

Appeal No. UKEAT/0301/19/BA

EMPLOYMENT APPEAL TRIBUNAL
ROLLS BUILDING, 7 ROLL BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 11 March 2020

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MR J PATEL

APPELLANT

THE COMMISSIONER OF THE POLICE OF THE METROPOLIS

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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INSTRUCTED BY;
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For the Respondent

MISS SUZANNE PALMER
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SUMMARY

PRACTICE AND PROCEDURE

RELIGION OR BELIEF DISCRIMINATION

The Claimant (a Hindu police officer) claimed religious discrimination arising out of a decision taken by a Chief Inspector in 2018 that he could not transfer to the Brent area because of his long association with the Hindu Temple in Neasden. A year later in 2019 a different Chief Inspector indicated that the rationale for the earlier decision no longer applied and that he could after all apply for the transfer. The Claimant sought to rely on this change of position in support of his case of discrimination and sought disclosure of documents related to the 2019 decision.

The EJ refused the application and ruled that the Claimant could not rely on the 2019 decision.

The EJ's decision relied in part on a finding that there had been a change of circumstances in that the Claimant had given up the role of deputy security manager at the Temple between the 2018 and 2019 decisions. On analysis of the 2018 emails it was clear that that was a factual error since the Claimant had informed the Chief Inspector of his resignation as deputy security manager several days before the decision was communicated to him.

Since the EJ's decision had proceeded on a false basis it could not stand and the EAT set it aside and remitted it to be decided by a new EJ. The EAT's decision applied both in relation to the disclosure application and the refusal to allow the Claimant to rely on the 2019 decision, which was expressed to be contingent on the disclosure application.

A **HIS HONOUR JUDGE SHANKS**

B 1. This is an appeal against a refusal by Employment Judge Taylor in the Central London Employment Tribunal to order disclosure of documents in an ongoing Employment Tribunal (“ET”) claim by the Claimant police officer against of the Commissioner of the Police of Metropolis.

C 2. The Claimant was working at the relevant time in the Road and Transport Police in Command Unit dealing with counter-terrorism. He is Asian, and a Hindu, and he had a longstanding association with the Neasden Temple in the London Borough of Brent. From **D** March 2015, he was also a volunteer Deputy Security Manager at the temple, something about which the Metropolitan Police were well aware. There is no suggestion that he disguised any of his activities in any way.

E 3. In February 2018, the Claimant made enquiries about a transfer to Area 1, which would include his home area of Ealing and neighbouring boroughs including Brent. He did that because he wanted to have less of a commute and also to make use of his particular language **F** skills which cover quite a number of language from the Indian sub-continent which are widely spoken in that area.

G 4. On 17 April 2018, he had a meeting with a Chief Inspector Steve Allen about his desire to move to Brent, as it was put in the email. The same day Chief Inspector Allen wrote an email to Mr Gregory Feldman about his discussion and he said he made the following **H** decisions:

(1) PC Patel was to continue his volunteer role at the Neasden Temple but to provide a role profile as to the responsibilities he undertakes and that related to the Deputy Security Manager position.

A (2) PC Patel is not to move to Brent Borough based on the information I have received. The reason is for this is that PC Patel has a long association with the temple dating back to 1993 and that should there be any question of partiality in his role, this may be cited against him or the Borough. The Borough themselves have raised a number of issues. These are documented and have been retained by myself. [Those documents have apparently been disclosed as a result of these proceedings].

B (3) Moving forward, we will look to make use of the considerable language skills PC Patel has and his heightened awareness around the Indian community.

B The following day, on 18 April 2020, PC Patel wrote to a gentleman at the Neasden Temple formerly resigning from his post as Deputy Head of Security at the Temple. He sent a copy of that email to Chief Inspector Allen on 19 April 2020; those emails are at pages 74 and 75 in my
C bundle.

C 5. On 23 April 2020, four days later, Chief Inspector Allen wrote to PC Patel in these
D terms (page 76 of my bundle):

“Jay as discussed and has formalised in a written note of our meeting in relation the proposed move to Brent, I have made the following observations/decisions.

