Appeal No. UKEAT/0145/14/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 October 2014

Before

HIS HONOUR JUDGE SEROTA QC

(SITTING ALONE)

MR S AHMED — APPELLANT

CITY OF BRADFORD METROPOLITAN DISTRICT COUNCIL AND OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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Bar Pro Bono Scheme

For the Respondents

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SUMMARY

VICTIMISATION DISCRIMINATION

Protected disclosure

Detriment

The Claimant was employed by the First Respondent ("Bradford") and at the time of a redundancy exercise was offered an alternative post subject to a CRB check and an internal reference, both of which were regarded as formalities. However the Claimant had made a protected disclosure which tended to show a serious breach of contract by Bradford in relation to a scheme funded by the European Development Fund. The Claimant had occasion to raise a grievance during the course of which he made the protected disclosures.

The Manager appointed to investigate the grievance, Mrs Baker (the Second Respondent) had taken very much against the Claimant and put herself forward to write the reference, even though she had no knowledge of the Claimant's work. She wrote a reference she knew to be negative and in a sense misleading and that would affect the Claimant's position in relation to the new post and did so to ensure that the Claimant was forced out of Bradford's employment.

The Officer appointing the new post considered (wrongly) that the Claimant had misled him about sickness absence and Mrs Baker knew of this but did not disabuse Mr Rashid. He withdrew the offer of the new post to the Claimant, relying to a substantial degree on the reference. The Claimant was then dismissed by reason of redundancy. The Employment Tribunal was satisfied that the Claimant suffered detriments by reason of his protected disclosures including the appointment of Mrs Baker to give the reference, the giving of the negative reference and her failure to correct misleading information about the sickness absence. The Employment Tribunal held that Mr Rashid did not rely on the reference on the grounds that the Claimant had made a protected disclosure. The Employment Tribunal in effect severed the relationship between Mrs Baker's action in writing the reference and the motivation of Mr Rashid in not appointing the Claimant to the new post, which the Employment Tribunal held had not been caused in a sufficient sense by the protected disclosure.

The Employment Appeal Tribunal held that the fact Mr Rashid did not realise that he was being misled by the reference did not 'sanitise' the effect of the reference and did not absolve Bradford, as employer, from responsibility for a decision influenced by the infected reference.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is an appeal by the Claimant from a decision of an Employment Tribunal in Leeds; the presiding Employment Judge was Employment Judge Starr, who sat with lay members. The decision was on 23 September 2013. The parties were the First Respondent, to which I shall refer as "Bradford", the employer, and five officers of Bradford. The Second Respondent, Ms Anne-Marie Baker, née Baker, investigated certain grievance of the Claimant in June 2011. She also became head of the department known as the Local-Impact Team on its reorganisation. Mr Terry Davis was the line manager of Mrs Baker. He was the principal manager in the Employment and Skills Department. The Fourth Respondent, Mr Jani Rashid, was a senior manager and the head of the Diversity and Cohesion Team but in another department; however, he was responsible for recruiting and interviewing applicants for a post known as a School Community and Development Officer (SCDO). Ms Karen Hoyle, the Fifth Respondent, was the Lead Redeployment Officer within the Department of Business Support, and she lead-managed the Redeployment Manager. Ms Catherine Davies, the Sixth Respondent, was the leader of the Social Care Legal Team.

2. The Employment Tribunal found that the Claimant had been unfairly dismissed; there is no appeal against this decision by the Respondents. The Claimant had been subjected to a detriment under section 48 of the **Employment Rights Act 1996** (ERA) in breach of section 47B of the Act in five respects. The Employment Tribunal, however, rejected a claim for automatic unfair dismissal under section 103A of the **ERA** and victimisation under section 27 of the **Equality Act 2010** (EqA). There were also complaints of breaches of the duty to make reasonable adjustments under sections 20 and 21 of the **EqA 2010**, which are the subject of an

appeal, and also the Employment Tribunal rejected a claim that the Claimant had been subjected to a detriment under sections 15 and 39 of the **EqA 2010**. The Notice of Appeal is dated 19 December 2013. It came before HHJ Eady QC on 28 May 2014 on what is colloquially referred to as the sift, and she referred grounds 1, 2 and 3 of the Notice of Appeal to a Full Hearing but not grounds 4 and 5.

The Factual Background

3. I take this, I hope fairly briefly, from the Decision of the Employment Tribunal. As this is an ex tempore Judgment, it is not as polished as might otherwise be the case. The Claimant has a back condition of a slipped disc causing intermittent pain leading to difficulties in dressing. Bradford was aware of this, and he had been provided with ergonomic equipment in relation to his seating and working arrangements and also in relation to the IT equipment with which he had been supplied. The Claimant is of Asian Bangladeshi ethnicity.

