Appeal No. UKEAT/0072/14/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 October 2014
Judgment handed down on 20 November 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MRS J IBEKWE APPELLANT

SUSSEX PARTNERSHIP NHS FOUNDATION TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL IBEKWE (Representative) Brighton & Hove Race Project Brighton Media Centre 15-17 Middle Street Brighton East Sussex BN1 1AL
For the Respondent	MR ANGUS WITHINGTON (of Counsel) Instructed by: Brachers LLP Somerfield House 59 London Road Maidstone Kent ME16 8JH

SUMMARY

VICTIMISATION DISCRIMINATION - Whistleblowing

One arguable ground of appeal relating to detrimental treatment on grounds of protected disclosure (**Employment Rights Act**, section 47B). Whether the Employment Tribunal properly applied burden of proof under section 48(2). Issue decided as a matter of fact (see **Kuzel v Roche** (CA)). No grounds for interference on appeal. The remaining grounds raised factual challenges not within Employment Appeal Tribunal jurisdiction).

HIS HONOUR JUDGE PETER CLARK

1. This case came before an Employment Tribunal sitting at London (Central); Employment Judge Hodgson and members, on 5-8 March 2013. The parties, as I shall describe them, are Mrs Ibekwe, the Claimant and Sussex Partnership NHS Foundation Trust, the Respondent. By a reserved Judgment with Reasons dated 3 June 2013 that Employment Tribunal, by a majority, dismissed her claims of disability discrimination (including victimisation and harassment) and section 47B protected disclosure detrimental treatment.

2. Against that Judgment this appeal is brought by the Claimant. It was originally rejected under Rule 3(7) on the paper sift by HHJ Birtles. However, at a Rule 3(10) Hearing before HHJ Eady QC on 3 February 2014 the appeal was allowed to proceed in part (grounds 7.3, 7.4, 7.6 and 7.7).

Background

3. The Claimant has been and remains in the employment of the Respondent since 1993 as a nursing assistant, materially at Mill View Hospital on a psychiatric ward. She works part-time (60pc) on nights.

4. On 8 June 2006 she was assaulted by a patient, suffering a perforated eardrum. On 11 September 2008 she was subjected to a second patient assault, sustaining injury to her left wrist.

5. Previous Employment Tribunal proceedings against the Respondent were ruled time-barred on 13 January 2011. The Judgment and Reasons of that Employment Tribunal, chaired by EJ Barrowclough are dated 14 March 2011.

6. During the employment the Claimant raised three 'grievances'; (1) on 30 September 2008, (2) on 3 November 2008 and (3) on 5 April 2012. There is some doubt about grievance (3) to which I shall return. Those 3 grievances were relied upon by the Claimant as constituting protected disclosures for the purposes of her section 47B complaint.

7. Looking at the list of issues to be determined by the Employment Tribunal (paragraph 2 of the Reasons) the Claimant raised four 'allegations'. Adopting the Employment Tribunal's numbering, they were as follows:

1) On 28 May 2012 she was put on stage 1 of the Respondent's sickness monitoring policy (paragraph 2.5.1).
2) She suffered a detriment in that the Respondent failed to deal with her grievances 1, 2 and 3 (paragraph 2.26.2).
3) Production by the Respondent of minutes of a meeting purportedly held with her on 28 May 2012, but which she did not attend (paragraph 2.5.2).
4) A failure to recognise the Claimant's disabilities from 2008 and continuing. This allegation is directed at Ms Tia Grice on 5 April 2012 and 7 June 2012 and Ms Bev Ryan-Hawes on 12 June 2012 (paragraph 2.9.2).

The Appeal

8. Before the Employment Tribunal the Claimant was represented by experienced counsel in this field, Mr Elesinnla. Her appeal is presented by her husband, Mr Ibekwe, who has considerable familiarity with employment law. I note that he is a volunteer case work co-ordinator with the Brighton & Hove Race Project and has appeared in this court in the past. He presented her case with conspicuous ability and clarity and characteristic courtesy. Mr

Withington of Counsel has represented the Respondent throughout. I am grateful to both advocates for their assistance, both on paper and in oral submissions.

9. Following our hearing on 2 October, when I reserved my judgment, I received further written submissions from Mr Ibekwe dated 3 October 2014 and a response from Mr Withington dated 6 October. Insofar as they add to my understanding of the case I have considered them.

10. By way of overview, during our discussion I formed the view that Mr Ibekwe's best point was the first of the four grounds permitted to proceed by Judge Eady. I shall consider each in turn.

(1) Ground 7.3

11. The focus here is on paragraph 7.46 of the Employment Tribunal Reasons, where the Tribunal said this:

> **"As regards allegation 2 and the failure to deal with the alleged grievance of 5 April, first, we do not accept that it was a grievance itself. We have noted it could be a grievance incorporated into the letter of 12 June. To the extent that there is delay following 12 June. Unfortunately, we have a lack of evidence. We have the bare fact that it was not pursued by either side. No meeting was called by the respondent. The next action the claimant took was issuing proceedings. The failure to deal with this matter could be seen as unreasonable. However, there is nothing whatsoever to suggest that any managerial failure had anything whatsoever to do with the protected disclosure. It was not on ground of any disclosure. It is fair to say that the lack of action provides some evidence of a managerial failure, which should not have happened, that is conceded by the witnesses in this case. However, that is insufficient evidence for us to find that it was any protected disclosure which caused the delay in the sense it was on the ground of a protected disclosure. There is simply no evidence to find that causational link. The burden of proof under section 48(2) of Employment Rights Act 1996 does nothing to assist the claimant; the claimant does not win by default if the respondent fails to establish a reason. There remains an evidential burden and there is no evidence to find the action was on the relevant ground."**

12. By way of context, at paragraph 7.33 the Employment Tribunal found that the letter of 5 April 2012 could not be read as a grievance of itself, but arguably became a grievance by reference to the Claimant's letter of 12 June.

