Appeal No. UKEAT/0221/11/MC
UKEAT/0222/11/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 & 7 March 2014
Judgment handed down on 8 April 2014

Before

THE HONOURABLE MR JUSTICE SUPPERSTONE

BARONESS DRAKE OF SHENE

MRS M V McARTHUR FCIPD

UKEAT/0221/11/MC

DR A OLAYEMI — APPELLANT

(1) ATHENA MEDICAL CENTRE
(2) DR A C OKOREAFFIA — RESPONDENTS

UKEAT/0222/11/MC

(1) ATHENA MEDICAL CENTRE
(2) DR A C OKOREAFFIA — APPELLANTS

DR A OLAYEMI — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For Dr A Olayemi	MR GARETH DAVIES (Representative) Camden Community Law Centre 2 Prince of Wales Road Kentish Town London NW5 3LQ
For Athena Medical Centre and Dr A C Okoreaffia	MR COLIN McDEVITT (of Counsel) Instructed by: Messrs Radcliffes LeBrasseur Solicitors 5 Great College Street Westminster London SW1P 3SJ

SUMMARY

SEX DISCRIMINATION – Burden of proof

UNLAWFUL DEDUCTION FROM WAGES

The Employment Tribunal found that the Appellant was unfairly dismissed and discriminated against by reason of her sex. The Appellant's claims for unlawful deduction of wages failed. The Appellant and the Respondent both appealed.

The EAT dismissed the Respondent's appeal that the ET had erred (1) in its approach to the burden of proof when considering the complaints of discrimination: **Hewage v Grampian Health Board** [2012] ICR 1054 applied; and (2) in finding that deductions from the Appellant's wages were made in breach of contract: **Sim v Rotherham MBC** [1987] ICH 216 applied. The Respondent failed to show the reason why there was reduced or no work and that it involved a breach of contract by the Appellant. However ET erred in failing to restrict its decision on harassment to the matters identified in the Agreed List of Issues.

Appellant's appeal against unlawful deduction of wages from May 2007 succeeded and issue of quantum remitted to the ET for determination.

THE HONOURABLE MR JUSTICE SUPPERSTONE

Introduction

1. Dr Olayemi ("the Appellant"), appeals against part of the judgment of an Employment Tribunal sitting at East London Hearing Centre, chaired by Employment Judge Warren, and sent to the parties on 25 October 2010 which held that (1) the Appellant's claims for unlawful deduction of wages fail and are dismissed, having been made out of time; and (2) the Appellant's claims in breach of contract, that she was unfairly dismissed and discriminated against by reason of her sex, each succeed. The Athena Medical Centre and Dr Okoreaffia, (who we shall refer to as "the Respondent"), also appeal against part of the judgment.

2. The Appellant is a medical doctor who practised as a General Practitioner at the surgery named as the Athena Medical Centre. Her employment was terminated by letter dated 28 August 2008. She claimed that she was unfairly dismissed, discriminated against by reason of her sex, harassed by reason of her sex and she sought payment of money which she said was due to her by reason of unlawful deductions made from her wages or deductions were made in breach of contract by the Respondent. Dr Okoreaffia is the sole proprietor of the medical practice.

3. The Appellant submitted a Notice of Appeal on 6 December 2010 raising seven grounds of appeal. Also on 6 December 2010 the Respondent submitted a Notice of Appeal containing four grounds.

4. The Appellant's Appeal was referred to HHJ McMullen QC in accordance with rule 3(7) of the Employment Appeal Tribunal Rules, who was of the opinion that Ground 1 relating to

the Appellant's claims for unlawful deduction of wages should go to a full hearing, but that Grounds 2-7 disclosed no point of law with a reasonable prospect of success.

5. On 28 January 2014 these two appeals were listed for a hearing before Cox J. Neither party attended the hearing. The judge, having noted that the appeals had a very lengthy procedural history, referred to an order dated 19 May 2011 made by Judge McMullen, who directed that the appeals on the grounds he considered arguable in both appeals, should be set down for a full hearing, to be heard together. Other grounds in both appeals were ordered to proceed no further. The listing before Cox J was to determine the viability of the remaining grounds of appeal in both Notices of Appeal, pursuant to rule 3(10), although the judge stated that she had seen no renewal applications. The previous day, 27 January 2014, the Respondent confirmed to the Employment Appeal Tribunal that they were no longer pursuing Grounds 1 and 4 of their appeal, which were to be withdrawn. The judge therefore dismissed these grounds upon withdrawal. The judge directed that Grounds 2 and 3 only would be considered at the full hearing of the Respondent's appeal.