4. The Claimant was employed by the First Respondent from September 2001 in various posts. Originally, he was a Legal Officer in the department of the Sixth Respondent. As at May 2010 the Claimant was a Local-Impact Officer in the Manningham Mills Local-Impact Team. I understand that Local-Impact Teams are tasked with helping persons to find and retain employment, among other things. I note at this point in time that the First Respondent has a policy of redeploying staff at risk of redundancy. It happens from time to time that local authorities effect reorganisations that leave certain posts redundant but create other posts, and in the past the Claimant had always been successful in redundancy exercises in being redeployed. May 2010 found him, as I have said, as a Local-Impact Officer. Redundancy was in the air in May 2010, but the Claimant, who had been through four redundancy exercises and redeployed,

expected that he would be redeployed. A decision was made at about this time that the Local-Impact Teams would be disbanded and their staff redeployed if possible.

5. I shall say something now about what I understand to be the position of Local-Impact Teams. Among the duties of Local-Impact Teams was the administration of a scheme provided for under a contract between Bradford and the European Redevelopment Fund (ERDF). The ERDF funded Bradford's Local-Impact Teams in supporting employment incentives. The scheme permitted a Local-Impact Team to support persons who found it difficult to stay in employment by giving them shopping vouchers, referred to as employment incentive vouchers, after 13 weeks' employment. The distribution of these vouchers was used as an incentive to individuals to provide information such as National Insurance numbers so outcomes could be claimed and audited, and the number of outcomes - that is, successful placements - would be reported to the ERDF. The officers were encouraged to increase the number of outcomes.

6. However, it is important for me to record that the terms of the scheme required persons placed in jobs so as to secure an outcome to have done so as a result of a process that involved the employer. As I shall come to shortly, the Claimant had occasion to raise with the Second Respondent's suggestions that Bradford had been in breach of its obligations under the scheme because it had recorded as outcomes cases where persons had been placed in employment without there having been any contact between Bradford and their employers, vouchers had been distributed and outcomes claimed in circumstances where neither should have happened, and the number of outcomes was therefore being inflated. In the proceedings it was asserted that the Claimant's disclosures amounted to protected disclosures.

7. In about May 2011 the Claimant had occasion to raise a grievance against his line manager, a Ms McAlpine, in which he made allegations of discrimination on the grounds of race, and there was a further intimation to make a complaint in June 2011. The Second Respondent, Mrs Baker, who as I have said, was to be appointed as the head of the Local-Impact Team, was appointed to investigate the grievance. There was some issue, to which it is not necessary to refer, as to whether at the time of her appointment she had been aware that the Respondents were the subject of Employment Tribunal proceedings by the Claimant in which he had made allegations of discrimination. The protected disclosures were made in the context of investigations having been started into his grievance. It led to the matter being referred to an internal audit, because the allegations were serious and could have had very damaging consequences for Bradford if made out. The Claimant, however, was never interviewed, although a cloud of suspicion had fallen on him and he was regarded as being possibly at fault by his superiors, including in particular, so far as is material, Mrs Baker, who was investigating the grievance. The Employment Tribunal found there was no reason why the Claimant should not have been informed at an early stage and interviewed in relation to the matters.

8. I note here - and I note in parentheses, because it is not something that appears either in the Decision of the Employment Tribunal or in the submissions of either Counsel - that during the course of investigations witnesses were interviewed who pointed a finger at the Claimant, suggesting that he had put pressure on them to produce misleading evidence as to outcomes in cases where Bradford was not entitled to claim that an outcome had been achieved.

9. In August 2011 the Claimant was informed he was in a pool at risk of redundancy. On 28 November he moved to an accredited learning service, because at that point in time I understand from the Decision of the Employment Tribunal the Local-Impact Team was no

longer functioning. The Claimant also made an unsuccessful application for a business advisor post. The Claimant took sick leave from 30 January 2012 by reason of his back problems and stress. His leave continued after 21 April but only on the basis of his back problem and not the stress. Of 16 August 2011 he had been placed in the pool facing the risk of redundancy; in March 2012, he was written to that he was at risk of redundancy and given notice that he would be made redundant.

10. The Claimant's first Employment Tribunal proceedings terminated on 3 April 2012 when his application was dismissed. At about this time the post of the SCDO was advertised. The Claimant had been given notice, but he expressed interest in this post and hoped to be redeployed. The Employment Tribunal at paragraph 78 found that after his interview he had in fact secured the post subject to a CRB check and a reference that the Claimant was entitled to regard as being a formality. There was no other candidate for the post, he had a clean record, and, so far as he was concerned, there was no reason to doubt his suitability for the post; indeed, there was support for him within Bradford's administration.

