

EMPLOYMENT TRIBUNALS

BETWEEN

Applicant

Mrs G Turner

Respondent

Mr Stephen Turner

DECISION OF THE EMPLOYMENT TRIBUNAL

HELD AT:	Manchester	ON:	30 July 2004
CHAIRMAN:	Mr J D Brain	MEMBERS:	Mr S T Anslow Mrs M A Gill

REPRESENTATION:

For the applicant: Mr D Calvert of Counsel.
For the respondent: In person.

DECISION

The unanimous decision of the Employment Tribunal is that:-

1. The applicant's claim that she was unfairly dismissed by the respondent succeeds.
2. The applicant's claim that she was unlawfully discriminated against by the respondent upon the basis of her marital status succeeds.
3. The applicant's complaint that the respondent discriminated against her upon the grounds of her sex is dismissed.

EVIDENCE

The Tribunal received evidence from the applicant and from Mr Dean Joseph Turner. The Tribunal also received evidence from the respondent and from Mrs Amanda Claire Roberts, the respondent's Service Manager.

EXTENDED REASONS

1. This is, in many respects, an unfortunate matter to be aired before the Employment Tribunal.
2. The applicant worked for the respondent between 11 September 2000 and 29 December 2003 as a Deputy Manager of a residential care home run by the respondent. The respondent trades under the style "AGR Care Services".
3. After working at a home in Godfrey Road, Salford as a Residential Social Worker from the date of her appointment, the applicant had a meeting with the respondent and her line manager, Amanda Claire Roberts, ("Mrs Roberts"), the respondent's Service Manager. The meeting took place in May 2002 with a view to offering the applicant the position of Deputy Manager at a new unit to be opened by the respondent in Bolton.
4. At the time of the meeting, no suitable site had been identified. A site was found in September 2002 and the applicant was then involved, on a full time basis, in refurbishing the site prior to its opening.
5. Assisting with this renovation was Dean Turner, the respondent's son and, now, the applicant's husband.
6. On 4 October 2002, the applicant and colleagues, including Dean, went for a night out. Dean spent the night at the applicant's house. The applicant and Dean both claim that he slept on the couch. Joanne Roberts, Mrs Roberts' sister-in-law, collected Dean from the applicant's home the following morning on her way to work at Godfrey Road.
7. The evidence of the applicant and Dean (which was not challenged by the respondent) was that a relationship started between them at the end of October or early November 2002.
8. A few weeks after the night out of 4 October 2002, the applicant was questioned by Mrs Roberts about the applicant's relationship with Dean. An allegation was put that the applicant and Dean had been seen together in a public house called The Dog. The applicant denied a relationship with Dean at that time. Later the same day, the applicant was again questioned, this time by the respondent, about an alleged sighting of her and Dean together in The Dog. Again, the applicant denied any relationship.
9. The respondent also questioned the applicant, at the same interview, about the night of 4 October 2002. The applicant said that she and Dean were not alone in the house together as somebody else stayed. It subsequently transpired that the third party to whom the applicant was referring was Joanne Roberts. It also transpired that Joanne Roberts in fact had not stayed the night at the applicant's house on 4 October 2002 and that Joanne Roberts had asked the applicant to cover

for her if questioned by Mrs Roberts. What was described by Mr Calvert as the applicant's "white lie" came to light when Joanne Roberts told Mrs Roberts what had actually happened and that she, Joanne Roberts, had not in fact stayed at the applicant's house on the night of 4 October 2002 but had, in fact, gone elsewhere. The applicant accepted, before the Tribunal, that she had not told the truth to the respondent about Joanne Roberts' whereabouts on the night of 4 October 2002.

10. Going back to the discussion between the applicant and respondent in October 2002, accounts of that meeting vary but it is agreed by the applicant that the respondent said that her position as Deputy Manager could be compromised if she was seen with a young boyfriend. His concern was that this could lead to an investigation, presumably by the National Care Standards Council, and would be bad for business. No further action was taken by the respondent. The respondent accepts that the discussion with the applicant was not disciplinary in nature. Nothing in the nature of a warning was given to the applicant by the respondent. It seems that the respondent's concern was that his son Dean was around the same age as boys in the respondent's charge who, we were told, can be up to the age of 18 or 19 years.

