clear or cogent grounds for granting anonymity in this appeal.

The Equality Act 2010

4. It is a feature of the Equality Act 2010 that (with the exception of equal pay) it tends to separate jurisdiction into watertight compartments. Allegations of discrimination in employment covered by Part 5 of the Act are within the exclusive jurisdiction of the ET by virtue of s 120. Allegations of discrimination in contravention of Part 6 of the Act dealing with education are among those within the exclusive jurisdiction of the County Court by virtue of s 114(1). An employment tribunal cannot hear a claim which is not within its jurisdiction, however convenient it might be to do so. Jurisdiction cannot even be conferred by consent.

5. Sections 53 and 54 of the 2010 Act, which fall within Part 5, introduce the concept of a qualifications body. Section 53 states that a qualifications body must not discriminate against a person in varying respects, for example as to the terms on which it is prepared to confer a relevant qualification on him. We are not concerned

on this appeal with the details of s 53. Section 54 is the interpretation section for the purposes of s 53. It provides, so far as relevant:-

> (2) A qualifications body is an authority or body which can confer a relevant qualification.
>
> (3)A relevant qualification is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession.
>
> (4) An authority or body is not a qualifications body in so far as—……
>
> (c) it is the governing body of an institution to which section 91 applies….

6. Section 91, to which s 54(4)(c) refers, provides that the responsible body of an institution to which the section applies must not discriminate against a person in various ways, and in particular (s 91(2)) must not discriminate against a student. Section 91(10) provides that:-

> "In relation to England and Wales, this section applies to—
>
> (a) a university;
>
> (b) any other institution within the higher education sector;
>
> (c) an institution within the further education sector."

7. Section 91(12) provides that in the case of an institution within Section 91(10) (a), (b) or (c) the governing body is the responsible body referred to.

The grounds of appeal

8. The grounds of appeal argue as follows:-

> "1. The definition of institution within the act is required to be a University receiving HEFCE funds at the material time relevant to the issues at hand.
>
> 2. The University of Law is not defined legally as a University as they were not granted Degree awarding powers they are holding the same DAP as the former College of Law.
>
> 3. The self critical cohesive academic community was granted DAP's in 2006, and at the time held within the legal entity of the College of Law which continues now within the University of Law limited.
>
> a. The University of Law Limited was not granted new DAP awarding powers in 2012

> b. The definition of University in section 94 of the 2010 Act includes college.
>
> c. The Court of Appeal heard a case (*Burke v College of Law*) from a body that held the same exact DAP that the first Respondent held.
>
> 4. Section 91 applies only to institutions as defined by section 94 (5) of the 2010 Act.
>
> 5. President of the Employment Appeal Court Justice Choudhury gave the Appellant permission that he could rely on the Burke v College of Law case.
>
> 6. The first Respondent pleaded to the ET that they were granted University status by Royal Charter creating confusion and subsequently the ET and EAT are now stating that the University of Law Limited were granted DAP in 2012 despite the DAP was only granted to the self critical cohesive academic community in 2006 and held with the College of Law which continues completely intact whilst being held with the University of Law.
>
> 7. The First Respondent keeps changing their status pleadings and material matters whenever I prove their facts provided to the courts are incorrect in which creates unfair confusion for all parties including the Courts."

Is the Respondent a university?

9. The evidence put forward by the Respondent includes the following. The College of Law was incorporated by Royal Charter in 1975. It was not at that stage a university and could not award degrees. It was originally granted the power to award degrees by an order of Her Majesty in Council dated 19 July 2006. It appears that a company was incorporated on 2 February 2012 and its name was changed to The College of Law Limited on 25 July 2012. Although there is no direct evidence of this, the implication is that it acquired the business of the chartered College of Law. The company changed its name to the University of Law Ltd pursuant to permission granted by the Department of Business, Innovation and Skills ("BIS"). A letter from BIS dated 12 November 2012 states:-

> "Thank you for your letter of 10 September enclosing your application for university title in the name of the "University of Law Ltd" on behalf of the College of Law Ltd. Regulations brought into force on 1 October 2009 under the Companies Act 2006 mean that the Department directly gives advice on consent to use the sensitive word university in a company name. Your application sets a precedent by being the first to seek approval of the sensitive word "university" in a company name where the applicant will be operating as a university and

> is therefore required to meet all the criteria for university title as follows……..
>
> I am pleased to inform you that we are satisfied that the College of Law Ltd meets the criteria for university title. … As a UK university we would strongly recommend that the organisation [known] as the University of Law Ltd maintains standards equivalent to those expected of universities in the funded sector. …"

10. On 22 November 2012 the Registrar of Companies for England and Wales certified the change of name. The register of higher education providers includes "the University of Law Ltd (operating as the University of Law)". A further order of the Privy Council dated 26 November 2012 conferred on the University of Law Ltd the power to award taught degrees for a period of six years from that date.

11. All this evidence demonstrates clearly in my view that the ET was right to find that the University of Law Ltd is a university within the meaning of ss 54 and 91 of the 2010 Act.

