Appeal No. UKEAT/0074/16/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 28 September 2016

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MS M LAMBERT — APPELLANT

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PATRICK HALLIDAY (of Counsel) Bar Pro Bono Scheme
For the Respondent	MR ROBERT MORETTO (of Counsel) Instructed by: Government Legal Department One Kemble Street London WC2B 4TS

SUMMARY

VICTIMISATION DISCRIMINATION

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

Whether the Employment Tribunal failed to recognise that in a complaint of victimisation the employer may act with mixed motives, protected act and "innocent" motivation. Answer: no. The Employment Tribunal clearly found that the sole reason for disciplinary proceedings brought against the Claimant was her perceived wilful unmanageability.

Sufficient, **Meek**-compliant reasons given for that conclusion.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the London (Central) Employment Tribunal. The Claimant, Ms Lambert, was and remains employed by the Respondent, the Home Office, as a presenting officer, presenting cases on behalf of the Respondent, particularly in the First-Tier Immigration Tribunal. She holds a law degree.

2. She brought complaints of unlawful discrimination on grounds of her race and/or sex and victimisation. All claims were resisted by the Respondent. In respect of victimisation, with which I am concerned, Employment Judge Lewis, at a case management hearing on 26 August 2014, identified the protected acts relied on (see his summary, paragraph 7) as emails from the Claimant dated 14 and 16 March 2012, specifically that any refusal by the Respondent of her request to work at offices at Angel Square for childcare reasons would be race and sex discrimination. That contention was resisted by the Respondent on the basis that the allegations were false and not made in good faith. In the event, the Tribunal did not find it necessary to rule on that contention.

3. At a further Preliminary Hearing before Employment Judge Grewal, held on 19 September 2014, three categories of complaint were identified (see paragraph 1 of her Order dated 23 September): (1) rejecting the Claimant's request to allow her to work at Angel Square on 28 March 2012 (that request was later accepted on 5 July); (2) refusing the Claimant's request for annual leave during the first week in June 2012, initially on 29 May but then granted on 1 June; and (3) disciplinary proceedings for misconduct beginning on 3 August 2012 and resulting in a final written warning for 12 months by a letter dated 21 August 2013. An appeal against that penalty was dismissed on 15 January 2014.

4. Aside from limitation issues, the substantive liability issues to be determined were set out at paragraph 7 of Judge Grewal's Order in this way:

> **"<u>The Issues</u>**
>
> **7. It was agreed that the issues that the Tribunal would have to determine are whether:**
>
> **(a) The Respondent directly discriminated against the Claimant on the grounds of race and/or sex by doing any of the matters set out at paragraph 1 (above);**
>
> **(b) The Respondent victimised the Claimant by doing any of the matters set out at paragraph 1(b) and (c) (above); and**
>
> **(c) Whether the Tribunal has jurisdiction to consider complaints about any acts that occurred before 12 January 2014."**

5. The Full Hearing of the claims came before a Tribunal chaired by Employment Judge Charlton on 13-16 January 2015, followed by that Tribunal deliberating in private on 18 March. By a Judgment with Reasons dated 27 April 2015 all claims were dismissed.

6. Against that Judgment the Claimant brings the present appeal. She was then acting in person, as she had done below. The appeal was initially rejected on the paper sift by HHJ David Richardson under **Employment Appeal Tribunal Rules** Rule 3(7). However, at a Rule 3(10) Appellant-only oral hearing before Laing J on 10 February 2016 the Claimant was represented pro bono by Mr Halliday of counsel, as she is today. Having heard submissions, Laing J allowed the appeal to proceed to a Full Hearing on a limited basis set out in what is now an amended ground 3. That is the hearing now before me.

7. Ground 3 as amended is directed to the Tribunal's finding expressed at paragraph 51 of their Reasons that the instigation and conduct of the disciplinary proceedings against the Claimant did not amount to an unlawful act of victimisation. At paragraph 50 the Tribunal also found that those proceedings did not amount to unlawful direct discrimination on the prohibited grounds alleged. Ground 3 contends that the Tribunal first misdirected itself in law and secondly failed to give adequate reasons for its conclusion on this aspect of the claim.