11. Dean was born on 3 November 1982. He was therefore 19 at the time of the night out of 4 October 2002 and had just turned 20 at about the time the relationship with the applicant commenced. The respondent's evidence was that when speaking to the applicant in October 2002, he was particularly concerned about the applicant having admitted to having had Dean stay overnight in circumstances where Dean was barely older than the young men in the respondent's charge and care. The Tribunal accepts the respondent's evidence that when speaking to the applicant, he was concerned about the impression that the applicant's behaviour would have upon his business. The applicant's evidence was that the respondent had asked her if she thought it would be wrong to see someone as young as 15. The Tribunal accepts that the respondent was not confining himself to talking about 15 year olds (the age of the applicant's charges in Salford) but rather, about those in his care generally. The applicant accepts in her evidence that she understood that the respondent's concern was about the need to behave in a professional manner.

12. It was apparent that the applicant understood the respondent's concern to be about the need to avoid relationships with those in their charge. However, she did not understand the respondent to be concerned about relations with young men of their age. The respondent's case was that he was making this point plain to the applicant. However, although the Tribunal accepts that the respondent was talking about young adolescents in his care generally (and not simply the 15 year old charges cared for by the applicant) and concerns about the applicant's behaviour on 4 October 2002, the respondent was unable to pinpoint any contractual document or policy which would prevent the applicant, pursuant to her contract of employment, from forming a relationship or attachment with a young man of Dean's age.

13. We have observed that the relationship between the applicant and Dean commenced at the end of October or early November 2002. The applicant did not

volunteer to the respondent information about their relationship. For that matter, the respondent did not ask her about it. Nothing further appears to have been said about the applicant's relations generally, and with Dean in particular, after the meeting held in October 2002.

14. Dean gave unchallenged evidence that in April 2003 he told his mother, Hazel Turner, of the relationship between himself and the applicant. The respondent accepted that Hazel had told him. However, he was unsure when and said that he had not understood the nature of the relationship from the information given to him by his wife and had not deduced from what she said that the relationship was sexual. The respondent's evidence was that Hazel had said that the applicant and Dean were "seeing each other". The respondent said he did not necessarily equate those words with a sexual or serious relationship. The Tribunal cannot accept that Hazel would not tell the respondent of the relationship between the applicant and Dean. The Tribunal also finds incredible the respondent's claim that he failed to understand, when told by his wife that the applicant and Dean were "seeing each other", that they were in a sexual relationship. It would be naïve in the extreme for the respondent to have taken his wife's words in any other way. As an experienced businessman, the Tribunal can only conclude that the respondent did know the true nature of the relationship between Dean and the applicant by April 2003. Upon finding out this information, the respondent took no action.

15. Dean gave unchallenged evidence that on or around 18 December 2003 he told the respondent of the relationship and the respondent accepted it. Again, the respondent did nothing as far as the applicant was concerned.

16. The respondent, Dean and other members of the family (not including the applicant) celebrated the Christmas holiday in Spain. On 25 December 2003, Dean announced that he and the applicant were to marry on 17 January 2004. The respondent said in evidence that he told Dean, on 26 December 2003, that he, the respondent, no longer trusted the applicant and that Dean had agreed, at the respondent's request, to telephone the applicant and request her to tender her resignation. Dean did this but the applicant refused to resign. Therefore, the respondent instructed Mrs Roberts to dismiss the applicant. The applicant telephoned Mrs Roberts on 29 December 2003 following her discussion with Dean of 26 December. They agreed to meet that day. Mrs Roberts summarily dismissed the applicant.

17. The letter of dismissal appears at page 5 of the Tribunal bundle. The reason given for the termination of her contract was said to be "due to gross misconduct on your part and conduct which is detrimental to the interests of the company".

18. There was nothing remotely resembling a fair procedure adopted by the respondent. The applicant was not told in what respect she had been guilty of gross misconduct nor how her conduct was said to be detrimental to the interests of the respondent's business. It seems that a meeting had been arranged for the applicant to discuss the matter with the respondent and Mrs Roberts on 30 December 2003.

Not surprisingly, perhaps, that meeting did not take place nor did the applicant appeal against the decision. As the appeal would have been to the respondent, the Tribunal takes the view that the appeal would have been an exercise in futility.

19. The respondent maintained, before the Tribunal, that the applicant was dismissed for lying and that she had not been dismissed for marrying Dean.

20. In order to resist the applicant's complaint of unfair dismissal, it is for the respondent to demonstrate one of the potentially fair reasons for dismissal set out in Section 98(1) and (2) of the Employment Rights Act 1996. Should the employer succeed in establishing a potentially fair reason, then the Tribunal must be satisfied that the employer has acted fairly and reasonably in treating the reason as sufficient for dismissing the employee within the meaning of Section 98(4).

21. It is well-established that in misconduct cases, the respondent must have a genuine belief, on reasonable grounds, of the employee's misconduct and that such reasonable belief must follow a reasonable investigation.