6. In relation to the Appellant's appeal the judge noted that there were no written submissions from her. However the judge said that in the circumstances she would "adopt a pragmatic approach and send [the Appellant's] appeal through for [a full hearing] in its entirety, so that everything can be dealt with together". She said that she adopted this course in the unusual circumstances of this case and that she expressed no view as to the arguable merits of the Appellant's remaining grounds, only Ground 1 having been previously permitted to proceed to a full hearing.

The Tribunal decision

7. The Tribunal heard evidence over the course of 11 days between 26 May and 14 June 2010. It heard from the Appellant and from Dr Okoreaffia. The Appellant called no additional witnesses. Dr Okoreaffia called his Practice Manager, Julie Mwosu and the Practice Nurse, Felica Ojo. There were in excess of 2,000 pages of documents in evidence.

8. The issues were agreed between the parties at a time when both parties were legally represented and those issues were adopted by agreement at a Case Management Discussion held with Employment Judge Gilbert on 16 November 2009. The agreed list of issues are set out at paragraphs 2-20 of the decision.

9. The credibility of Dr Okoreaffia and Dr Olayemi was very much in issue in these proceedings. At paragraphs 84-107 the tribunal consider Dr Okoreaffia's credibility and conclude at paragraph 107:

> **"Overall, we have to say Dr Okoreaffia's frequent inability to answer a straight question and his attitude toward the Claimant, which appeared to be dismissive and arrogant, troubled us greatly."**

10. The Tribunal consider the Appellant's credibility at paragraphs 108-118. At paragraph 108 the Tribunal observe:

> **"Generally Dr Olayemi appeared to answer questions with scrupulous honesty, to the point sometimes where she would take a question rather too literally, when the purport of the question was obvious. Nevertheless, she was it seemed, scrupulously honest; she took great care to be honest. … However, that is not to say that her evidence did not also present us with some difficulty, because it did."**

11. The Tribunal's conclusions on credibility generally are set out at paragraph 119:

> **"We have to say that there are reasons why both parties' evidence has to be treated with circumspection and we approached our findings of fact on that basis. Where there were conflicts of evidence, we looked for corroboration. We avoided at any stage assuming that one or the other of them was telling the truth."**

12. The decision of the Tribunal is very detailed. It runs to some 79 pages. The findings of fact are set out at paragraphs 120-332; the conclusions of the Tribunal are at paragraphs 333-412. We shall refer to them, in so far as it is necessary, in relation to individual grounds of appeal.

The grounds of appeal

The Respondent's appeal

13. The parties were agreed that it was convenient to consider the Respondent's appeal first.

14. Mr Colin McDevitt, on behalf of the Respondent, submits that the Tribunal erred in its analysis of the complaints of discrimination in the following respects (**Ground 2**). First, when considering whether the burden of proof had shifted to the Respondents, the Tribunal expressly excluded the Respondent's explanation of events. Second, the Tribunal erred in that it appears to have made findings beyond those pleaded by the Appellant and set out in the Agreed List of Issues. Third, the Tribunal failed properly to consider in respect of each alleged act of discrimination whether the hypothetical comparator would have been treated differently from the Appellant. Fourth, the Tribunal found that one act of discrimination was Dr Okoreaffia's calling by telephone the Appellant's mother whereas earlier in its judgment it found that it could not reach a conclusion on this point.

15. Further Mr McDevitt submits that the Tribunal erred in its analysis in relation to the deductions from the Appellant's pay which it concluded were made in breach of contract. First,

in relation to the reduced salary payments in May, June and July 2007 and the non-payments of salary in August and September 2007 (**Ground 3(a)**) Mr McDevitt submits that the Tribunal erred in its approach to the breach of contract claims in that it failed to have any regard to the Respondent's defence to the claim, namely that the Appellant had not provided the service required of her under her contract of employment and therefore she had no contractual entitlement to be paid as if she had provided that service. Second, he submits that the Tribunal erred in that it found that deductions from the Appellant's salary made in February and March 2008 relating to the use of the Appellant's mobile phone were made in breach of contract (**Ground 3(b)**).

