Appeal No. UKEAT/0235/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 February 2014
Judgment handed down on 11 March 2014

Before

HIS HONOUR JUDGE SHANKS

MS G MILLS CBE

MR B WARMAN

WESTMINSTER DRUG PROJECT — APPELLANT

MS C O'SULLIVAN — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR MICHAEL PAULIN (of Counsel) Instructed by: Berrymans Lace Mawer LLP Solicitors Kings House 42 King Street West Manchester M3 2NU
For the Respondent	MS LINDA HUDSON (of Counsel) Instructed by: Begum & Co 93 East Hill Wandsworth London SW18 2QD

SUMMARY

VICTIMISATION DISCRIMINATION – Protected disclosure

Protected disclosure – whether it was the grounds for a dismissal

The Claimant maintained that she was dismissed by the Appellant on the grounds that she had made a protected disclosure. At the hearing before the Employment Tribunal the Appellant maintained that the decision maker who dismissed her knew nothing at all about any protected disclosure. The ET rejected that evidence and found that her protected disclosure had a material influence on the decision to dismiss. On appeal the Appellant maintained that the ET in considering the reasons for the dismissal had ignored the distinction between the making of a protected disclosure and the manner in which it was made or conduct associated with it. Because of the way the Appellant had run the case before the ET that distinction was not relevant and it was too late to raise it on appeal.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal by Westminster Drugs Project (WDP) against a decision dated 20 December 2012 of an Employment Tribunal sitting in Watford following a three day hearing.

2. WDP were commissioned by the LB Enfield Drug and Alcohol Action Team (DAAT) to provide support to drug users involved in the criminal justice system. The Claimant, who was a qualified social worker, worked for WDP as a community care assessor (CCA) from May 2010 until she was dismissed on 8 December 2011. The ET found that she was a "worker" for the purposes of **Employment Rights Act 1996** but that she was not an employee. Her claim for unfair dismissal therefore failed.

3. However, the ET upheld her claim that she was dismissed on the grounds that she had made protected disclosures and that WDP had therefore subjected her to a detriment for which they were liable under section 47B ERA. The protected disclosures relied on included a disclosure to DAAT about a former client of hers called CO made by the Claimant on 22 November 2011 which we describe in more detail below. As we understand it, it is not now disputed by WDP that this was one among a number of protected disclosures made by the Claimant; their case before the ET and this Tribunal is that the fact that she made them was not the cause of her dismissal.

Factual background

4. It was clear that Mr Welsh, the Claimant's line manager, had issues with her from an early stage. He had concerns about her punctuality and, as he put it before the ET, she would not accept his guidance as a manager and tended to "do her own thing."

5. On 22 November 2011 the Claimant received an email from CO's husband expressing serious concerns about her health and state of mind. She forwarded this email and her reply to the husband to people at the DAAT. She stated to DAAT that she wanted to keep them "in the loop" and that "it might be worth raising CO again at another clinical meeting." Mr Welsh saw the exchange of emails and wrote the Claimant an email in which he criticised various aspects of what she was saying to the husband and also said: " … it does not need to be sent on to the DAAT." It is right to record that shortly before that email he had sent a briefer one to the Claimant stating: "… I am not sure why you have forwarded to the DAAT and not myself? The DAAT do not need to be copied in to such matters and only require an update at CCA panels." In the course of her reply the Claimant had said:

> **"The reasons I did not wait until the CCA panel was that CO is a vulnerable adult and the risks are very high around her. I would not be doing my job if I did not make all concerned aware of the risks around this lady."**

6. The ET found that on 29 November 2011 there was an argument between the Claimant and Mr Welsh about the way she had dealt with this matter. He reminded her that she was not employed as a social worker but as a CCA and he said that he felt uncomfortable with her contacting the DAAT over this matter as he felt it was outside her remit. The ET also found that 29 November was the first occasion when Mr Welsh told his own line manager, Ms McLean, of his concerns about the Claimant's punctuality; before this he had not raised the matter with Ms McLean but had agreed on three occasions to put back the Claimant's morning start time.

7. On 30 November 2011 the Claimant arrived at work very late. She gave an explanation for her absence which Mr Welsh checked up on and, at least on his understanding, found to be false. This led to an exchange of emails and the involvement of Ms McLean. Ms McLean spoke to the Claimant and wrote her an email on 1 December 2011 stating that as far as she was

concerned the matter was closed. However Mr Welsh sent the Claimant a further email on 5 December 2011 and she responded on 6 December 2011. In that email the Claimant complained about the fact that Mr Welsh had checked up on her whereabouts and that he had not shown her respect and was implying she had lied; she also referred to her working capacity as a social worker and the need to clear up expectations about her role.