22. Before the Tribunal, the respondent was unable to say in what respect the applicant had been guilty of gross misconduct other than to say that she had practised a deception and lied. When pressed, the respondent was unable to pinpoint any lie or deception other than the applicant's admitted untruth about Joanne Roberts' activities on the night of 4 October 2002. The respondent appeared to be seeking to assert that there was a lie of omission in that the applicant had failed to tell the respondent of her relationship with Dean. The respondent accepted however that there was no legal obligation upon the applicant to tell of the relationship and did not give any evidence that they had expressly asked the applicant about her relationship with him after October 2002.

23. Mrs Roberts said that the meeting at which the relationship between the applicant and respondent had been discussed in fact took place in January 2003, not October 2002. She claimed to be able to recall the date of the meeting as she had, unfortunately, broken her jaw on 16 October 2002. She has said in her written statement that the meeting took place in early 2003 and shifted her ground somewhat before the Tribunal today, pinpointing the date of the meeting to January 2003. She accepted, when questioned by the Tribunal Chairman, that there was the possibility of a meeting having taken place in October 2002. The respondent did not challenge the applicant's evidence that the meeting took place in October 2002. Indeed, he seems to accept that such a meeting had taken place. As both the applicant and respondent appear to accept that a meeting took place in October 2002, the conclusion of the Tribunal is that a meeting did indeed take place that month and before the applicant's relationship with Dean had commenced. Mrs Roberts' evidence is, accordingly, rejected.

24. The respondent was unable to point to any lie told by the applicant other than the untruth about Joanne Roberts. Mrs Roberts' evidence on this point was unsatisfactory and vague. Although the applicant had admitted telling an untruth

about Joanne Roberts' whereabouts on the evening of 4 October 2002, such could not, by any stretch of the imagination, justify the dismissal of the applicant. The description of that untruth as a "white lie" is entirely apposite and could not come close to being destructive of mutual trust and confidence.

25. In the circumstances, the Tribunal is of the view that the respondent could not entertain a reasonable belief that the applicant had practised lies and deception. In an attempt to bolster his case, the respondent sought to argue that the applicant had lied about her attempts to obtain a driving licence. We were told that it is normally a requirement for post-holders employed by the respondent to have a driving licence but an exception was made in the case of the applicant upon the basis that she should make efforts to obtain a licence. The respondent gave evidence that the applicant had given a range of excuses for not obtaining a driving licence, evidence which he said supported his case that the applicant was untrustworthy. However, there was no evidence adduced by the respondent that the applicant's explanations for not having obtained the driving licence were untrue. The applicant was not warned of the consequences of a failure to obtain a licence. Perhaps most tellingly of all, at a supervision meeting of 25 November 2003, the applicant was given until the middle of 2004 to obtain her driving licence. This was, on our findings on the evidence, after the respondent knew of the relationship between the applicant and Dean.

26. No reasonable or fair procedure was followed by the respondent. We have already observed that the applicant did not know the charges against her. It was plain that Mrs Roberts had no discretion whatsoever at the hearing of 29 December 2003 and that dismissal was inevitable. The respondent had placed Mrs Roberts in a straitjacket and Mrs Roberts was acting purely as his agent with no discretion to entertain any other outcome but instant dismissal. The applicant's complaint of unfair dismissal is therefore unanimously upheld.

27. In any event, the Tribunal concludes that the real reason for dismissal of the applicant was not, as the respondent would have it, her lies and deception nor her relationship with Dean but rather the announcement, by Dean, that they were to marry on 17 January 2004. It is telling that the respondent knew of the relationship from around April 2003, certainly by 18 December 2003, but took no action against the applicant. It was only when Dean announced the marriage that the respondent acted. The respondent knew of the white lie about Joanne Roberts in April 2003 and, certainly, by December 2003 but did nothing. The conclusion to which the Tribunal is inexorably drawn is that it was the announcement of the marriage that caused the respondent to act.

28. Getting married to Dean could not constitute a fair reason for dismissal in the absence of any contractual obligation upon the applicant not to enter into relationships with men of Dean's age. The real reason for the applicant's dismissal, being her intention to marry Dean, could not be considered a fair reason for dismissal and certainly the respondent, in acting as he did, acted outside the range of reasonable responses open to a reasonable employer in such circumstances.

29. As if to reinforce the point, the Employment Tribunal is obliged, pursuant to Section 3 of the Human Rights Act 1998, to read legislation in a way which is compatible with the convention rights set out in the Human Rights Act. The Tribunal therefore must read and give effect to Section 98 in a way which is compatible with the convention rights. Articles 8 and 12 of the convention are particularly relevant in this case. These provides that everyone has the right to respect for private and family life, his home and correspondence and a right to marry.