The Appellant's appeal

16. The Respondent concedes that the appeal in relation to the unlawful deduction of wages in respect of April to August 2008 should succeed to the extent that the Appellant was entitled, on the basis of the Tribunal's findings, to be paid £7,000 gross per month, whereas she was in fact paid only £6,000 gross per month (see Respondent's submissions pursuant to the Direction of the EAT dated 6 July 2011 at para 7.5). Mr Gareth Davies, for the Appellant, submits that the Appellant is entitled to the unlawful deductions that were made, on the basis of the Tribunal's findings, from May 2007.

17. The Appellant does not pursue the remaining grounds of appeal save for Ground 3 in relation to the finding of the Tribunal that the Appellant was not entitled to bonuses. In respect of that ground Mr Davies submits that the ET failed to consider whether the failure to pay the Appellant bonuses was discriminatory.

The Parties' submissions and discussion

The Respondent's appeal

Ground 2: the complaints of discrimination

Ground 2.1 – Shifting the Burden of Proof

18. Mr McDevitt in his written and oral submissions makes four points. First he submits that the Tribunal erred in its approach to the burden of proof. At paragraph 388 of the judgment the Tribunal state:

> **"Before we look to the Respondent's explanations; on the basis of these primary facts we could conclude that he has discriminated against the Claimant on the grounds of her sex:**
>
> **388.1 We draw inferences about Dr Okoreaffia's attitude towards women from the similar fashion in which he appeared to have treated Dr Allen, the misleading and untruthful answers to the Discrimination Questionnaire, the 'women's knickers' comment, the 'mad woman' comment and measures that he took that appeared to seek to exploit Dr Olayemi's weakness, such as the incident relating to the car in the car park.**
>
> **388.2 We could conclude that many of the incidents of adverse treatment, particularly those that might be categorised as arrogant, disrespectful, belittling and/or demeaning, would not have been meted out by the Respondent to a male Doctor who was in the same circumstances as Dr Olayemi. In other words, that this amounted to Direct Discrimination.**
>
> **388.3 Most of the same instances of treatment, (and not just those listed at paragraph 11 of the List of Issues) could also be regarded as being related to Dr Olayemi's sex and having the purpose or effect of creating an intimidating, hostile, degrading, humiliating and offensive environment for her. In other words, Harassment on the grounds of sex."**

19. This, Mr McDevitt submits, was an error of law in that it was an approach inconsistent with that required by the Court of Appeal in **Madarassy v Nomura International plc** [2007] IRLR 246 at para 57, per Mummery LJ. In support of his submission that the Tribunal should not have concluded that the burden shifted to the Respondent, Mr McDevitt relies upon the observations of Peter Gibson LJ in **Chapman v Simon** [1994] IRLR 124 at para 43:

> **"Racial discrimination may be established as a matter of direct primary fact. … More often racial discrimination will have to be established, if at all, as a matter of inference. It is of the greatest importance that the primary facts from which such inference is drawn are set out with clarity by the Tribunal in it's fact-finding role, so that the validity of the inference can be examined…"**

20. It is important, in our view, to read Mummery LJ's judgment in **Madarassy** in relation to burden of proof as a whole (see in particular paras 55-79). In **Hewage v Grampian Health Board** [2012] ICR 1054 Lord Hope (in a judgment with which the other members of the court agreed) said:

> **"30. …Mummery LJ went on in paras 56 and following of his judgment in *Madarassy* to offer his own comments as to how the guidance in *Igen Ltd v Wong* ought to be interpreted, which I would respectfully endorse. In para 70, having re-stated what the tribunal should and should not do at each stage in the two-stage process, he pointed out that, from a practical point of view, although the statute involved a two-stage analysis, the tribunal does not in practice hear the evidence and the argument in two stages: …**
>
> **31. In para 77, in a passage which is particularly in point in this case in view of the employment tribunal's reference in para 107 to its being required to make an assumption, he said:**
>
> > **'In my judgment, it is unhelpful to introduce words like "presume" into the first stage of establishing a prima facie case. Section 63A(2) [of the Sex Discrimination Act 1975] makes no mention of any presumption. In the relevant passage in *Igen Ltd v Wong* … the court explained why the court does not, at the first stage, consider the absence of an adequate explanation. The tribunal is told by the section to assume the absence of an adequate explanation. The absence of an adequate explanation only becomes relevant to the burden of proof at the second stage when the respondent has to prove that he did not commit an unlawful act of discrimination.'**
>
> **The assumption at that stage, in other words, is simply that there is no adequate explanation. There is no assumption as to whether or not a prima facie case has been established. The wording of section 63A(2) and 54A(2) is quite explicit on this point. The complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. So the prima facie case must be *proved*, and it is for the claimant to discharge that burden.**
>
> **32. The points made by the Court of Appeal about the effect of the statute in these two cases could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J (President) pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other..."**