8. On 7 December 2011 Ms McLean decided the Claimant should be dismissed. She told the ET that the reason for this decision was that she considered that the relationship between the Claimant and Mr Welsh had broken down. She told the ET that her decision was based on conversations she had had with Mr Welsh about the Claimant (which the ET accepted had taken place on a daily basis since 30 November 2011), her reading of "the emails" and in particular that of 6 December 2011 which she found rude and unacceptable, especially as it had been written after she (Ms McLean) believed the matter had been closed. Mr Welsh agreed with her decision.

9. There was an email from WDP's human resources manager to Ms McLean of 7 December 2011 stating that the Claimant was self-employed, that she should be given one weeks notice and that this was "… as a result of general conduct/behaviour towards [Mr Welsh]". That formula was not followed when formal reasons for the decision to dismiss were given in an email dated 15 December 2011 as follows:

> **"[1] Recurring issues with punctuality**
>
> **[2] On 30th November your start time was 10.15 am and you arrived at work at 11.30 am. On your arrival in the office when I asked you where you had been you stated you were at Compass. It was later confirmed that you did not attend Compass that morning.**
>
> **In relation to the second point, this would if you were an employee of WDP constitute gross misconduct."**

<u>The legal framework and the issue for the ET</u>

10. Section 43A defines a "protected disclosure" as a "qualifying disclosure" made by a worker in accordance with *inter alia* section 43C. Section 43B(1) of the ERA defines a "qualifying disclosure" as:

> **"… any disclosure of information which, in the reasonable belief of the worker making [it] … tends to show …:**
>
> > **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject …[or]**
> >
> > **(d) that the health or safety of any individual has been, is being or is likely to be endangered."**

Section 43C(1) provides:

> **"A qualifying disclosure is made in accordance with this section if the worker makes [it] in good faith –**
>
> **…**
>
> > **(b) where the worker reasonably believes that the relevant failure relates solely or mainly to-**
> >
> > > **(i) the conduct of a person other than his employer, or**
> > >
> > > **(ii) any other matter for which a person other than his employer has legal responsibility**
> >
> > **to that other person."**

Section 47B(1) provides:

> **"A worker has the right not to be subjected to any detriment by any act … by his employer done on the ground that the worker has made a protected disclosure…"**

Section 48(2) provides that on a complaint under section 47B "… it is for the employer to show the ground on which any act … was done."

11. The ET found that the Claimant had made protected disclosures including that on 22 November 2011 to DAAT and that such disclosures were made in good faith: those findings are

not challenged. The ET was referred to **Fecitt v NHS Manchester** [2012] ICR 372 where the Court of Appeal stated that section 47B would be infringed if the protected disclosure "materially influences" the employer's treatment of the worker in question. The relevant issue in the case was therefore whether the making of a protected disclosure "materially influenced" WDP's decision to dismiss the Claimant. An ET's decision on such an issue must inevitably be one based on inference from all the relevant circumstances as they find them to be.

The ET's decision

12. It is important to note that it was WDP's case in the ET that Ms McLean's reason for dismissing the Claimant broke down into three elements: (1) her lack of punctuality; (2) the fact that she had misled WDP as to her whereabouts on 30 November 2011; and (3) her failure to let matters go after her (Ms McLean's) conversation with her on 1 December 2011 and her email of 6 December 2011. It was Ms McLean's position (as confirmed in written submissions dated 13 December 2012 and a note of Mr Paulin's oral submissions which we have seen) that she was completely unaware of the Claimant ever having made any protected disclosure. WDP therefore submitted that the making of a protected disclosure could not have caused the dismissal.

13. The ET first considered at paras [63] to [65] of their judgment Mr Welsh's state of mind in relation to the dismissal of the Claimant. They reached the view that he felt that his relationship with her had broken down and that she was difficult to manage for at least three reasons: (1) her late arrival on 30 November 2011 and her reaction to her whereabouts being questioned; (2) his concerns that she was going beyond her job description and not accepting his authority; and (3) a further substantial reason was that she had made a protected disclosure to DAAT in CO's case. At paras [64] and [65] they set out their reasons for their finding about the third reason. They noted that when explaining to them how the Claimant tended to "do her

own thing" the first example he gave to the ET was that she had gone direct to DAAT and not copied him in and had made inappropriate comments to CO's husband on 22 November 2011. They also noted that the first time he had raised the Claimant's punctuality with Ms McLean was on 29 November 2011, the same day as the argument about her conduct in relation to CO. The ET considered that something must have triggered him to make the complaint to Ms McLean on that particular day and that it must have been the fact that she had contacted DAAT about CO.

