Appeal No. UKEAT/0279/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 December 2013
Judgment handed down on 11 February 2014

Before

HIS HONOUR JUDGE PETER CLARK

MR B BEYNON

MS N SUTCLIFFE

BARCLAYS BANK PLC — APPELLANT

MS M MITCHELL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR BRUCE CARR (One of Her Majesty's Counsel) Instructed by: Addleshaw Goddard LLP 100 Barbirolli Square Manchester M2 3AB
For the Respondent	MS ANGHARAD DAVIES (of Counsel) Instructed by: Thompsons Solicitors The St Nicholas Building St Nicholas Street Newcastle-upon-Tyne NE1 1TH

SUMMARY

VICTIMISATION DISCRIMINATION – Whistle blowing

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

Employment Tribunal failed to explain sufficiently their reasoning on the causation issue in s.47B **Employment Rights Act 1996** 'whistle-blowing' complaint. Case remitted to same ET for reconsideration.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the Newcastle Employment Tribunal. The parties are Ms Mitchell, Claimant, and Barclays Bank, Respondent. This is an appeal by the Respondent against the Judgment of an Employment Tribunal chaired by Employment Judge Garside and promulgated with Reasons on 20 December 2012, following a hearing held on 14 - 16 November 2012, upholding the Claimant's complaint of detrimental treatment (short of dismissal) on the grounds that she had made protected disclosures contrary to section 47B of the **Employment Rights Act 1996** (ERA), a "whistle-blowing" complaint.

The facts

2. The facts found by the Employment Tribunal and material to this appeal are as follows. The Claimant commenced her employment with the Respondent on 27 February 1995. By 2010 she had risen to the position of Area Director covering a number of branches in the Northumberland area. She was based in North Shields.

3. On the night of 13/14 July 2010 she attended a regional board meeting at the Cave Castle Hotel, Hull. Also present was a Mr Milner, Regional Head of Performance, and other senior colleagues.

4. During the evening Mr Milner brought her a non-alcoholic drink at the hotel bar. It tasted odd to her. She then became increasingly unwell, returning to her room where she was violently ill.

5. The following morning Mr Milner insisted on taking her home to Whitley Bay. During the journey he told her not to tell anybody what had happened, but to put her illness down to food poisoning. She felt bullied by him.

6. She consulted her GP, who thought she had been drugged. A toxicology report found the sample which she provided to be positive for cannabis.

7. She reported the matter to the police. They found insufficient evidence to mount a prosecution. However, they told the Claimant that the most likely person to have "spiked" her drink was the person who bought it for her (Mr Milner).

8. The Employment Tribunal found that the Claimant made three potentially relevant protected disclosures to her employer, the first to her Regional Director, Mr Andrew Wright, on 15 July 2010; the second to Linda Lunn, HR Business Partner, on 28 July 2010, and the third, again to Mr Wright, on 20 September 2010. The nature of those disclosures was an allegation that Mr Milner had spiked her drink and had then put pressure on her to say that she was the victim of food poisoning such that she was frightened of him. She decided not to raise a formal grievance or other complaint against Mr Milner. She felt that she could deal with him on a professional basis only (Reasons paragraph 23).

9. In December 2010 Mr Wright altered her region in order to accommodate an unrelated back condition from which she suffered, a condition further exacerbated by a road traffic accident on 6 May 2011. The problem lay in long distance driving. As a result she missed eight out of 11 meetings scheduled for 2011.

10. A meeting was arranged to be held in Newcastle. That led to an exchange of e-mails between the Claimant and Mr Wright on 25 January 2012. In one, the Claimant said (Reasons, paragraph 26):

> **"I lose sleep at the thought of having to sit in the same room as someone who in the opinion of the police has most likely committed a serious crime against me and who certainly bullied me the following day to keep quiet about the events of the previous evening."**

11. Following that exchange of emails, the Claimant attended a meeting with Mr Wright and Ms Nuttall (who had taken over Ms Lunn's HR role) on 25 February 2012. The meeting was not minuted. The relevant finding by the ET (paragraph 97) was that at that meeting Ms Nuttall was basically saying to the Claimant: "You need to move out of your present job to find another job, that is we need to take you out of the region because of what you have said in regard to Mr Milner."

The ET conclusions

12. Having considered the law, particularly as it was explained by Elias LJ in **Fecitt v NHS Manchester** [2012] ICR 372 (CA); see Reasons paragraphs 49 and 71, where reference is also made to the Judgment of Mr Recorder Underhill QC, as he then was, in **Harrow London Borough v Knight** [2003] IRLR 140 (EAT), the ET dealt with the critical "causation" issue, whether the detrimental treatment on 2 February 2012 was on the grounds that the Claimant had made the three protected disclosures in 2010, at paragraph 98 thus:

> **"We are satisfied that the trigger for this meeting was the fact that Miss Mitchell did not want to be in the same hotel as Mr Milner. Mr Wright and Ms Nuttall knew that Miss Mitchell was clearly accusing Mr Milner of spiking her drink. That relates directly back to the disclosures made in July 2010. A disclosure had been made that Miss Mitchell was frightened of Mr Milner. She had been treated very badly by him on 13 and 14 July and this information had been imparted to her managers and to HR who had done absolutely nothing about it. There is a direct link between that trigger and the meeting on 2 February. The meeting was not about whether Miss Mitchell could attend board meetings with her bad back. Moving to another region would not alleviate the problem of her bad back. The problem was Mr Milner. The respondent was asking Miss Mitchell to move regions or find another job because there were problems about the disclosure that had been made. This is clearly a detriment. Here was a highly successful district manager whose performance rating was very high and who before this incident had been highly regarded by her colleagues. Now she was being shunted across to another region because she had made a protected disclosure.**

The appeal

13. In advancing the Respondent's appeal, Mr Bruce Carr QC takes two separate but inter-connected points: first, that the Employment Tribunal applied the wrong legal test in deciding that the detrimental treatment found was causally connected to the protected acts in 2010; secondly that the Employment Tribunal's reasoning in relation to the causation issue was inadequate or, to use the expression coined by Sedley LJ in **Tran v Greenwich Vietnam Community Project** [2002] IRLR 735, was not "**Meek**-compliant". We pause to observe that those submissions are necessarily in the alternative since either the misdirection was patent or it is unclear from the Employment Tribunal's reasoning whether or not the correct test was in fact applied. Having considered the finely balanced arguments presented by Mr Carr and Ms Davies, who has represented the Claimant throughout, we accept Mr Carr's second submission, but not the first. Our reasoning is as follows.

14. As the Employment Tribunal correctly observed, at paragraph 71, the Tribunal must look at the Respondent's reason for the treatment complained of; the reason why question as Lord Nicholls formulated it in the discrimination cases. The issue here is whether that question is clearly asked and answered in the critical reasoning section at paragraph 98, set out above. That is the final and often critical piece in the jigsaw presented by rule 30(6) of the ET Rules 2004 (then in force). Having set out the issues, findings of fact and a statement of the applicable law an Employment Tribunal Judgment must show:

> **"(e) how the relevant findings of fact and applicable law have been applied in order to determine the issues;"**

15. In analysing the Employment Tribunal's reasoning at paragraph 98, we take full account of the appellate weaknesses identified by Mummery LJ in **Fuller v London Borough of Brent**

[2011] IRLR 414, paragraph 30, to which Ms Davies has properly referred us. We must look at the Reasons as a whole and avoid the "pernickety critique" which is the modern expression for what used to be Lord Russell of Killowen's "fine-tooth comb" injunction in **Retarded Childrens Aid v Day** [1978] ICR 437, 444D (CA).

16. In answering the reason why question in a section 47B whistle-blowing case it is not enough that the subject matter of the protected disclosures is linked with a management problem leading to the detrimental treatment complained of: see **Fecitt**, paragraphs 50-51; further the fact that the disclosure(s) and the detrimental treatment are "related" does not answer the reason why question: see **Knight**, paragraph 16. What is required to answer that question is a clear finding that the disclosure(s) materially caused or influenced the employer to act as he did. Under section 48(2) of the Employment Rights Act it is for the employer to prove that he did not act on the prohibited ground.

17. Turning to the facts of the present case, Mr Carr submits that it was not the fact of the earlier disclosures which influenced Mr Wright and Ms Nuttall to suggest to the Claimant a move to another region on 2 February 2012; rather it was the Claimant's announcement on 25 January that she could not be in the same room as Mr Milner. That was a state of affairs related to the subject matter of the original disclosures, but that is not, on the authorities cited to the ET, enough. If that case is accepted then the section 47B complaint must fail. Paragraph 98 begins:

> **"We are satisfied that the trigger for this meeting [of 2 February 2012] was the fact that Miss Mitchell did not want to be in the same hotel as Mr Milner."**

If that was the sole reason for the eventual outcome of the meeting, a suggested transfer, then Mr Carr's first submission on appeal would succeed.

18. However, as Ms Davies points out, the Employment Tribunal go on to state

"...that [the spiking of her drink] relates directly back to the disclosures made in July 2010".

19. We accept that is the conclusion expressed by the Employment Tribunal: what is missing is an explanation as to why that conclusion was reached. It is that lacuna which causes us to accept Mr Carr's second way of putting the appeal. The reasoning is not **Meek**-compliant.

Disposal

20. On that ground we shall allow the appeal. It is not appropriate simply to formulate a **Burns-Barke** question for the original Employment Tribunal. The causation issue must be considered afresh by the Employment Tribunal.

21. The question is whether, having allowed the appeal, we remit the case to the same or a different tribunal. Ms Davies advocated the former course; Mr Carr the latter. We agree with Ms Davies. The EAT heard the evidence over three days: there is no suggestion of bias or lack of professionalism on the part of this ET; nor is the decision totally flawed; what is missing is a failure to explain how the ET made the necessary causal link between the protected disclosures and detrimental treatment found. We consider remission to the same ET to the proportionate resolution to this appeal.

22. On remission no further evidence will be required. The matter will proceed on the basis of oral submissions at a hearing. Skeleton arguments should be exchanged between counsel and lodged with the Employment Tribunal not less than 14 days before the hearing to be appointed by the Employment Tribunal.

23. Following the hearing the Employment Tribunal will reconsider the causation issue afresh on the basis of the facts found. It must answer the reason why question in accordance with the guidance to which we have referred.