Appeal No. UKEAT/0044/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 April 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MS K BILGAN

MR P GAMMON MBE

ABERTAWE BRO MORGANNWG UNIVERSITY HEALTH BOARD APPELLANT

DR M FERGUSON RESPONDENT

Transcript of Proceedings

JUDGMENT

AMENDED

APPEARANCES

For the Appellant	MR NICHOLAS SMITH (of Counsel) Instructed by: MLM Cartwright Pendragon Court Fitzalan Court Newport Road Cardiff CF24 OBA
For the Respondent	MR RHYS JOHNS (of Counsel) Instructed by: Messrs Tonner Johns Ratti Solicitors 48 Walter Road Swansea SA1 5PW

SUMMARY

VICTIMISATION DISCRIMINATION

An Employment Tribunal refused applications by a Health Board to strike out some allegations that the Claimant doctor (a "worker" within the extended definition section 43K **ERA 96**) had been subject to detriment. The appeal centred on the meaning of s.47B. **Held** that "subjected to" were words of causation, appropriate to encompass both direct acts and deliberate omissions to act, and did not require the actor to control the circumstances giving rise to detriment: that a "deliberate failure to act" presupposed a duty or power/ability to take action (an expectation would not be sufficient), and that although establishing that the "reason why" there was an act or failure to act was the making of a protected disclosure would not be easy, the ET had been right not to strike out the claims in advance of hearing evidence of the detailed factual circumstances, evidence of the contract between the Board and the doctor, and being assured evidentially or by agreement of the statutory powers and functions of the Board.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. Dr Ferguson, a GP in Wales, was a partner in general practice. All GPs are required to enter a contract with the relevant Health Board (here, the Appellant). She disclosed concerns that a partner of hers in the GP's practice had acted wrongly in relation to prescribing Fentanyl. The disclosure was, it is accepted, made in good faith, it was genuine, and there were reasonable grounds for it though the Health Board does not necessarily accept the truth of them. She claimed that because she had made those disclosures her general practitioner partners had acted to cause her detriment, but also that the Health Board had both acted (positively) so as to subject her to a detriment and (negatively) had failed to act with the same consequence. She claimed therefore to be entitled to a remedy under the whistle blowing provisions of the **Employment Rights Act 1996**.

2. Her claim against her general practitioner partners no longer proceeds; that against the Health Board continues. At a hearing in December 2012 at Cardiff before Employment Judge Clarke, Mr Horn and Ms Williams-Edgar the Doctor identified five detriments to which she claimed to have been subjected. This claim was finally made only at the outset of the hearing. Having considered them within the brief time available the Health Board applied to strike out the claim insofar as three of the detriments were concerned.

3. The five detriments were said to be:

1) the Health Board had failed properly to investigate the Respondent's concerns, preventing her from fulfilling her GMC obligations;

2) the Respondent had failed to treat the Respondent's identity as whistle blower with due confidentiality, releasing her name and her report of her GP partners;

3) the Appellant had failed to act in accordance with its own whistle blowing policy so as to prevent the Respondent from being subjected to reprisals from her colleagues in her GP practice;

4) the Appellant had forced the Respondent to take voluntary leave as an alternative to suspension and had inappropriately maintained that enforced voluntary leave;

5) the Appellant had forced the Respondent to be subjected to an investigation by Mr Paul Myers.

4. The Tribunal rejected the application to strike out. The Health Board appeals to this Tribunal against that decision.

5. It is common ground between the parties that the statutory provisions in Part IVA of the **Employment Rights Act 1996** applied. It is necessary here to mention only two of those. Section 43A provides:

> **"In this act a 'protected disclosure' means a qualifying disclosure […] which is made by a worker in accordance with any of sections 43C to 43H."**

For the purposes of Part IVA the meaning of "worker" is wider than it is elsewhere in the Employment Rights Act. Section 43K(1)(ba) provides that:

> **"For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who –**
>
> **…..(ba) works or worked as a person performing services under a contract entered into by him […] with a Local Health Board under section 42 or 57 of the National Health Service (Wales) Act 2006."**

Subsection 2(aa) provides that:

> **"For the purposes of this Part, "employer" includes -**
>
> **(aa) in relation to a worker falling within paragraph (ba) of [subsection (1)][…] the Local Health Board referred to in that paragraph."**

6. It is thus plain that the relationship created between a doctor and a Health Board is one which is governed by a contract, though it may also, we suspect, be governed by the statutory provisions which relate to the actions and activities of the Health Board. The appellations "worker" and "employer" are nominal descriptions designed to enable a doctor to make a claim against a Health Board if the ground for liability is made out. The statutory provisions say nothing in detail of the precise relationship between the two: it is accepted before us that it is not the same as the common law relationship of employer and employee so that, for instance, there is no duty to be implied of mutual trust and confidence.

7. Section 47B provides the right which is central to a claim. It does so in these terms so far as material:

> **"(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure […]"**

8. The argument before us centred upon the precise meaning of that provision as it applied to the five detriments identified above. It was argued by Mr Smith, as in essence he had argued below, that the critical words were "subjected" and "failure to act". Although he sought to widen the argument to encompass matters which were not in dispute this was of no assistance to us on the appeal.

9. Thus he argued that the strike out application should succeed because the claim sought to make the Health Board vicariously liable for the actions which were truly causative of the Respondent's loss, yet those were actions taken against her by her GP partners who were not (save in the very different sense referred to in s.43K(1)(ba)) employees nor agents of the Board. We rejected this. The alleged detriments were clearly framed as being breaches of obligation of

the Health Board, not of the Claimant's partners in the GP practice. It was a primary liability which was asserted and not a secondary one.

10. He argued that the case screened an attempt to saddle the Health Board with the full financial consequences of the loss of practice as a GP which the Respondent had suffered. This we rejected, since it does not follow that if any of the allegations are found to be proven the consequence will be that the Claimant is entitled to compensation as if she would never work again as a doctor. If there is liability for causing or failing to stop any of alleged detriments it will be for the Tribunal to determine in due course and in accordance with evidence on the point whether there should be any and, if so, what compensation for it.

11. He suggested that third parties were liable for the loss or detriment which the Doctor suffered. If so, the Health Board could not be liable for the self-same loss. He may be right in this submission but it is beside the point so far as we are concerned. If the point is well made, it will in due course be recognised by the Tribunal in its findings in respect of compensation or, as it may be, causation but it is in itself no reason for a Tribunal holding that claims which might succeed had no realistic possibility of doing so.

12. We return therefore to the central issues of interpretation which he raised. As to the meaning of "subjected to" he argued that there was no decided case which clearly set out what those words meant in such as the current context. He submitted that Parliament had not adopted the word "caused". There must be a reason for that. Whereas "caused" was a general phrase, "subjected to" was specific. It connoted a wilfulness in the doer; it connoted an element of the doer's capacity to control events and to bestow upon the person subject to them the consequences of the act or omission.

13. Though confirming early in his submissions that it was to that extent only that the word went beyond what would be the effect if the word "caused" had been used, later on reflection he submitted there might be a wider meaning. If one focussed upon "subjected" then in current circumstances, he asserted, the person who subjected the doctor to the detriment of which she complained was not in truth the Health Board: it was, rather, her partners. He was much attracted by an expression of view by Smith J in **Burton v De Vere Hotels Ltd** [1996] IRLR 596. There at paragraph 13 she summarised the position in these terms:

> **"Although the statutory language is arguably not very well-chosen the position on the current authorities is that "an employer subjects an employee to a detriment if he causes or allows the detriment to occur in circumstances where he can control whether it happens or not"."**

14. At paragraphs 36 to 38, in paragraph 36 she said that:

> **"36 A person, "subjects" another to something if he causes or allows that thing to happen in circumstances where he can control whether it happens or not. An employer subjects an employee to the detriment of racial harassment if he causes or permits the racial harassment to occur in circumstances in which he can control whether it happens or not.**
>
> **38 We think that the question of whether an employer has subjected his employee to racial harassment where a third party is primarily responsible for the harassment should be decided by the tribunal in its capacity as an industrial jury. The tribunal should ask themselves whether the event in question was something which was sufficiently under the control of the employer that he could by the application of good employment practice have prevented the harassment or reduced the extent of it. If such is their finding, then the employer has subjected the employee to the harassment."**

15. It followed in Mr Smith's argument that it would have to be shown that the Health board could control what had happened to the Claimant. In the absence of any control over the partnership itself the Health Board could not "subject" the doctor to any detriment which arose out of the failure of the partnership as he told us her claims here did.