11. I have mentioned a reference was required. It was decided that Mrs Baker, who was carrying out the grievance investigation, would give the reference. It is quite clear that she had taken strongly against the Claimant. As the Employment Tribunal state at paragraph 82, Mrs Baker put herself forward as a referee because she knew more about the Claimant than anyone else; and what she knew related to the voucher and outcome issues and the ongoing investigation by internal audit, but she did not know about the Claimant's work. She wrote her reference on 16 May, and it was at about this time that the Claimant was told that there was an investigation being undertaken and that he would be interviewed in the near future. He was not told that he himself was under investigation, and he did not even know about the investigation

until that date. The reference was dated 16 May, and it was sent to Mr Rashid, who was responsible for interviewing and appointing to post. The reference was said to be a factual reference because Mrs Baker did not have knowledge of the Claimant's work. She referred to the Claimant's absence from work due to the stress and backache, saying it was not known whether the backache could constitute a disability. She was asked in terms (a box requiring to be ticked) "Are you aware of any current recent disciplinary procedures against the applicant?" and she completed the "No" box. However, she added this, notwithstanding her negative response:

> **"There is no current disciplinary action against [the Claimant], however there is a current internal audit investigation into management concerns which came to light in 2011 whilst [the Claimant] was working in the Local Impact Team - a recommendation was made to consider investigating concerns in the report which was fed back to [the Claimant] in October 2011. Internal audit are due to interview [the Claimant] shortly, the delay has been due to sickness absence."**

12. Mrs Baker told the Employment Tribunal that she would not have been happy to have a reference like that given about her. The Employment Tribunal found that the reference was clearly negative and that she knew that when she gave it it was negative and that it would affect the Claimant's position in respect of the SCDO post.

13. Mr Rashid met the Claimant on 24 May, having seen the reference. The Claimant told him he had raised Tribunal proceedings alleging discrimination. There was a discussion about the sickness absence. Mr Rashid expressed concern to the Tribunal that the Claimant had misled and confused him about the extent of his sickness absence, saying merely he was flabbergasted to hear he was supposed to have taken 78 days off sick. This centred on the Claimant's belief the reference was wrong to suggest that he had had time off in 2011 when he had not and Mr Rashid's belief the Claimant could not have thought that. The Employment Tribunal concluded Mr Rashid did not have access to the Claimant's sickness absence record on the internal system and had genuinely formed the view that the Claimant was misleading him

about his sickness absence. It is the case, however, that the Claimant was at that time off sick, Mr Rashid knew that and did not ask specific questions of the Claimant about the periods and nature of his sickness absence. Mr Rashid also considered the Claimant to be misleading him about the internal audit investigation in that Mr Rashid considered a letter of 15 May 2012 to make clear the Claimant was the subject of the internal-audit investigation. This was wholly unreasonable; the letter did no such thing.

14. On 29 May Mr Rashid met with Mrs Baker, who did nothing to dispel Mr Rashid's sense from the reference that the Claimant was the subject of a possible fraud investigation. There were two occasions when there were discussions about the reference, and Ms Hoyle, whom the Employment Tribunal considered to be an honest and reliable witness, had told Mr Rashid there was a misunderstanding in relation to the sickness absence record. The Employment Tribunal found there had been a genuine and honest mistake on the part of the Claimant in relation to his understanding that the 78 days might include time in the previous year, 2011.

15. Paragraph 89 is a paragraph of some importance in the context of this case. The Employment Tribunal referred to evidence it had had from Mr Rashid in relation to his reasons for rejecting the Claimant as he did for the SCDO post. There were two reasons: the first, that he felt hoodwinked in relation to sickness absence; and the second is that he felt misled in relation to the Claimant's explanation about the internal-audit investigation. The Tribunal went on:

> **"… In summary, we find that Mr Rashid's conclusion about the Claimant on the sickness absence was genuine, although we consider that it was unfortunate and somewhat unreasonable."**

16. The Employment Tribunal then said they would come back to that matter later in the Judgment.

The Decision of the Employment Tribunal

17. The Employment Tribunal set out the facts in some detail, as I have very briefly summarised them. It set out the law, and it is right to say that no issue has been taken as to the Employment Tribunal's self-direction; and for that reason I do not see the need myself to set out the law in any great detail. In relation to whistleblowing the Employment Tribunal directed itself as to sections 48, 47B, 43A and 43B of the **ERA**. It directed itself to the Judgment of Elias LJ in the case of **NHS Manchester v Fecitt and Ors** [2011] EWCA Civ 1190. Reference was also made to the decision of **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 and the decision of Slade J in **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38.