(1) It was noted that insofar as PSO’s dealing with him, PC Patel had acted at all times in an open and transparent and there was no question of impropriety in this case.

E (2) PC Patel’s continued involvement in his community was a benefit to the MPS and should be encouraged.

(3) PC Patel may continue a volunteer role at Neasden Temple but that (as is suggested by the SOP- Annex A) he should not have any role that mirror those undertaken by the police officer, (e.g., security or stewarding). He is to provide a role profile as to the responsibilities he undertakes.

F (4) PC Patel will not move to Brent Borough or SX or QA(the wider BCU) [Borough Command Unit]. The reason for this decision is that PC Patel has a long association with the temple dating back to 1993. The standing operating procedure is clear that officers must not only behave with impartiality must discharge their duties in a way in which no member of the public might perceive or form an impression that this was not the case. Additionally, officers should not take any role that might cause confusion in the minds of the public as to whether the individual was operating in an official or unofficial capacity. The Borough themselves have raised several issues around this last point. These are documented and have been retained by me. Moving forward, PC Patel’s line management will look to make sure of his considerable language skills and his heightened awareness around the Indian community.”
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It seems clear that that letter would have been sent in the knowledge that PC Patel had resigned from his position as Deputy Head of Security at the Temple.

H 6. The Claimant then started proceedings against the Commissioner. He claimed in effect that he was being denied the transfer was on the basis of his religion as a Hindu and/or his race.

A The relevant part of the grounds of complaint is at pages 46 and 47 in the bundle. There is at
paragraph 18 a recital of the email of 23 April 2018, and then an allegation at the top of page 47
B of race and/or religious discrimination; the less favourable treatment is set out at paragraph 21.2
as being told that he was not able carry on his volunteer role as Deputy Security Manager, and
at 21.3 as being denied a transfer to the Borough of Brent. The ET1 therefore covered a general
denial of a transfer and the email of 23 April and said that they involved discrimination on the
basis of religion or race.

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7. About a year later, on 16 April 2019, the Claimant had a meeting with Chief Inspector
Veronica Merrell, which is documented at pages 77 to 79 in my bundle. It starts by saying that
D it was agreed that this was an informal meeting to allow her to bring him up to speed with the
current position in advance of the LRPM (Local Resource Planning Meeting). She noted that
he had previously expressed an interest in being posted as a BSO (Borough Support Officer) to
Brent and that there had been an application to the ET arising from that and then (at page 78)
E she said,

F **“Having spoken to the OCU Commander for NWBCU(ch Supt Sara Leach), which is the
North West Borough Command Unit, there has been no change in stance since the
previous decision on their part. They still have concerns about you being posted as BSO to
Brent because of your association and affiliation to the temple. They have confirmed this
in writing and have been invited to submit detailed written rationale of that position
before our next LRPM. This has not yet been supplied.”**

I am told that the “detailed written rationale” never came into existence and it does not seem to
me that the Claimant can take that any further. However, the confirmation in writing referred to
has not been disclosed and is the subject of the dispute in relation to disclosure. Chief Inspector
G Merrell goes on:

H **“There has been a material change in circumstances in that you no longer hold the
position of Deputy Security Manager at the temple in Neasden, but you are however still
part of that congregation where you go to pray. It was noted that you resigned that post
immediately after the previous decision was made, which deemed that to be a conflict of
interest.”**

A It seems to me based on the other emails that it was wrong to imply that the resignation as Deputy Security Manager came after the previous decision; in fact it was very shortly before the decision was communicated to the Claimant. In addition, CI Merrell says this:

B “I have based my recommendation to the OCU Commander on the grounds that:

- It can now be argued that a major component of the conflict and interest argument now no longer holds true as you do not hold a role at the temple that mirrors the role of the police officer.
- On balance, the conflict of interest case is therefore not made out going forward and as such the rationale for previous decisions does not apply in the same way to future decisions.”