30. In the case of *X v Y* [2004] IRLR 625, the issue of interpretation of the Employment Rights Act 1996 in the light of the Human Rights Act 1998 was considered. The Court of Appeal held that it would not normally be fair for a private sector employer to dismiss an employee for a reason which was an unjustified interference with the employee's private life. The engagement of the Human Rights Act 1998 therefore reinforces the unfairness of the applicant's dismissal.

31. The applicant also complains that she has been discriminated against upon the grounds of her sex contrary to Section 1 of the Sex Discrimination Act 1975 and because she was a married person contrary to Section 3.

32. The Tribunal identified a difficulty with the applicant's argument that she had been discriminated against under Section 3 of the Sex Discrimination Act 1975 upon the basis that, at the date of her dismissal, she was not married. In submission, Mr Calvert indicated that the situation was analogous to that of a female employee announcing to her employer that she was going to try for a family and the employer dismissing her as a consequence. The Tribunal is not satisfied that that is an entirely apposite analogy. After all, only a woman can become pregnant. In those circumstances, it is axiomatic that the employer would be guilty of sex discrimination. It is well established there is no need, in such circumstances, to identify a male comparator.

33. The flaw that the Tribunal identified in Mr Calvert's argument is that, while in the analogy which he draws, only a woman could be the victim of such discrimination (as only a woman can become pregnant), it is the case that both a man and a woman could be dismissed for announcing an intention to marry, both men and women, of course, being able to marry. It would be therefore necessary to demonstrate, by an actual or hypothetical comparator, that a male employee of the respondent, announcing an intention to marry, would also be dismissed. In order to compare like with like, the male employee would, presumably, have to announce an intention to marry the respondent's daughter (real or hypothetical). A male employee who was dismissed by the respondent because of an intention to marry somebody not related to the respondent would not be truly comparable. No attempt was made by the applicant to set up an actual or hypothetical male comparator nor was any evidence adduced before the Tribunal from which it would be possible to draw an inference that the respondent would have treated a male employee in comparable circumstances to the applicant in a different way. For that reason, the applicant's complaint that she was discriminated against upon the grounds of her sex fails.

34. We therefore turn to the applicant's complaint that she was discriminated against because of her marriage to Dean. We have already identified that at the date of dismissal, the applicant was not married to Dean, the ceremony not taking place until 17 January 2004.

35. Section 3 of the Sex Discrimination Act 1975 provides as follows:

"(1) In any circumstances relevant for the purposes of any provision of Part 2, a person discriminates against a married person of either sex if –

(a) on the ground of his or her marital status he treats that person less favourably than he treats or would treat an unmarried person of the same sex or

(b) ... [irrelevant for the purposes of this case]."

36. In order to demonstrate discrimination upon the grounds of her marital status, therefore, the applicant needs to identify, as a comparator, an unmarried person of the same sex. Again, no real attempt was made by the applicant to identify an actual or hypothetical comparator. However, the Tribunal draws an inference from the respondent's treatment of the applicant herself and concludes that an unmarried female employee would not have been dismissed by the respondent. After all, the respondent did not dismiss the applicant herself notwithstanding that he knew of the relationship with Dean from April 2003. It was the announcement of her forthcoming change of marital status which, as a matter of causation, led the respondent to dismiss the applicant. Had Dean carried on the relationship with the applicant, and had they remained unmarried, the respondent's conduct prior to 25 December 2003 was such that an inference can be drawn that the applicant would not have been dismissed. It was therefore the applicant's proposed change of marital status, in general, and her marriage to Dean in particular, that was the cause of her downfall at the hands of the respondent. Unquestionably, therefore, the applicant had been treated less favourably upon the grounds of her proposed marital status by the respondent and discriminated against.

37. This still leaves the applicant with the difficulty, however, that she was unmarried at the date of the less favourable treatment. The only authority which the Tribunal could find upon this issue is the case of *Bick v Royal Western England Residential School for the Deaf* [1976] IRLR 326. The facts of that case can be briefly stated. Mrs Bick was employed by the respondent as a childcare officer from 3 November 1975. On 18 December 1975, she informed her employer that she was going to get married on 31 December 1976. She was then given notice of termination with effect from 31 January 1976, the reason for her dismissal being that she was going to be married on 31 December 1976.

38. The case was decided at first instance by an Industrial Tribunal (as it then was) sitting in Exeter. It was held that as Mrs Bick, as she then was, was unmarried at the date of dismissal, she could not complain that she had been discriminated

against contrary to Section 3 of the Sex Discrimination Act 1975. Such appears to be the only authority for the proposition that to dismiss a woman because she is about to be married is not discrimination on grounds of marital status.