18. The Employment Tribunal then turned to the law in relation to unfair dismissal and referred to sections 94, 98 and 103A of the **ERA**, and it also drew attention to the decision of the Court of Appeal in **Kuzel v Roche Products Ltd** [2008] IRLR 530, in which the Court of Appeal concluded that the failure by an employer to establish a potentially fair reason for dismissal does not lead automatically to a finding that a dismissal is automatically unfair, but where the employer's explanation has been rejected and a *prima facie* case of automatic unfair dismissal has been raised, and where the reason for the treatment is a protected disclosure, the Employment Tribunal is entitled to conclude that that was the principal reason. The Employment Tribunal considered the law in relation to victimisation, sections 27, 39, 120 and 136 of the **EqA**, **Chief Constable of West Yorkshire Police v Khan** [2001] UKHL 48, **Woodhouse v North West Homes Leeds Ltd** [2013] Eq LR 796, **Martin v Devonshires Solicitors** [2011] ICR 352 and **St Helens Metropolitan Borough Council v Derbyshire** [2007] UKHL 16. It then directed itself in relation to disability discrimination; I do not think I need go into that, because this is not an issue in this appeal.

19. The Employment Tribunal in relation to whistleblowing at paragraphs 124 to 126 noted the Claimant's case was that the information that he had disclosed amounted in relation to the Respondents' failure under the ERDF contact to protected disclosures. The Employment Tribunal accepted that submission; I do not think this is the subject of any challenge, and I therefore do not need to expand further on this. The Employment Tribunal were satisfied the disclosures had been made to Mrs Baker, his line manager, and then asked itself whether the Claimant was subjected to any detriment.

20. The Employment Tribunal found the following to be detriments: firstly, the appointment of Mrs Baker as the referee; secondly, the decision for a formal investigation of the Claimant by internal audit; thirdly, the reference provided by Mrs Baker; fourthly, Mrs Baker's failure or refusal to correct misleading information in the reference; fifthly, Mrs Baker's informing the Claimant she had concerns over his work on the response to redundancy contract on 26 June; and then a threat, to which I have not previously referred, by Mrs Baker and her line manager, Mr Davis, that the Claimant would be investigated and implicitly threatened disciplinary action should he remain an employee or return to employment. The decision to reject the Claimant for the SCDO post and also another post were specifically found to be detriments. The Employment Tribunal said that various other matters had been put forward as detriments and had been rejected.

21. The Employment Tribunal having found there had been a protected disclosure and a number of detriments led to the engagement of section 48(2), that it was for the Respondent employer, Bradford, to show the ground on which any act or deliberate failure to act was done. The Employment Tribunal applied the **Fecitt** test; that is, did the protected disclosure have a material or more than insignificant power of influence on the decision to inflict the detriment?

The Employment Tribunal found that the following detriments were suffered as a result of the protected disclosure: the appointment of Mrs Baker as a referee, the reference provided by Mrs Baker, and her failure or refusal to correct misleading information as well as informing the Claimant of concerns over his work, the threat of investigation and implicit threats of disciplinary action. The Employment Tribunal at paragraph 133 say this:

> **"We reached those conclusions both as a result of the Respondent failing to show the ground on which acts were done and, in case it is necessary, on the basis that the evidence, anyway, established the detriments that the Claimant was subjected to were on the ground of his protected disclosure."**

22. The Employment Tribunal then returned to the whistleblowing detriment case in more detail. The Employment Tribunal concluded that the Claimant raised matters that led to an internal-audit investigation and a cloud over the Claimant, prompting a view to be taken against him by principally the Second Respondent, Mrs Baker, which in turn led others, including the Third Respondent, Mr Davis, to share their views of the Claimant and acted to ensure that the Claimant was forced out of the First Respondent's employment. It seems to me that this is an important matter in considering the question as to whether there has been automatic unfair dismissal.

23. The Employment Tribunal at paragraph 135 noted the Claimant's previous quiet and unblemished length of prior employment and four prior redeployments, the disbanding of the department, and the investigation by internal audit, which appeared to focus on the Claimant; there was an absence of evidence others had been threatened with disciplinary action in relation to the subject matter of the investigation. He became the focus of attention and the suspect in respect of a financial fraud that could have caused Bradford significant embarrassment. The Second Respondent's grievance investigation had thrown up problems with other members of the affected Local-Impact Team, including Ms McAlpine, who the Second Respondent

considered had attendance issues of her own. She was not disciplined or threatened in relation to the vouchers issue. The Claimant complained that the Respondents had been counting down the clock on his employment and there were obvious superficial discrepancies in treatment and coincidences that needed to be examined.

