



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 13
XA25/20

Lord Malcolm
Lord Glennie
Lord Pentland

OPINION OF THE COURT

delivered by LORD MALCOLM

in the Appeal

by

GENERAL TEACHING COUNCIL OF SCOTLAND

Appellant

against

a decision of the Employment Appeal Tribunal

Appellant: Lindsay QC; Anderson Strathern LLP

17 February 2021

[1] The General Teaching Council of Scotland (GTCS) has appealed against a decision of the Employment Appeal Tribunal (EAT) dated 7 August 2019. The appeal concerns the proper interpretation of Regulation 4 of the Requirement of Teachers (Scotland) Regulations 2005, as amended in 2011 (the 2005 Regulations). In particular does it mean that registered teachers can only be employed in accordance with their registration category in the register of teachers maintained by the GTCS? The EAT held that there was no statutory

bar on a teacher registered as a further education lecturer (college lecturer) being employed as a teacher in a secondary school. The GTCS contends that this was an error.

The background circumstances

[2] The background circumstances are that the claimant in the tribunal proceedings was dismissed from employment as a secondary school teacher when the nature of his registration emerged. His claim for unfair dismissal was resisted by the employing education authority on various bases including statutory bar in terms of section 98(2)(d) of the Employment Rights Act 1996. The claimant was successful before the Employment Tribunal. The employers appealed to the EAT, with the GTCS being permitted to intervene. So far as statutory bar is concerned, the EAT took the view that in terms of the 2005 Regulations the only prohibition is on the employment of an unregistered teacher, the particular terms of the registration having no restrictive effect. The appeal on this ground was therefore dismissed. (Grounds of appeal concerning the levels of compensation and pension loss awarded were also dismissed.)

[3] This court granted permission to the GTCS to appeal on the question of statutory bar. In the meantime the dispute between the claimant and the employers was settled extra-judicially, hence neither has participated in these proceedings. Although the underlying claim is no longer live, permission was granted in recognition that a matter of general importance is raised. In considering the appeal the court has had not only the benefit of submissions on behalf of the GTCS but also a clear and comprehensive judgment by the EAT explaining the reasons for its decision.

The relevant statutory provisions

[4] Education authorities are under a general duty to secure adequate and effective provision of education in their area: section 1 of the Education (Scotland) Act 1980, as amended (the 1980 Act). The 2005 Regulations concern the requirements to be met by education authorities when employing teachers. Regulation 4 provides that an education authority shall employ only a registered teacher as a teacher. “Registered teacher” is defined as a teacher whose particulars are recorded in the register maintained by the GTCS under the Public Services Reform (General Teaching Council for Scotland) Order 2011 (the 2011 Order).

[5] The core aims and functions of the GTCS, which has existed since 1965, were not changed by the 2011 Order. The functions are set out in article 6 of that Order. They include keeping the register; responsibilities in respect of standards of education and training for school teachers; and as to standards of conduct and teachers’ professional competence. Article 14 states that the GTCS can “subdivide or otherwise organise entries in the register in such manner as it thinks fit”. An example is provided, namely that it may have separate parts for primary schools, secondary schools and further education institutions. Article 15 requires the GTCS to make rules concerning, amongst other things, registration criteria. The rules can set different procedures and different criteria for different types of teacher, and can include provision as to the keeping of separate categories of registration. Article 16 deals with entries in the register. The registration criteria rules must provide that an applicant can only be registered if (a) the individual has obtained a recognised teaching qualification or (b) the GTCS is otherwise satisfied that his or her education, training or experience warrants registration: see article 17.

[6] Article 29 of the 2011 Order deals with teaching qualifications for primary and secondary education. It is for the GTCS “to determine what constitutes a recognised teaching qualification for individuals seeking registration as a school teacher”. A determination may “make such provision about the education and training required to attain such a qualification as the GTCS thinks fit”. Article 30 sets out equivalent provisions in respect of teaching qualifications for those seeking registration as further education teachers, but in this regard the Scottish Ministers are the responsible body. By way of an example of the different regimes, both the EAT and this court were informed that an applicant for registration as a secondary school teacher must have a degree, but there is no such requirement in respect of registration as a lecturer in a further education institution.