13. Looking at the letter of 5 April 2012 it does contain a complaint, under the heading 'Disability' that the Respondent did not acknowledge her conditions (tinnitus, vertigo and left hand wrist injury) as falling under the former DDA; **Disability Discrimination Act 1995**. The letter of 12 June 2012 lists complaints of disability discrimination and protected disclosure detrimental treatment.

14. Mr Withington submits, by way of an additional ground in support of the Employment Tribunal's Decision (see paragraph 3(1) of the Respondent's Answer) that the Employment Tribunal was wrong to treat the letter of 5 April 2012 as a protected disclosure; it contained allegations and did not disclose information; see **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38, paragraph 24, per Slade J. I reject that submission. Whether or not the letter of 5 April 2012 amounted to a 'grievance' (no longer a term of art since the repeal of the **Dispute Resolution Regulations 2004**) it is plain to me that the Claimant's complaint was that the Respondent did not recognise her as a disabled person within the meaning of the Act (whether **DDA** or subsequent **Equality Act 2010**) and thus was not complying with its statutory duties towards her under the legislation.

15. Thus the real question, addressed by the Employment Tribunal at paragraph 7.46, was whether, in failing to deal with her complaint of 5 April 2012 before these proceedings were commenced that potential detriment was causatively linked to the fact of the protected disclosed on 5 April.

16. As appears from paragraph 7.46 the Employment Tribunal held that there was no evidence to find that causational link.

17. In challenging that finding Mr Ibekwe submits that the Employment Tribunal failed to apply the burden of proof laid down in section 48(2) **ERA**.

18. Section 48(2) provides:

> **"On *such a complaint* [under s47B] it is for the employer to show the ground on which any act, or deliberate failure to act, was done."**

19. The Employment Tribunal carefully directed themselves as to the burden of proof. They set out section 48(2) **ERA** at paragraph 6.2. They consider guidance on its application at paragraph 6.29. It has been clarified to me in argument that the reference to paragraph 8 of **Fecitt and others v NHS Manchester** is not in fact a reference to the EAT Judgment of HHJ Serota QC in that case (despite the EAT reference) but to paragraph 8 of the Judgment of Elias LJ in the Court of Appeal [2012] IRLR 64. The Employment Tribunal therefore had in mind the Court of Appeal guidance in that case. Further, they directed themselves in accordance with the approach of Recorder Underhill QC, as he then was, in **London Borough of Harrow v Knight** [2003] IRLR 140, paragraphs 20-21, a case cited without disapproval by Elias LJ in **Fecitt**.

20. I also note, see paragraph 6.14, that the Employment Tribunal were referred by Mr Elesinnla to **Kuzel v Roche Products Ltd** "in the Employment Appeal Tribunal". My judgment in that case [2007] IRLR 309, was scrutinised by Mummery LJ, giving the leading judgment in the Court of Appeal in that case [2008] 530 CA. That was a case concerned with 'whistle-blowing' unfair dismissal under section 103A **ERA**. Although my analysis of the burden of proof in such cases (see paragraph 30) was approved (paragraph 66) our application of the principles was not; the Court of Appeal allowed the employer's cross-appeal and restored the Employment Tribunal Judgment dismissing Dr Kuzel's complaint, see paragraphs 63-65.

21. Although concerned with the reason for dismissal, Mummery LJ made the point (paragraph 55) "that only a small number of cases will in practice turn on the burden of proof". I raised that authority with the parties during the course of argument. I do not accept that a failure by the Respondent to show positively why no action was taken on the letter of 5 April before the form ET1 was lodged on 12 June means that the section 47B complaint succeeds by default (*cf*. the position under the ordinary discrimination legislation, considered by Elias LJ in **Fecitt**). Ultimately it was a question of fact for the Employment Tribunal as to whether or not the 'managerial failure' to deal with the Claimant's letter of 5 April was on the ground that she there made a protected disclosure.

22. Their clear and unequivocal conclusion was that it was not, having considered the whole of the evidence. That was a finding of fact with which I shall not interfere (see **Kuzel**). Accordingly this first ground of appeal fails.

(2) Ground 7.4

23. This relates to allegation (3); see above and reasons paragraphs 7.47-7.48. The Employment Tribunal found that the allegation failed on the facts. What seems to have happened is that Ms Ryan-Hawes gave the 'minutes' document to the Claimant's supervisor, Mr Venkama and he gave it to the Claimant. In fact the Claimant was never placed on stage 1 of the policy (although she was eligible for stage 1). The Employment Tribunal finding of fact at paragraph 5.55 was that it was never suggested that a meeting, as described in the minute has in fact taken place. Thus allegation 3 simply failed on the facts and is not properly the subject of appeal.

(3) Ground 7.6

24. This concerns the Employment Tribunal's majority findings as to the harassment complaint at paragraphs 7.57-7.65. That complaint failed on the majority findings of fact. Having considered Mr Ibekwe's submissions on this ground of appeal I can see no error of law identified. That the minority member (Mr Soskin) took a different view; paragraphs 7.90-7.100 is nothing to the point.

(4) Ground 7.7

25. This concerns the majority finding on victimisation (paragraph 7.66), with which the minority member agreed (paragraph 7.101).

26. It was the view of all members of the Tribunal that this claim failed on the facts. There was no causative link to the protected acts relied upon. It related only to allegation 1, putting the Claimant on stage 1 of the policy of 28 May. But the Employment Tribunal found that she never was placed on stage 1. So that claim necessarily failed. There is no more to be said.

Disposal

27. It follows, for the reasons given, that I am not persuaded that any error of law is made out in this appeal. Consequently it fails and is dismissed.