8. By way of context, I should summarise the position in relation to those internal disciplinary proceedings as found by the Tribunal. In the summer of 2012 the Claimant's then line manager, Ms Crowe, was finding the Claimant difficult to manage. As a result, Mr Nickell was appointed investigating officer with a view to possible disciplinary proceedings. He produced a report on 15 February 2013. By then Mr Ferguson had succeeded Ms Crowe as the Claimant's line manager with effect from 5 September 2012. Mr Ferguson held a misconduct meeting with the Claimant on 1 May 2013. He concluded that the Claimant had been guilty of bullying and harassing colleagues and had sent intimidatory emails. He imposed the final written warning mentioned earlier. An appeal against that sanction was dismissed by Ms Ramachandran following an appeal hearing by her letter of 15 January 2014. At paragraph 51 the Tribunal said this:

> **"51. Neither do we see this [i.e. the disciplinary proceedings] as victimisation. To succeed in the claim of victimisation the Claimant has to show that he or she was subjected to a detriment because he or she did a protected act or because the employer believed he or she had done or might do a protected act. If the asserted detrimental treatment is due to another reason such as [the Claimant's] wilful unmanageability, then the claim cannot succeed. Our conclusion is that the disciplinary proceedings were taken for that reason and therefore the claim for victimisation in relation to the disciplinary proceedings does not succeed."**

9. Focusing on that paragraph, Mr Halliday submits first that the Tribunal fell into error in proceeding on the basis that it was faced with an either/or choice - either the reason for the disciplinary process was the protected act or acts relied on or it was the Claimant's perceived wilful unmanageability - thereby excluding the possibility that both reasons formed a part of the Respondent's conscious or subconscious motivation. I entirely accept that mixed motives may apply. Indeed, Mr Moretto at paragraph 10 of his written closing submissions below (EAT bundle, page 145) correctly states the law by reference to the relevant passage in the speech of Lord Nicholls in **Nagarajan v London Regional Transport** [2000] AC 501 at 513A. Mr Halliday accepts that the principle is there correctly stated. However, he points out that the ET do not set it out expressly in their self-direction (see paragraph 46 of their Reasons). That is

A true. However, it is plain to me that the Tribunal took account of those written submissions (see paragraph 42).

B 10. Moreover, Mr Halliday submits that the Tribunal were wrong in law to characterise the question as a binary one: protected act or another reason. I disagree. Mr Moretto has directed me to passages in three cases (**Fecitt v NHS Manchester** [2012] ICR 372, paragraph 41, per Elias LJ; **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337, C paragraph 11, per Lord Nicholls; and **Martin v Devonshires Solicitors** [2011] ICR 352, paragraph 22, per Underhill J, as he then was) for the proposition that where the reason for the detrimental treatment complained of is an innocent one and not the protected act or acts relied D on then the victimisation claim will fail.

11. The real question, it seems to me, is whether, fairly reading the Tribunal's Reasons as a E whole, the Tribunal found as a fact that the sole reason for the disciplinary proceedings was the Claimant's perceived unmanageability. I am satisfied that it did. In particular, I accept Mr Moretto's submission, viewed against the background of the earlier findings of fact (see especially the last sentence of paragraph 36) that in paragraph 50 the Tribunal unequivocally F find that the reason (i.e. the sole reason) for the disciplinary proceedings was the Claimant's perceived unmanageability.

G 12. That leaves the **Meek v City of Birmingham District Council** [1987] IRLR 250 point. Mr Halliday argues that, given the various references to the Claimant's threatened ET proceedings in Mr Nickell's report, those threats having appeared in her email particularly of 14 March 2012, and its effect on the recipients, at the very least it was incumbent upon the H Tribunal to explain why it rejected the Claimant's case that the protected acts had a significant

influence on the course of the disciplinary investigation. Again, I disagree. The question for the Tribunal as posed by Nicholls LJ is the "reason why" question: why did the Respondent instigate and pursue disciplinary proceedings against the Claimant? The resounding answer from the Tribunal, effectively adopting the submission made by Mr Moretto below, was that on the whole of the evidence the only reason for the disciplinary process was the Claimant's unmanageability. It had nothing to do with the protected acts. That is sufficient to tell the parties why they won or lost on this issue, hence the Reasons challenge also fails.

13. It therefore follows that this appeal must stand dismissed.