21. In our view the Tribunal did not err in its approach to the burden of proof. At paragraphs 352-355, before setting out its findings of primary fact, the Tribunal said:

> **"352. In respect of each strand of sex discrimination alleged, we have asked ourselves, by reference to the List of Issues, whether the Claimant has proved facts which, taken together, are sufficient to suggest that the Respondent may have discriminated against her on grounds of her sex.**
>
> **353. Before we get into that analysis, we considered specifically the Respondent's answers to the Discrimination Questionnaire. In our findings of fact we considered the answers to 5**

questions in the Questionnaire and observe that those answers are either misleading or incorrect.

353.1. He denied repeatedly referring to her as an employee during a conversation about a flu workshop; he did so.

353.2. He denied ignoring the Claimant, speaking to a male doctor and walking off; he did so.

353.3. He denied referring to the Claimant as, 'the mad woman'; he did so.

353.4. He denied that he and the Surgery staff were asked to leave the Claimant['s] room when they all walked in together; they were asked to leave.

353.5. He denied allegations made in respect of Dr Beverley Allen which were in fact true.

354. On the latter point relating to Dr Allen; there are similarities with the way Dr Okoreaffia treated her and the way he treated the Claimant. He made deductions from her salary, he failed to respond to her correspondence, he made disparaging remarks regarding her professionalism. His treatment of her resulted in her absence from work due to stress.

355. The answers to the Questionnaire and the similarity in the treatment of Dr Allen assist us in deciding upon what inferences may be drawn from the findings of primary fact set out below. …"

22. At paragraph 356-388 the Tribunal sets out its findings of primary fact in relation to direct discrimination. Mr McDevitt submits that a number of the findings are neutral in terms of whether there has or has not been direct discrimination. For example he points to paragraph 357 which states:

"In October 2006 Dr Okoreaffia reversed an instruction given by Dr Olayemi to a member of staff."

Mr McDevitt also refers to the issue relating to the removal of the Appellant's car (para 379). In isolation we agree these findings are neutral.

23. However individual findings such as these have to be considered in the context of the findings as a whole. There are at least seven findings of primary fact which, in our view, potentially entitled the Tribunal, absent explanation, to conclude that the Respondent had discriminated against the Appellant on the grounds of her sex. They are as follows:

(1) "On 29 August 2007 Dr Okoreaffia made a telephone call to Dr Olayemi's mother regarding their dispute, (it seems unlikely he would have made such a

phone call to a male doctor's mother) and also on that day, became angry with Dr Olayemi and told her that he wanted her out of the practice" (para 360).

(2) "On 26 September 2007 Dr Okoreaffia told Dr Olayemi that her days were numbered and he compared her to a typist" (para 366)

(3) "Dr Okoreaffia made a series of unpleasant comments and threats to Dr Olayemi on 19 November 2007 including: 'Do you want to be Mrs Okoreaffia?'; 'I will destroy you'; 'By the time I have finished with you, you will need a psychiatrist'; 'You will leave here with your tail between your legs'; 'I want you out of the practice'; 'I will not beat you up but there are people who will'. He also expressed a desire to eat her ears because he liked cartilage". (Para 374).

(4) "On 12 December 2007 Dr Okoreaffia 'blanked' Dr Olayemi, ignoring a question from her, speaking to a male Doctor and then walking off". (Para 375).

(5) "Over the Christmas period of 2007 Dr Okoreaffia excluded Dr Olayemi from the usual practice of joint presents and cards. In a telephone conversation about this, Dr Okoreaffia openly referred to the Claimant as, 'the mad woman' to another member of staff". (Para 376).

(6) "For the year 2007/2008 Dr Olayemi had been excluded from the Patient Satisfaction Survey concluded by the Practice; only Dr Okoreaffia and Dr Adekami (male) had been included in the survey". (Para 377).