39. The Industrial Tribunal Chairman said, as follows, in his Judgment:

"We have not the least doubt that Parliament intended this section to apply to discrimination against a woman who announces her intention of getting married; in other words, it was the intention to penalise employers who dismiss girls when they say that they are about to get married. Parliament has not so stated and we can see no way round [the employer's Counsel's] interpretation of the Act without rewriting Section 3. We are therefore obliged, to hold, with considerable reluctance, that the respondent's submission succeeds and the application must be dismissed."

40. So far as the Tribunal can ascertain, that decision was not appealed and remains the only authority upon this issue. Being a decision of an Industrial Tribunal, it does not bind us as would a decision of the Employment Appeal Tribunal or Court of Appeal. The decision is also, now, of some age. Since then, the Human Rights Act 1998 has been passed into English law and therefore the obstacle which the learned Tribunal Chairman perceived in his way upon the interpretation of Section 3 has, if not removed altogether, been somewhat eroded.

41. We have already alluded to the impact of the Human Rights Act 1998 upon the interpretation of Section 98 of the Employment Rights Act 1996. The Human Rights Act 1998 must also have significance when it comes to an interpretation of the Sex Discrimination Act 1975. The Tribunal is, accordingly, obliged, under Section 3 of the Human Rights Act, to interpret, so far as it is possible to do, Section 3 of the Sex Discrimination Act 1975 in a way which is compatible with the convention rights, in particular, Articles 8 and 12. Article 12, which is an unqualified right, says as follows:

"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

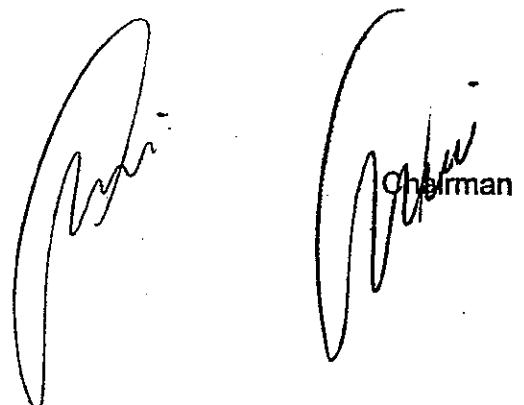
42. It would, in the Tribunal's respectful view, be to drive a coach and horses through the right enshrined in Article 12 were a narrow interpretation of Section 3 of the Sex Discrimination Act 1975 to be maintained. In order to give effect to the Human Rights Act 1998 in general, and Articles 8 and 12 in particular, Section 3 of the Sex Discrimination Act 1975 must be interpreted as encompassing discrimination not only against married persons but also against those about to marry. It is significant, in this case, that the applicant and Dean had a very short engagement and that a definite date had been fixed for the marriage. It would be contrary to the mischief at which the Sex Discrimination Act 1975 and the Human Rights Act 1998 are aimed were Section 3 to be interpreted as being confined to those who actually have undergone a ceremony of marriage and to exclude those who are about to go through such. It would also act as an inducement to unscrupulous employers to

dismiss those who announce engagements before the marriage ceremony takes place. The introduction of the Human Rights Act 1998 has signalled Parliament's intention that those of marriageable age have the right to marry and it would be contrary to that intention to interpret Section 3 of the Sex Discrimination Act 1975 in the narrow way in which it was applied in the case of *Bick*.

43. The Tribunal is acutely conscious that there is here an important point of principle and that we are departing from a case of some antiquity dating back to 1976. We are also conscious of the fact that this may create some practical uncertainties as there will be two conflicting Employment Tribunal decisions upon cases involving very similar facts. However, we are drawn to the conclusion that *Bick* would have been decided differently had the Human Rights Act 1998 been in force when that case came before the Industrial Tribunal. It is to be hoped that this issue may be the subject of consideration by higher authority.

44. Accordingly, the applicant's complaints of unfair dismissal and discrimination upon the grounds of marital status succeed. Her complaint of sex discrimination fails. The matter has been re-listed for a hearing upon the question of remedy on 1 October 2004. It is most unfortunate to see family affairs such as this becoming the subject of litigation and the Tribunal earnestly hopes that once these proceedings are concluded, the parties can effect a reconciliation for the good of all concerned.

DECISION SENT TO THE PARTIES ON
..... 11 AUGUST 2004
AND ENTERED IN THE REGISTER
..... S. Smith
FOR THE SECRETARY OF THE TRIBUNALS



Chairman

DC