[7] In accordance with long-standing practice the GTCS subdivides the register into categories, including into individuals registered to teach in primary schools; those registered to teach in secondary schools; and those registered to teach in further education institutions.

The decision of the EAT

[8] The basic contention for the GTCS is that since Regulation 4 refers to a registered teacher as a teacher whose particulars are recorded in the register maintained by the GTCS under the 2011 Order, the requirement to employ only a registered teacher means that a teacher may only be employed consistently with the terms of the individual’s registration. If that is correct, satisfaction of the criteria for further education teaching would not open the way to employment as a secondary school teacher.

[9] The EAT considered that the terms of the definition of a registered teacher in Regulation 4(2) provide a complete answer to the question. “Any teacher whose particulars

are recorded in the register maintained by the GTCS would be a registered teacher for the purpose of the Regulations” (paragraph 56 of the judgment). To answer the question it was not necessary to look at the 2011 Order; “mere inclusion in the register is sufficient”. The reference to the 2011 Order is simply to identify the relevant register. “Had the intention been for employment to be limited to teachers within a particular category in the register, then Regulation 4 could have so provided”.

[10] For the EAT it was relevant that the predecessor provisions in the Schools (Scotland) Code 1956 (the 1956 Code) stated that “every teacher employed by an education authority shall be a registered teacher holding the qualifications required by this Code for the post in which he is employed.” The different terms of Regulation 4 appeared

“to indicate that the intention was to enact a more liberal regime in which education authorities had more freedom to employ teachers whom they regarded as having the appropriate skills and knowledge to meet the education demands within their area” (paragraph 56(d)).

The EAT saw nothing in the 2011 Order which contradicted or undermined its approach to Regulation 4. The contrary interpretation would mean that a teacher entered as a physics teacher could not teach mathematics. This would be “a highly impractical outcome” and would run counter to Regulation 3 which requires education authorities to employ sufficient teachers with the appropriate skills and knowledge. That provision implied that this is a matter for education authorities, unconstrained by whatever subdivisions or categories the GTCS sees fit to fix upon (paragraph 66).

[11] The EAT had regard to non-statutory guidance which it considered supported its conclusion on statutory bar. A document issued by the Scottish Education Department after the 2005 Regulations came into force indicated that the appropriateness of a teacher for a particular post would be a matter for the education authority as the employer, it having to

be assured that the person had the skills and knowledge required for the post (SED Circular 4/2005 paragraph 3.3). For completeness it should be recorded that the EAT also considered and rejected a submission that the 2005 Regulations and the 2011 Order should be treated as *in pari materia* - however this submission was not maintained before this court.

Discussion and decision

[12] The GTCS was established as a non-departmental professional regulator for the teaching profession by the Teaching Council (Scotland) Act 1965 (the 1965 Act). This was in response to concerns as to the maintenance of standards in the teaching profession, for example in respect of the use of unqualified teachers. In brief the remit was to register teachers, regulate their professional training, and cancel their registration when appropriate to do so. The Council was to “contribute to improving the quality of teaching and learning” and to maintain and improve teachers’ standards of professional competence (section 1(2A)). Detailed provisions were made in relation to those entitled to be on the register, and the GTCS had a power to register someone not otherwise entitled if the individual’s education, training, fitness to teach and experience were such as in the opinion of the GCTS warranted registration.

[13] In 2011 the GTCS was made an independent statutory body with greater autonomy in respect of its functions. The 1965 Act was repealed and replaced by the 2011 Order, parts of which are summarised above.

[14] Prior to the introduction of the 2005 Regulations, the requirements for teachers were contained in the 1956 Code. As mentioned earlier, it provided that every teacher employed by an education authority shall be a registered teacher holding the qualifications required by the Code for the post in which he is employed. (Limited exceptions were made for

appointments approved by the Secretary of State or for temporary appointments.) In the 2005 Regulations as originally enacted, prior to the 2011 Order, Regulation 4(2) defined a registered teacher as a teacher whose particulars are recorded in the register maintained by the GTCS under section 6 of the 1965 Act. (Since 2011 the reference has been to the register kept under the 2011 Order: schedule 6 to the 2011 Order, paragraph 7(2)(a).)