(7) "In response to enquiries from Dr Olayemi through a third party to seek recovery of personal possessions from Dr Okoreaffia's flat, he passed back a message via that third party that there are many women's knickers in his flat and he did not know which belonged to the Claimant". (Para 380).

24. Mr McDevitt submits that the finding at paragraph 360 that Dr Okoreaffia made a telephone call to Dr Olayemi's mother is inconsistent with the finding at paragraph 189 where the Tribunal stated: "We make no finding about who called who, in the scheme of things it is not important". That being so, Mr McDevitt submits that the finding at paragraph 360 cannot be a foundation for a finding of sex discrimination. We consider there to be some force in this submission (but see para 33 below).

25. We also see force in Mr McDevitt's criticisms of the findings in paragraphs 375 and 377 when considered individually. As for the former, there is no analysis of whether Dr Okoreaffia would have conducted himself in relation to a male doctor in the same way; as for the latter, there is no analysis as to whether if the Appellant had been a male doctor there would have been any different treatment.

26. However we consider that the Tribunal was plainly entitled to treat the remaining incidents as primary findings of direct discrimination. First, the Tribunal was entitled to find that the comments and threats referred to in paragraph 374 would not have been made to a male

doctor. Second, the Tribunal was entitled to find that referring to the Appellant as "the mad woman" (para 376) was discriminatory. Dr Okoreaffia appeared to be in the habit of referring to the Appellant in such terms. At paragraph 247 the Tribunal made the following finding:

> **"On 24 December 2007 Dr Olayemi telephoned Dr Okoreaffia on his mobile telephone to try and find out what he had done about the cards and presents for the staff. In that conversation, speaking to his companion in the background (who was a member of staff) he referred to Dr Olayemi as 'the mad woman'. His companion clearly knew who he was referring to, for she replied, 'what does she want?' It would seem that Dr Okoreaffia was in the habit of referring to Dr Olayemi as, 'the mad woman'."**

27. Further, the findings that Dr Okoreaffia "compared [the Appellant] to a typist" (para 366) and the message via a third party that "there are many women's knickers in his flat" (para 380) were findings of primary fact that the Tribunal was entitled to make.

28. In any event, at paragraphs 390-396 the Tribunal considered at length and with care the Respondent's explanation for the way Dr Okoreaffia treated Dr Olayemi. At paragraph 396 the Tribunal concluded:

> **"The conduct to which the Claimant was subjected was unwanted conduct relating to her sex, which had the purpose (and had the effect) of creating an intimidating, hostile, degrading and humiliating environment for her; it was designed to drive her out. There is no question of hypersensitivity on the part of Dr Olayemi."**

29. The Tribunal, in our view, was entitled to consider the primary facts as a whole and having heard the Respondent's explanation to reach the conclusion that it did.

Ground 2.2 – Findings of harassment beyond those pleaded

30. The Tribunal referred to a wide range of treatment as constituting harassment in paragraph 396 (see also paragraph 388.3). Mr McDevitt submits that the Tribunal erred in failing to restrict its decision on harassment to the matters identified in the Agreed List of

Issues. It was not permissible, he submits, for the Tribunal to find that acts other than those complained of were unlawful acts of discrimination. (See **Chapman v Simon** [1994] IRLR 124, per Peter Gibson LJ at para 42).

31. We agree that the Tribunal was obliged to confine itself to the acts of harassment specified in the ET1 and the List of Issues. We do not understand Mr Davies to submit to the contrary.

Ground 2.3 – No consideration of the hypothetical comparator

32. In the Respondent's skeleton argument Mr McDevitt submitted that the Tribunal failed to identify the characteristics of the hypothetical comparator. Further, he submitted, that the Tribunal failed to compare the treatment of the Claimant to the treatment that the hypothetical comparator would have received. However during the course of his oral submissions Mr McDevitt accepted that the Tribunal had in fact correctly identified a hypothetical comparator. At paragraph 395 the Tribunal stated:

> **"We are satisfied that had Dr Olayemi been a male doctor, (*someone in precisely the same circumstances as she, but a male*) Dr Okoreaffia would not have treated him in the same way. He would not have sought to belittle and humiliate a male doctor as he did Dr Olayemi, he would not have treated a male doctor with the same contempt and disdain. He would have dealt with their differences in a more respectful way and would not have sought to resolve their dispute by setting out on a campaign of harassment, designed to wear him down and drive him out of the Practice as he did." (Emphasis added)**

Ground 2.4 – Perverse finding regarding the phone call between Dr Okoreaffia and the Claimant's mother

33. Mr McDevitt submits that the findings in paragraphs 189 and 360 in respect of whether the Dr Okoreaffia called the Appellant's mother or vice versa (see para 23 above) are perverse.