24. The Employment Tribunal did, however, find that the First Respondent had good reason to disband the Local-Impact Teams and they did not base any decision on that. Ms Davies, the Sixth Respondent, had prepared a detailed financial model. The Employment Tribunal note that neither Mrs Baker nor Mr Davis held the Claimant responsible for any deficiencies in the administration of the vouchers and outcomes matter. The Employment Tribunal did not consider that Mrs Baker was the obvious person to become the referee for the SCDO post, not knowing anything of the Claimant's work. Mrs Baker stepped in to ensure she became the referee, and the reason she gave the reference (paragraph 138):

> **"… was that that she had been involved in the investigation and had formed views that the Claimant was guilty of involvement in - even instigation of - a fraud. Her purpose in becoming referee was to give the reference which she then gave. It must have been obvious to [Ms Baker] when she gave it, and if not, no later than her discussion with Mr Rashid, that the reference scuppered the Claimant's job prospects in the redeployment pool and immediately for the SCDO post. Ms Baker accepted that that [sic] she would not be happy with the reference she gave for the Claimant and we think that was telling. Whilst Ms Baker may have been honestly motivated by conclusions she had drawn, she acted unfairly and unreasonably in giving the reference she gave when, as her tick indicated, no disciplinary charges had been brought, still less aired and the Claimant given any chance to speak on the matter. Internal Audit had specifically commented that the Claimant's manager appeared to have sanctioned his actions. …"**

25. Nor did the Employment Tribunal consider that the reference was misleading as to sickness absence. Mrs Baker did not help the Claimant in his redeployment although, on her case, she was responsible for him as a manager. As Mr Davis accepted, he was also responsible formally for the Claimant but did nothing to help. The Employment Tribunal went on (paragraph 139):

> **"… It is not obvious why those two individuals did not help the Claimant in his redeployment efforts, given their positions in relation to him, unless they had a reason to seen him fail to secure a post through the redeployment. In that connection, as we have also found, they**

> **actively stepped in to prevent his redeployment. When a chance arose at Ms Baker's meeting with Mr Rashid on 29th May 2012, she did not correct any impressions that Mr Rashid had about the status of the investigation, what it concerned and whether the Claimant was the focus. If, as she maintained before us, the investigation was a wider consideration of the matters than the Claimant's role in the matter, she could have made her view clear to Mr Rashid, but chose not to."**

26. The Claimant was told there would be a permanent laying on file of unresolved allegations, which could be investigated at any time after 2 April but which were not investigated until June and were never taken beyond the interview with him into any process. This inevitably led to a situation where, in the view of the Employment Tribunal, there was a more-or-less permanent inference that would stand in the way of the Claimant's redeployment or re-employment at Bradford. The Employment Tribunal then went on to consider various issues that led to its conclusion there was an inference properly to be drawn that the Claimant had been subjected to detriment on the ground of his protected disclosure: the placing of Mrs Baker as referee, the reference given and the meeting on 26 June and what was conveyed to the Claimant. The Employment then set out a number of matters that it did not consider had been done on the ground that the Claimant had made a protected disclosure; I need not go into these.

27. The Employment Tribunal considered that the decision to investigate further by interviewing the Claimant was appropriate and one the Claimant himself had wanted to have taken place earlier. It was critical of the failure to carry out the interview earlier, because it might have given the opportunity for the Claimant to escape from under the cloud created by Mrs Baker and Mr Davis. The Employment Tribunal then says this (paragraph 144):

> **"… The decision to reject the Claimant for the SCDO post was taken by the Fourth Respondent, Mr Rashid. We were satisfied that Mr Rashid took his decision because he unreasonably but honestly believed the Claimant to be lying about sickness absence and *because of the reference* [emphasis added]. We do not consider Mr Rashid's acting on the reference to deny the Claimant the job renders Mr Rashid's action on the ground of protected disclosure, although the underlying reference was written and delivered to him on that ground. The Second Respondent's motivation in writing the reference and the Fourth Respondent's motivation in acting on the reference as received were different and the latter was not caused, in a sufficient sense, by the Claimant's protected disclosure. It was not Mr Rashid's real reason for rejecting the Claimant, to which we return below. As to the Legal Officer post, the Sixth Respondent [Ms Davies] was unaware of the protected disclosure and did not base any decision on it, consciously or otherwise."**

28. I pause there for one moment; the passage that I have just read is heavily relied upon by the Claimant in this appeal, and Ms Dickinson has submitted - and I shall come on to her submissions shortly - that what the Employment Tribunal here has done, impermissibly, is to somehow sever the relationship between the Second Respondent's motives and the Third Respondent's motives and to ignore the fact that the detriment that was suffered by the Claimant - that is, the withdrawal of the offer of the SCDO post - was as a result of something done that the Employment Tribunal accepted was a detriment that had been caused, or was as a result of, protected disclosures made by Mr Ahmed. The Employment Tribunal then, in relation to victimisation, reject the submission that there had not been any protected acts and then identified the protected acts to which I have already referred: his grievances and his application to the Employment Tribunal.