14. They then turned to Ms McLean's state of mind. They rejected her evidence that she did not know anything about the protected disclosures: they considered that she would not have taken the decision to dismiss the Claimant without probing matters with Mr Welsh. They considered the three reasons put forward by Ms McLean and discounted them for reasons set out in paras [69] to [71] of their judgment; in relation to the email of 6 December 2011 in particular they noted that it had not been mentioned in the reasons given for the dismissal at the time.

15. In para [72] they stated that WDP had therefore not satisfied them that the reason for the dismissal was not materially influenced by the protected disclosure and the disclosure to DAAT on 22 November 2011. In para [73] they said they would "go further": they made a positive finding that Ms McLean and Mr Welsh must have discussed the Claimant's behaviour during the week starting 30 November 2011 and that Mr Welsh must have passed on his concerns about the information concerning CO being passed to DAAT; this, they found, was the most likely explanation for Ms McLean's apparent change of mind between 1 December and 7 December 2011.

16. It followed that the decision to dismiss the Claimant was materially influenced by the protected disclosure made by the Claimant to DAAT on 22 November 2011 and that WDP was liable to the Claimant for a breach of section 47B of ERA in respect of the dismissal.

The grounds of appeal

17. Ground 1 in the notice of appeal (which Langstaff P allowed to proceed on the sift) stated as follows:

> **"The Tribunal erred by ignoring a crucial distinction in the present case: that between a detriment on *the grounds* of a qualifying protected disclosure, as compared with the *manner* in which the disclosures were made and the Claimant's *conduct* in the process of making those disclosures … The Appellant's case was that it was the unacceptable way in which the various disclosures had been made and the fact that the Claimant's conduct in making those disclosures was unacceptable … that was the cause of its treatment of her."**

Langstaff P rejected all the other grounds of appeal on the sift, save that he said of ground 5 that he was not persuaded "… it had any relevant existence separate from Ground 1, taken in context." Ground 5 was as follows:

> **"The Tribunal erred in its approach to the burden of proof under s.48(2) ERA 1996 and/or its decision was perverse."**

In the circumstances we allowed Mr Paulin for WDP to argue perversity and to refer to section 48(2) in the course of his submissions.

18. We readily accept that there is a proper distinction to be made between a detriment done on the grounds of the *fact* that a protected disclosure has been made and a detriment on the grounds of the *manner* of such a disclosure or *conduct* associated with it. Based on the material that Mr Paulin showed us we also accept that it may have been possible for WDP to run a case that, in so far as the Claimant's dismissal was related to any protected disclosure, it was caused

by the manner of the disclosure and associated conduct about which Mr Welsh was legitimately concerned.

19. The problem, as Ms Hudson pointed out forcefully, is that that was not how the case was run in the ET. As we have said, WDP's case was that the decision maker, Ms McLean, knew nothing about any protected disclosures and that they cannot therefore have influenced her decision to dismiss the Claimant. The consequence was that the distinction now relied on between the fact and manner of a protected disclosure does not seem to have been drawn to the ET's attention by WDP and, Ms Hudson tells us, she did not cross-examine WDP's witnesses about the manner in which the Claimant made her disclosures. Further, WDP did not dispute that the Claimant made her disclosures in good faith and the ET expressly found at para [59] that she was genuinely worried about the health and safety of the clients (including CO) and felt that she had to inform those who were in a position to do something about it (we infer that this is a reference to the Council acting through DAAT); if WDP had wanted to run a case that she was making disclosures in an inappropriate manner an attack on her good faith might have been expected.

20. In the circumstances it is hardly surprising that the ET did not turn its mind to the distinction or that, having rejected Ms McLean's evidence about what she knew at the time of the dismissal (as they were entitled to do), they came to the conclusion that her decision was materially influenced by the protected disclosure on 22 November 2011. We are of the firm view that it is now too late for WDP to seek to rely on the distinction referred to in ground 1.

21. That leaves "perversity" and section 48(2). Again, having been given a substantial tour of the evidence by Mr Paulin, we accept that if we had been hearing the case we may have reached a different view to that of the ET about whether the *fact* the Claimant had made

protected disclosures to DAAT materially influenced the decision to dismiss her. But, having read and re-read the reasoning of the ET in paras [63] to [73] of the judgment which we summarise above, we cannot possibly say that their decision is even close to perverse, particularly bearing in mind the way the respective cases were being put. As to section 48(2), we are a little uneasy about the way the ET approached the burden of proof in para [72], but any error in that regard is cured in our view by the express findings based on inference at para [73] (see our para [15] above).

Disposal

22. For all those reasons, while paying tribute to Mr Paulin's arguments and his mastery of the facts, we dismiss this appeal.