34. We do not agree. We accept Mr Davies' submission that paragraphs 188 and 189 must be read together. In paragraph 189 there is a limited finding, namely that the Tribunal can make no finding as to who initiated the telephone call. Paragraphs 188 and 360 are in essence concerned with the conversation that took place. The Appellant's allegation is supported by an e-mail dated 30 August (the next day). We do not consider the finding of the Tribunal to be perverse in this regard.

Ground 3 – Deductions from the Appellant's wages made in breach of contract

35. The Tribunal decided (paras 342-3) that reduced salary payments for the period May-July 2007 and no salary payments for August and September 2007 were unlawful deductions of wages and were in breach of contract. Mr McDevitt submits that in so deciding the Tribunal failed to consider the Respondent's argument that the Appellant did not receive her full salary because she was not working fully during the material periods. In support of this submission Mr McDevitt relies upon the well-established principles set out in **Sim v Rotherham MBC** [1987] 1 Ch 216, and **Miles v Wakefield MDC** [1987] 1 AC 539. (**Ground 3(a)**).

36. However in **Sim v Rotherham MBC** Scott J said at 254F-G:

> **"…The right to make deductions must depend on the reason why there has been 'no work'. If the reason involves breach of contract, then it may be that deductions can be made. But if the reason for 'no work' does not involve any breach of contract, then why should the consequence 'no pay' follow?..."**

(As to equitable set-off, see 261G-262D).

37. The findings at paragraph 182 of the judgment in relation to the reduced monthly salary are as follows:

> **"On 31 May 2007 Dr Okoreaffia reduced the monthly pay to Dr Olayemi from £7,000 to £4,120. She did not notice this until July and queried the reduction by an e-mail to Dr Okoreaffia dated 19 July. As usual, she received no response. Dr Okoreaffia gave a confusing account as to his justification for this reduction in pay. He said that he had been paying Dr Olayemi for seven sessions as a GP and two sessions as an administrator and that he had stopped paying her for the administrator's sessions. This does not make sense, because by now he had given information to PCT that her status is a partner and if she was not a partner, on his case, she was a salaried employee. The measure taken amounted to his unilaterally reducing her pay without notifying Dr Olayemi either that he was making the deduction or why. It was no doubt connected to the fact that she was not working in the surgery as normal, but he did not say so, he did not explain as such to her. Furthermore, the maths do not add up; he could not explain to us how the figure was calculated, it appeared to be arbitrary."**

38. We are not satisfied that either in relation to the reduced salary in the period May-July 2007 or the non-payment of salary in August-September 2007 that the Respondent has shown the reasons why there was reduced or no work and that it involved breach of contract by the Appellant. Indeed, not only was there no finding of breach of contract by the Appellant, but the Tribunal in fact criticised the Respondent (see paras 390.2 and 391) and, in particular Dr Okoreaffia for his conduct.

39. Mr McDevitt further submits that it was perverse for the Tribunal not to find that the Appellant had made the phone calls on the mobile given to her by Dr Okoreaffia and that therefore her salary was correctly reduced to reflect the cost of the calls (**Ground 3(b)**).

40. Dr Okoreaffia had accused the Appellant of intercepting his mail and stealing a new SIM card he had ordered for the mobile telephone that she was using and in respect of which he paid the bill (para 221). He alleged that she intercepted the new SIM card and continued using the telephone with the replacement SIM card; running up excessive charges when she was not at work (para 228). At paragraphs 221-236 of its judgment the Tribunal conducted a detailed and careful analysis of the evidence in relation to this allegation. At paragraph 236 the Tribunal concluded:

> **"We cannot get to the bottom of all this. We cannot unravel what happened. It seems the new SIM card was used in her phone."**

41. Mr McDevitt relies in particular on that finding in the last sentence of paragraph 236.

42. However, while the Tribunal tentatively concluded that the SIM card was used on the Appellant's phone, the Tribunal also accepted that calls made on the phone were made to Dr Oyendor and Dr Odunze, who were people the Appellant "would be unlikely to call" (para 229). Further, the Tribunal "cannot understand how [the Appellant] would have had an opportunity to intercept the SIM card" (para 235).