29. The Employment Tribunal then went on to say that the Respondents subjected the Claimant to detriment in relation to the less-favourable treatment and made no different finding for the purposes of the victimisation claim in this respect and for the purposes of the whistleblowing detriment claim. The Employment Tribunal then went on to consider in relation to victimisation the key issue: was the Claimant subjected to detriment and dismissal because he had done protected acts? Although the Claimant's case in relation to victimisation was powerful, the Employment Tribunal found insufficient evidence to support a finding that the Respondents had acted as they did because of his protected acts. The appropriate inference to draw is that their reason for acting was the Claimant's protected disclosure and its view of his involvement in the matters raised. The Employment Tribunal went on (paragraph154):

> **"… We declined to draw a second inference that the protected acts were a reason for the actions of those Respondents."**

30. I find this difficult to understand. On the one hand they seem to be saying that there was a link between the protected disclosures and the detriments, and on the other hand they are saying they are not prepared to draw that inference.

31. The Employment Tribunal then turned to consider the position of Mr Rashid. He was told by the Claimant about the discrimination grievance and Employment Tribunal proceedings:

> **"155. … Before that, he had made up his mind that the Claimant was appointable, which we took to mean that the decision had gone in the Claimant's favour … subject to the CRB check and the reference. After that, Mr Rashid changed his mind.**
>
> **156. We were persuaded that Mr Rashid's decision was nothing to do with the protected acts. The case against Mr Rashid on disability discrimination and in relation to whistleblowing detriment required more consideration, which we dealt with above and return to under disability discrimination … His reasons to reject the Claimant for the SCDO post, in short, related to the sickness absence and the Internal Audit investigation."**

32. I, again, pause here for one moment and go back to the passage to which I had referred at paragraph 144, in which the Employment Tribunal explicitly linked Mr Rashid's decision not only to having, he believed mistakenly, been misled but "because of the reference". I find it very difficult to reconcile those two aspects.

33. The Employment Tribunal then went on at paragraph 157 to conclude the protected acts were not a cause of the dismissal:

> **"… Ms Baker's intervention in connection with the SCDO post, and Mr Rashid's view of the Claimant as misleading him on sickness and in relation to the investigation, were the real cause of the dismissal [again, I find that inconsistent with the passage I had referred to earlier] (which in turn related to the whistleblowing case and the view Ms Baker took of the Claimant's participation in illegality); in the background were redundancy and the Legal Officer application. The facts from which we might decide there was victimisation were not well explained by that theory but rather by the Claimant's whistleblowing case, and we therefore concluded that the Claimant's victimisation case, including on dismissal, did not pass the threshold in section 136(2) of the Equality Act. If that is wrong, we would have held that the Respondents had proved that they did not victimise the Claimant because of his protected acts - they subjected him to detriment in ways which were either explained, as above, or culpable under the whistleblowing provisions."**

34. Again, I have significant difficulty with this reasoning.

35. I do not think I need say much more about disability discrimination; I do note, however, that in the course of considering disability discrimination the Employment Tribunal at paragraph 161 concluded that Mr Rashid's views as to having been misled as the sickness and the internal audit were both unfair and unreasonable.

36. So far as unfair dismissal is concerned, and automatically unfair dismissal, the Employment Tribunal noted the Respondents' case that this was a redundancy dismissal. The Tribunal was not persuaded that redundancy was the reason or principal reason for the Claimant's dismissal (paragraph 164):

> **"… There was a diminution in the council's requirements for employees to carry out work of the kind carried out by the LIT. For that reason, the Claimant was put on notice of potential redundancy. He then secured a redeployment job offer internally."**

37. This, of course, is the post of SCDO and the subject of the reference and the CRB check. The Employment Tribunal went on (paragraph 165):

> **"… The Second Respondent and Third Respondent did not wish to see the Claimant remain employed, because of their views of his conduct. They discussed who should give the reference and the Second Respondent then gave that reference, not knowing about the Claimant's work, obliged by the rules to provide a factual reference only and knowing that the terms of the reference which she provided would prevent the Claimant taking up the offered internal role.**

38. The Claimant had the support of the redeployment team who wished to see him placed again in Bradford's employment, but (paragraph 166 to 167):