C She then refers to the ET proceedings and says at the very end, “In summary, you now have the opportunity to apply for the role at Brent and compete in an open and fair recruitment process alongside any other candidates of the vacant post”. So, DI Merrell appears, having taken into account the resignation, to have come to the view that there was no valid objection to a transfer.

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E 8. Given that view, the Claimant unsurprisingly sought to rely on it as part of his case. He put in some voluntary Particulars relating to it and sought disclosure of material relating to CI Merrell’s decision. In particular, what is really now sought is the confirmation in writing to which I have referred and all documents passing between Leech, Merrell and the North West Borough Command Unit about the Claimant and the Neasden Temple relating to the April 2019 decision. I am not sure that the application for disclosure was put in quite those terms but that basically is what the Claimant was after.

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G 9. There was a Full Hearing already fixed for 16 July 2019. On 1 July 2019, the Respondent wrote to the Tribunal as follows (page 91):

H “In the Tribunal’s letter of 27 June 2019, Employment Judge Wade has stated that the parties’ dispute regarding ‘disclosure’ will be dealt with at the start of the Hearing unless ‘the disagreement is so profound that the Hearing cannot go ahead as scheduled. The Respondent is of the view that this is matter that needs to be determined before the Hearing. If it can not be determined before the Hearing, then the Hearing cannot proceed. It is not a simple matter of whether a document or documents are relevant or irrelevant.

On 21 May 2019, her Claimant submitted to the Tribunal voluntary Further Particulars of matters post-dating his claim, which although stated to be background are said to be

A probative to the issues in the existing claim and expand the claim. To deal with these new matters, the Respondent would require at least two further witnesses they would not have available for the Hearing. The additional documentation which the Claimant seeks to rely on relates to these new issues.

B The Respondent has prepared its case on the basis that claims served on 20 September 2018 and the agreed issues set out in the Tribunal's Order of 4 December 2018. Disclosure had been provided and witness statements were exchanged on 24 June 2019. If the Claimant persists in his application, the Respondent considers that a Full Merits Hearing cannot proceed as scheduled for the week commencing 15 July 2019."

C It is clear that the Respondent was suggesting not only that the disclosure should not be allowed but also that the new areas that the Claimant wanted to introduce into evidence should not be part of the evidence, although I think it is wrong to suggest that the new areas expanded the claim in any way, since it was simply a matter of evidence relating to the reason for the refusal that the Claimant wanted to put before the Tribunal.

D 10. In any event, on 16 July 2019 the parties appeared before the Tribunal. They were in front of Employment Judge Taylor and what happened was that there was simply a Preliminary Hearing and the Full Hearing was not reached. However, Employment Judge Taylor decided matters against the Claimant and the Order which was issued on 18 July 2019 said, "The Claimant's application for disclosure is refused. The Claimant is refused permission to rely on his voluntary additional information and the section of the Claimant's witness statement dealing with the exercise in 2019 to be removed." The Reasons for that Decision were issued on 5 September 2019, and this is an appeal against the Decision. I mention at this stage that in the meantime a new Full Hearing has been arranged for October 2020. I come then to the appeal itself.

G 11. The appeal was allowed to proceed only on one ground, which related to part of the Reasons given by the Judge at paragraph 23. He said this:

H "In this case, I am not persuaded that it is sufficiently likely that there will be evidence of sufficient relevance to make it necessary to disclose the documents sought. The second decision [and he is there referring to the April 2019 decision] was made about a year after the first by different people and in circumstances in which there have been a significant

A change of circumstances in that the Claimant had given up the role as Deputy Security Manager at the temple.”

There are then a couple of other relevant observations in paragraphs 24 and 26. The Judge at paragraph 24 refers to these matters being relied on as “background” and then he says:

B “...On the Claimant’s case that would involve a full investigation into the reasoning adopted at the meeting in April 2019. That would necessarily involve further disclosure of documentation and further witness evidence. I do not consider that increasing the scope of disclosure and evidence is proportionate and it is very unlikely to be of any significant relevance. It will take additional time and involve further expense; I do not consider it is necessary.”