43. The Respondent has not, in our view, established that the Tribunal's failure to find that the Appellant had made the phone calls on the mobile phone given to her by Dr Okoreaffia was perverse.

Conclusion on the Respondent's appeal

44. For the reasons we have given we dismiss the appeal save in relation to the ground numbered 2.2 (findings of harassment beyond those pleaded) which succeeds. In relation to that ground we consider that the Tribunal failed to restrict its decision on harassment to the matters identified in the Agreed List of Issues, as it should have done.

The Claimant's appeal

Ground 1 – the Appellant's claims for unlawful deduction of wages

45. As we have noted the Respondent's concede that the claim for unlawful deductions in respect of the period April to August 2008 should succeed to the extent admitted by the Respondent (see para 16 above).

46. Dr Olayemi claimed for unpaid salary between February 2007 and August 2008. At paragraph 342 of its judgment the Tribunal stated:

> **"…there is no written contract authorising any other deduction in pay, nor at any time was there any other form of written authorisation from Dr Olayemi for any deduction. Therefore the reduced salary paid in May, June and July 2007, (£4,120 each month); the non-payments in August 2007, September 2007 and January 2008 and the deductions made in February and March 2008 for telephone usage, were all unlawful deductions from wages."**

47. At paragraph 349 the Tribunal made the finding:

> **"that the reason for the [deductions] is that the Respondent felt that he was at liberty to pay the Claimant whatever he felt like paying her from one month to the next and in our view, that is a connected reason for each of the deductions such that they amount to a 'series'."**

48. On the basis of those findings of fact made by the Tribunal (and having rejected Ground 3 of the Respondent's grounds of appeal) we consider that the Appellant is entitled to the unlawful deductions that were made from May 2007.

49. In an attempt to avoid remission to the Tribunal we heard submissions from Mr Davies and Mr McDevitt as to the sums that are payable to the Appellant on the basis of the Tribunal's findings. We invited them to reach agreement with regard to this matter, but they were unable to do so. In those circumstances we have no alternative but to remit to the Tribunal the issue of quantum of the unlawful deductions for the Tribunal to determine the sums to be paid to the Appellant.

Ground 3 – Entitlement to bonuses

50. At paragraph 345 of the judgment the Tribunal stated:

> **"There is no evidence to suggest that there was any agreement between the two Doctors that Dr Olayemi would be entitled as of right to any bonus, calculated in any particular way. There is a suggestion that she received ad hoc additional payments in June 2006 of £3,500 and March 2004 of £9,000. We have found that the schedule of payments from which these figures are taken is unreliable. The amount and timing of the payments are impossible to follow and no one has explained them to us. Dr Olayemi claims these additional sums are bonuses; they may have been, but if they were they were paid at Dr Okoreaffia's discretion and not pursuant to any agreement as to an entitlement to a payment of a bonus or payment of any particular amount. We therefore find that Dr Olayemi was not entitled to be paid bonuses for 2005, 2007 and 2008 as claimed and in that respect her claim fails."**

51. Mr Davies submits that the Tribunal failed to consider whether the failure to pay bonuses was discriminatory. This was one of the agreed issues (see para 11.4.4).

52. We reject this submission. The bonuses were purely discretionary and the Tribunal made an express finding that the Appellant was not entitled to be paid bonuses for the three years in question. Accordingly this claim for bonuses must fail. In addition the Tribunal made a finding that the first act of direct discrimination was in October 2006 (para 357). That being so there is no basis in any event for the claim in respect of the 2005 bonus on discriminatory grounds.

Conclusion on Claimant's appeal

53. We dismiss the Claimant's appeal save for Ground 1 which in our view succeeds.

Disposal

54. For the reasons we have given

(1) the Respondent's appeal is dismissed save in relation to Ground 2.2 (findings of harassment beyond those pleaded) which succeeds. In relation to that ground the Tribunal failed to restrict its decision on harassment to the matters identified in the Agreed List of Issues.

(2) The Appellant's appeal is dismissed save for Ground 1 (unlawful deduction of wages) which succeeds. The Appellant is entitled to the unlawful deductions which were made on the basis of the Tribunal's findings from May 2007. We remit to the same Tribunal, if practicable, the issue of quantum of such unlawful deductions for the Tribunal to determine the sums to be paid to the Appellant.