> **"166. … That was effectively thwarted by the Second and Third Respondents. The position today remains that an unknown negative mark remains 'on file' against the Claimant, having been placed there by the Second and Third Respondents, and it prevents his employment at the council for practical purposes.**
>
> **167. In the circumstances, it seemed to us that the real reason for dismissal when the extended period came to an end on 27 July 2012 was the wish of the Second Respondent and the Third Respondent to see the Claimant out of the council's employment. They blocked his redeployment to the SCDO role to make sure that the Claimant did not stay at the council. Their own reasons for their stance toward the Claimant were that they suspected him of wrongdoing. Whatever the motivation of those staff, the redundancy was by then no longer the effective cause of his dismissal and their action to block redeployment was the effective cause."**

39. They then went on to find that this was an unfair dismissal, whether it was a dismissal for redundancy, which was not the Employment Tribunal's view, or whether it was that the Second and Third Respondents wanted him out, as they found. The Employment Tribunal went on (paragraph 169):

> **"What really happened was that the Second Respondent, with the support of the Third Respondent, unreasonably convicted the Claimant in her own mind of serious wrongdoing without ever offering the right to a fair hearing. Indeed, there was no hearing at all, and the [First] Respondent acted to ensure that there was no hearing, such that even today we cannot say, and we have no evidence that the First Respondent can say, whether the Claimant faces a case to answer. The Tribunal's own tentative view of the Claimant's position is that, as the Internal Audit report commented, his superior had sanctioned the conduct at the heart of the matter and, in those circumstances, there must be room for doubt about culpability on the Claimant's part."**

40. In relation to the section 103A claim, the Tribunal concluded (paragraph 171):

> **"… applying *Kuzel v Roche,* although we have rejected the First Respondent's redundancy reason, we cannot conclude that the whistleblowing was the principal reason for dismissal. The Claimant failed to secure the SCDO post and he also failed in his application for the Legal Officer post. In relation to the former, there were two reasons, one of which related to Mr Rashid's perception that the Claimant had misled him about sickness, and the other related to the protected disclosure case. Even if Mr Rashid's decision could be said to have been on the ground of the protected disclosure, which we considered it could not, being derivative, there were still other reasons such that we could not find that the protected disclosure was the principal reason for his dismissal."**

41. What these "other reasons" are I regret to say neither I nor Ms Dickinson knows. Mr Harwood-Gray has the advantage of having been present at the Employment Tribunal, but he was not able to enlighten me either.

Submissions and Discussion

42. Ms Dickinson's submissions were in ground 1 of her Notice of Appeal that the Employment Tribunal's approach to the question of whether there had been a detriment within the meaning of section 47B(1) of the **ERA** resulting from a protected act was flawed. Although the Employment Tribunal correctly referred itself to the **Fecitt** test, it applied a different test from the material influence test of separating the motivation for writing the prejudicial reference and the motivation for acting on it, and finding that the latter had not been caused in a

sufficient sense by the protected disclosure. This was a more stringent test than laid down in **Fecitt**. The decision by Mrs Baker to give an unfavourable reference, in the findings of the Employment Tribunal, clearly had more than a trivial influence on the decision not to appoint the Claimant to the post of SCDO.

43. My attention was drawn to the Judgment of Underhill LJ in the case of **The Co-Operative Group v Baddeley** [2014] EWCA Civ 658. Underhill LJ, in a passage that I have at paragraph 42 - in considering what the reason is for dismissal, to identify decision-makers - said a decision might be unfair if the beliefs held by the person, for example, carrying out the dismissal:

> **"… have been manipulated by some other person involved in the disciplinary process who has an inadmissible motivation - for short, an Iago situation. [Counsel for the Appellant] accepted that in such a case the motivation of the manipulator could in principle be attributed to the employer, at least where he was a manager with some responsibility for investigation; and for my part I think that must be correct."**

44. That, says Ms Dickinson, is the case here. On the findings that I have set out made by the Employment Tribunal Mrs Baker deliberately set out to secure Mr Ahmed's employment with the council coming to an end by scuppering, in the words of the Employment Tribunal, his chances of redeployment not only for the SCDO post but for any post. It seems to me in those circumstances that it is almost impossible to argue that, from the findings of the Employment Tribunal, by reason of the protected disclosure her act in particular in relation to the reference could not be regarded as having had a "material influence, being more than a trivial influence", as per **Fecitt**, on the treatment meted out to the Claimant. Ms Dickinson's second ground of appeal was, in the alternative, that the decision by the Employment Tribunal that there was no link between the decision not to offer the Claimant the SCDO post and his protected disclosure was perverse.