At paragraph 26 he said this:

C “In circumstances where I am not making new Order for disclosures sought, I do not consider it is appropriate for the Tribunal to conduct a full investigation into the discussion in April 2019. I do not consider it is appropriate for the purported voluntary additional Particulars to be before the Tribunal or for the sections of the Claimant’s current statement that deal with this matter to be included in his witness statement for the final hearing.”

D The appeal as I say is against the Order for disclosure. It is not clear from the face of it that it is also an appeal against the exclusion of the voluntary additional information or part of the Claimant’s witness statement, although in the standard form part of the Notice of Appeal at page 10 it just says “The Order of Employment Judge Taylor” whilst in the grounds of appeal there is reference to the Decision refusing the application for disclosure. However, in any event, it was allowed through only on ground 3, which related to the statement I have read out from paragraph 23 of the Judge’s Reasons where he said that there had been a significant change of circumstance as between the decision made by Chief Inspector Allen and the one made by Chief Inspector Merrell.

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G 12. On the appeal, having been shown the relevant emails, it was clear to me that there was in truth no change of circumstances as described by the Judge in paragraph 23 as between the two decisions. It was also clear to me that that consideration was a material part of the background to the Employment Judge’s decision on disclosure. The decision was based, therefore, on a demonstrable and clear factual error. That is a valid ground for setting aside a case management decision like this. Mr Bannen says on that basis that I should allow the

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A appeal, set aside the Order and indeed go ahead and decide for myself whether there should be an Order for disclosure, and (I suppose) decide what areas the Claimant's evidence can cover.

B 13. Ms Palmer in response says that even if I am against her in relation to the change of circumstances point, which I am afraid I am, the error by the Employment Judge is academic because the later decision, the April 2019 decision, is simply of no logical relevance to anything. It seems to me that the later decision may be of some relevance to the ET in that it shows that a different officer made a favourable decision apparently on the basis of the same material and that might reflect on the decision made by the earlier officer. In addition, it seems to me that, especially bearing in the mind the difficulties in proving religious and race discrimination, it may well be that this material should be before the Tribunal. Therefore, it does not seem to me right to overlook the error in paragraph 23 on the basis that there was only ever one answer in this case.

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E 14. Ms Palmer also relied on the fact that there is apparently no appeal against the Order in so far as it dealt with the evidence and particulars that could be relied on by the Claimant at trial. I have already gone into it a little bit, but Mr Bannen's Notice of Appeal certainly does not make clear that he intends to appeal against other parts of the Order, but he says they stand or fall with the decision made about disclosure. That, he says, is confirmed by the terms of paragraph 26 of the Reasons where it says, "In circumstances where I am not making the Order for disclosure sought, I do not consider it is appropriate for the Tribunal to conduct a full investigation ... I do not consider it is appropriate for the other material to be before the Tribunal ..." It does appear indeed appear that the decision on what should be included in evidence was contingent on the decision about disclosure, although I am not sure that was a logical approach. Further, the Respondent Commissioner will not be materially prejudiced by

A any omission from the Notice of Appeal because we now have a date for the Full Hearing in
October 2020 and there will be plenty of time for the ET to reconsider this and to give a final
decision about what evidence can be relied on and for the Commissioner, if necessary, to seek
B further evidence.

C 15. However, it does not seem to me right, notwithstanding Mr Bannen's position, that the
EAT should make the necessary decisions about the scope of disclosure and evidence in this
case. It may be that an Employment Judge on further consideration will still come to the view
that the events in April 2019 should not form part of the Full Hearing or that in any event
disclosure about them would be excessive given a proper appreciation of the factual matrix. It
D therefore seems to me that the case should be remitted to the ET to reconsider all relevant
aspects of the Order issued on 18 July 2019.

E 16. I am therefore going to allow the appeal, set aside the whole Order sent out on 18 July
2019 and remit the matter back the ET to give directions as to the scope of evidence and
disclosure in relation to the April 2019 meeting. It seems to me inevitable (but I will hear the
parties if they wish), that it should not go back to Employment Judge Taylor but rather to a
F fresh Employment Judge.

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