Previous cases

12. The Appellant relies firstly on the disability discrimination case of *Burke v The College of Law and Solicitors Regulation Authority*, heard successively by an ET in 2009, then by the EAT (judgment of 8 March 2011; UKEAT/0301/10/SM) and finally by this court in 2012 ([2012] EWCA Civ 37). Paragraph 37 of the ET's substantive decision (cited by the EAT at the start of its paragraph 4) indicates that "it is accepted that Mr Burke is disabled and [has] been decided by a previous tribunal at a previous hearing that both Respondents are qualification bodies." It appears that there was no appeal from that determination. There is nothing in the judgments of the EAT or of this court to suggest that before them the jurisdiction of the ET was called into question on the grounds that the College of Law (not at that stage it seems, referring to itself as a university or using the word "university" as part of its name) could not be sued in an employment tribunal; moreover, the 2010 Act had not been enacted. I do not think any purpose would be served by excavating the now replaced provisions of the Disability Discrimination Act 1995 which applied in 2009 to see how closely, if at all, they resembled ss 54 and 91 of the 2010 Act. The issue was simply never raised or considered on appeal. I also note that the Second Respondent was the regulator, the SRA, which was and is a qualifications body rather than a university or higher education institution.

13. Nor is the decision of this court in *Blackwood v Birmingham and Solihull Mental Health NHS Foundation Trust* [2016] ICR 903 of any assistance. That was a claim of indirect sex discrimination brought by a university student in respect of a vocational placement arranged by Birmingham City University as part of her diploma of higher education in mental health nursing. She brought the claim against the NHS Trust as an employment service provider under section 55 of the 2010 Act. In a comprehensive and learned judgment of Underhill LJ (with whom Patten and Lewison LJJ agreed) it was held that the employment tribunal did have jurisdiction. But that case turns on the complex nature of the provisions for work placement cases in sections 55 and 56 of the Act. Underhill LJ said at paragraph 55:-

> "I do not believe that it can be regarded as a fundamental feature of the legislation that claims should be allocated to one forum rather than another, which is an essentially procedural matter, at the cost of substantive protection against discrimination: on the contrary, such a result would go clean against the grain of the Act. If the choice is between students having no remedy at all against discrimination by the placement provider and restriction of the effect of Section 56(5) so as to give them such a remedy albeit in a different forum than the draughtsman directed I believe it is legitimate to choose the latter."

14. The present case is much simpler. There is no question of neither the ET nor the county court having jurisdiction. The Respondents' case is and always has been that the correct forum was the county court.

"In so far as"

15. The issue on which Arnold LJ gave permission to appeal to this court was "the effect of the words "in so far as" in s 54(4) of the Equality Act 2010 in circumstances where the First Respondent was both a qualifications body as defined by s 54(2) and a university within s 91". The suggestion is that we have to choose whether "in so far as" in this context means "to the extent that" (the Appellant's case) or "if" (the Respondents' case).

16. Reliance was placed in written submissions on an insurance case, *Charman v WOC Offshore DV* [1993] 1 Lloyd's Rep 378 (Hirst J); [1993] 2 Lloyd's Rep 551 (Court of Appeal). That case concerned the Brussels Convention on jurisdiction, Article 11 of which provided that an insurer could bring proceedings only in the courts of the contracting state in which the defendant was domiciled. Article 12(5) allowed that rule to be departed from by an agreement on jurisdiction:-

> "which relates to a contract of insurance in so far as it covers one of more of the risks set out in Article 12A"

17. Hirst J held that the words "in so far as it covers one or more of the risks" meant "to the extent that it covers one or more of the risks". Staughton LJ, giving the leading judgment in this court said:-

> Once one has reached the conclusion that the words "and no other" are necessarily implied in Article 12(5) the problem disappears. There is no need to decide the point which was so elaborately argued before the judge and before us as to the meaning of the words in so far as" the owners say that they mean in ordinary English and in this convention "to the extent that", the insurers say that they mean "if" or "provided that".
>
> In correct usage it is no doubt right that the words "in so far as" mean "to the extent that". But correct usage is not always followed. One can compare the similar words "in as much as", which are sometimes used to mean "because" or "whereas".

18. I do not think that either the decision of Hirst J or the observations on it of Staughton LJ is of any help: the context is entirely different from the present one. I accept that "in so far as" is not a usual synonym for "if"; but I observe that in s 54(4) the critical words are the lead-in to five rather disparate subsections. In looking at s 54(4)(c) the choice is binary. Either an authority or body is the governing body of a s 91 institution or it is not; and likewise under s 54(4)(b) either it is the responsible body of a school to which s 85 applies or it is not. But I can see that there may be authorities some of whose functions are exercised under the Education Acts and some not, so that under s 54(4)(d) the words in question do mean "to the extent that".

19. As Ms Davies submits on behalf of the Respondents, were it to be held that the effect of the words "in so far as" in section 54(4) as applied to subparagraph (c) is that the University of Law Ltd can be both a university and a qualifications body at the same time – or, more accurately, that its governing body is the governing body of both a university and a qualifications body - the consequences would be on the issue of any claim that one would have to identify in which respects it was acting as one and in which respects it was acting as the other. The degree course for which the Appellant was studying included seven modules which were compulsory in order to meet the requirements of the Solicitors Regulation Authority's Legal Practice Course, and two additional modules which were not so required. It would, in Ms Davies' words, be chaotic if the Appellant had to divide his complaints by reference to particular modules, claiming in relation to the seven compulsory modules in the ET and at the same time claiming in the county court relating to the rest.

20. The clear effect of section 54(4)(c) in my view is that if a body is a governing body of a university this displaces its status as a qualification body. It follows that the Appellant's claim could only be brought in the county court and that the ET has no jurisdiction.

Conclusion

21. I would dismiss the appeal.

Lady Justice Asplin

22. I agree.

Lord Justice Lewis

23. I also agree.

ORDER

UPON hearing the Appellant in person and counsel for the Respondent on 10 November 2020, by Skype for Business

IT IS ORDERED THAT:

1. The appeal is dismissed.

2. The Appellant is to pay the Respondents' costs in this court summarily assessed at £5,000 plus VAT.

DATED 13 November 2020.