45. The third ground of appeal was that the rejection of the Claimant's claim under section 103A that his dismissal was automatically unfair was perverse by reason of the findings of fact, to which I have referred, and the acts and motivations of Mrs Baker and Mr Davis to block the Claimant's reappointment and see him removed from Bradford's employment. This all pointed, she submitted, to the reason for the treatment - that is, the dismissal - being the protected disclosure. The Employment Tribunal having discounted the Respondents' explanations, no reasonable Employment Tribunal could have concluded that a protected disclosure was not the principal reason.

46. Mr Harwood-Gray submitted in relation to the first ground of appeal that the Employment Tribunal had explicitly found that the Claimant did not get the SDO post because Mr Rashid considered he had been misled or hoodwinked. Mr Harwood-Gray relied upon the Judgment of Elias LJ in **Fecitt** to the effect that what was required was an enquiry into the reasons why the employer acted as it did. In that case the Court of Appeal had concluded that the reasons given by the employer were genuine and demonstrated the fact that the Claimant had made protected disclosures did not influence those decisions. There had to be a causal connection between the protected act and the Respondents' acts or omissions to act. Its reasoning demonstrates, following the view of Elias LJ, that it did not think there was such a causal connection.

47. I pause for one moment to note that on the facts of this case a causal connection was found between the protected disclosure, the detriment of the reference from Mrs Baker, the reliance on that reference by Mr Rashid and the withdrawal of the offer of appointment.

Conclusions

48. I now turn to my conclusions. So far as grounds 1 and 2 are concerned - and I shall take these together - I am satisfied that the Employment Tribunal did apply the wrong test for causation and applied too strict a test; they should have applied the test formulated by Elias LJ, to which I have referred, in **Fecitt**. The findings in this case in relation to the non-appointment to the SCDO post strongly suggest that the reference, tainted as it was, had more than a trivial influence and that Mrs Baker's reference was a means of manipulating the redeployment process. It seems to me that grounds 1 and 2 are made out. The Employment Tribunal should not have separated the motivation for writing the reference by Mrs Baker, which she wrote with the intent that he should cease to be employed and not be re-employed, from the reliance by Mr Rashid upon it. The fact that Mr Rashid did not realise he was being misled by the reference does not sanitise the effect of the reference and does not exonerate Bradford as the employer from a decision that ultimately was significantly, in my opinion, influenced by an infected reference that came into existence as a result of a protected disclosure.

49. So far as ground 3 is concerned, the Employment Tribunal has found in terms that the Claimant was not dismissed by reason of redundancy and he was dismissed by reason of the fact that Mr Davis and Mrs Baker, no doubt honestly but thoroughly mistakenly and unreasonably, believed he should be removed from Bradford's employment. That decision, it seems to me, was clearly influenced by its being a response to a protected disclosure. I do not feel able, however, to say on the material before me that the reason for the dismissal was principally because of the protected disclosure. The Employment Tribunal itself draws attention to the fact of the unspecified other reasons. In my opinion where employee X does an act which amounts to a detriment to employee Y by reason of a protected disclosure, such as by giving an unfair and negative reference, with the intention that it should lead to the Claimant

suffering a further detriment at the hands of employee Z, or might reasonably be found to have been so intended, the employer will be liable for the second detriment if it can be shown to have been infected by the first discriminatory act and had materially influenced the imposition of the second detriment imposed by Z upon Y.

50. In those circumstances, and having regard to recent authorities in the Court of Appeal - and I have in mind the authorities of **Burrell v Micheldever Tyre Services** [2014] ICR 935 and **Jafri v Lincoln College** [2014] ICR 920 - it is not an appropriate case for me to make a finding one way or the other. I did consider that there may be no difference in compensation payable to the Claimant in respect of a finding of automatic unfair dismissal as opposed to the detriment that he is found to have suffered by reason of not being appointed to the CPSO post. I invited Counsel to see if they could come to some agreement that would render it unnecessary for the case to be remitted to the Employment Tribunal. I, however, have come to the conclusion that, as the parties are unable to agree, this matter must be remitted. The only question that should be remitted to the Employment Tribunal in my decision is whether or not the Claimant was the subject of an automatically unfair dismissal.

51. Both Counsel agree that it would not be appropriate for this matter to be remitted to the same Employment Tribunal. I have borne in mind the views of the former President, Burton J, expressed in the case of **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, but I do not consider it would be fair to expect this Employment Tribunal to be able to bring an entirely fresh mind to the question as to whether or not the dismissal in this case was automatically unfair. The appeal is allowed, and I substitute a finding that the Claimant suffered a detriment by reason of making a protected disclosure in that either he was not appointed to the post of SCDO or the offer of employment as SCDO was removed.