[15] The EAT considered that this change in wording pointed to a legislative intention to create a more liberal regime in which education authorities would have freedom to employ any registered teacher whatever the terms of the registration. In a sense this approach adds nothing, in that it proceeds on the premise that the EAT's construction of Regulation 4 is correct. However, and leaving the wording of Regulation 4 in comparison with the 1956 Code to one side, we are not aware of anything which might be prayed in aid of the proposition that the intention was that education authorities were no longer to be restrained by the terms of a teacher's registration. The EAT referred to education authorities' duty under Regulation 3 to ensure that they employ sufficient numbers of appropriately qualified teachers, but this has always been their responsibility, and it is a neutral factor in the dispute as to the correct construction of Regulation 4. The approach of the GTCS is consistent with the terms of Regulation 3. Indeed the role and functions of the GTCS from 1965 to the present can be seen as assisting education authorities in their obligation under the 1980 Act to provide adequate and effective education in their area. Registration is and has always been intended as a safeguard for the quality of school education. Furthermore the contention that an appropriate registration is a necessary criterion for employment in a particular teaching post does not dilute or remove the need for the employing authority's assessment of the suitability of applicants for vacant positions.

[16] We consider that the appeal turns on the proper construction of Regulation 4 of the 2005 Regulations in its amended terms. In this regard it is legitimate to have regard to the overall context of the Regulations. This includes the role of the GTCS as the keeper and administrator of a register aimed at identifying when someone has passed the necessary steps for qualification in a particular sphere of teaching, all with a view to maintaining teaching standards in schools. So far as the current version of Regulation 4 is concerned, it refers to the register maintained by the GTCS under the 2011 Order. Earlier the terms of articles 14/17 and 29/30 were summarised. Given the role and purpose of the GTCS, and its new autonomy and enhanced status, it was to be expected that it would exercise the powers given to it, and that this would include different registration criteria for different registration categories, including for primary, secondary and further education teaching. Indeed in this regard it was following a practice established over many years. It would be apparent that an applicant for a particular registration would require to meet the qualifications necessary for it. The GTCS sets the standards for primary and secondary education. The Scottish Ministers determine the qualifications needed for further education institutions, and these are then policed by the GTCS through its administration of the register of teachers. Education authorities will no doubt be consulted from time to time, but they have no formal involvement in these procedures.

[17] Given the reasons for its existence and the functions of the GTCS, plus the elaborate regimes set up under the 1965 Act and now the 2011 Order, it would be something of a surprise if an education authority was not constrained by any of this, with the only restriction being that an applicant's name had to appear somewhere on the register. Why go to all the effort of setting different registration criteria for different types of teacher if the resultant categories have no impact on the scope of a registrant's employment? We consider

that no material change from the previous regime was signalled by the terms of Regulation 4. The requirement to have the qualifications specified for the particular position by the 1956 Code had to go. It was initially replaced by a reference to the particulars in the register maintained by the GTCS under the 1965 Act and more recently by a reference to the 2011 Order. The reference to the register maintained under the 2011 Order goes beyond mere identification of the relevant document. The requirement to employ a registered teacher “whose particulars are recorded in the register” imports a need to employ teachers only in accordance with the particulars of their registration. We are impressed by the care exhibited in and the clarity of the EAT’s judgment, but we are persuaded that when regard is had to the wider context and the purpose of the Regulations it adopted an overly literal approach. The result is that the claimant’s dismissal was fair on the grounds of statutory bar.

Disposal

[18] While the appeal is upheld, this will have no practical effect on the claimant and his employers as they have reached an extra-judicial agreement. Nevertheless for the sake of good order we will quash the decision of the EAT and remit the whole matter to it for further procedure, which no doubt will be determined by the terms of the settlement.