16. The difficulty which he faced with this line of argument was, he frankly acknowledged, provided by the House of Lords in **Pearce v Governing Body of Mayfield Secondary School** (sub-nom **McDonald v Ministry of Defence** [2003] ICR 937). There, at paragraphs 26, 29, 37, 98, 103, 105, 122, 145, 204 and 205 in the speeches **Burton v De Vere Hotels** was

disapproved. The approach which their Lordships took to Smith J's view of the meaning of "subjected to" was most clearly expressed in the speech of Lord Hope of Craighead, who said at paragraph 99:

> **"Smith J said that the question in the *Burton* was what was meant by "subjected" in section 4(2)(c) of the 1976 Act and that an employer subjects an employee to the detriment of racial harassment if he causes or permits the racial harassment to occur in circumstances which he can "control" whether it happens or not [1997] ICR 1, at 7C-E. She said that the Tribunal should ask themselves whether the event in question was something which was sufficiently under the control of the employer that he could, by the application of "good employment practice" have prevented the harassment or reduced the effect of it; pages 9H - 10B. But this approach is not based on anything which is to be found in the statute; I agree that it should now be disapproved."**

17. We have no hesitation in accepting that as authoritative. We do not therefore accept the meaning of "subjected to" in the terms in which Mr Smith advances it.

18. We recognise that Mr Smith's submissions may be correct to this extent. The word "subjected" might appear to have been deliberately chosen. It occurred to us (and our suggestion to this effect was warmly endorsed by Mr Johns who appeared for the Claimant) that the word might have been chosen as a word of causation, equivalent in meaning to "cause", but not using that precise word because the statute had to deal not only with an "act" which would almost by definition be capable of "causing" a detriment, but also with a "deliberate failure to act". If a course of events, harmful to a worker, was ongoing, then to fail to stop it could amount to a deliberate failure to act. Yet it might be difficult to talk of the failure to act as having "caused" the ongoing detriment, since that was being caused by the ongoing course of events, and not by a failure to stop it. Linguistically – to convey a sense of causation capable of operating both in respect of a (positive) act, and a (negative) failure to act – "subjecting to" better conveys the sense of that which the legislature wished to achieve.

19. We think, therefore, that the word has the force of causation and is adopted as a Parliamentary alternative suitable to a context where it has to cover both positive acts and

omissions to act. We do not see that it has within it any connotation of wilfulness, not least because the statute provides specifically that any act which is done by the employer has to be done for a particular reason - that is that the worker has made a protected disclosure. A failure to act for its part has to be deliberate. "Wilfulness" is therefore successfully accommodated by the rest of the subsection: it does not need any further and separate reflection in the word "subjected".

20. Section 47B contains the expression "a worker has the right not to be subjected to". As observed by Mr Gammon in the course of argument, the right is couched in terms of protecting the victim: "subjected to" is passive. The words which follow - "by ***any*** act or ***any*** deliberate failure to act" (emphasis added) - are, as Mr Johns submits and we accept, broad. As to those, Mr Smith submitted to the Employment Tribunal that the Claimant's contentions were predicated on an assumption that the Health Board had some duty in law to act or to refrain from acting as she suggested. The Tribunal, in dealing with that argument amongst the others submitted to it, concluded that the question to be asked was essentially a simple one, as it said at paragraph 36: "We simply need to consider the two questions derived from statute that following our analysis of the law we identified at paragraph 34 above." Those two questions were: first, can the Claimant show on a balance of probabilities that the Health Board subjected her to one or more of the five detriments set out in her schedule? Second, if yes, can the Health Board show on a balance of probabilities that her protected disclosures did not materially influence that detrimental treatment?

21. The Tribunal could have but did not expressly add a third requirement which is that the "subjecting" referred to there had to be by "any act or any deliberate failure to act". As Mr Smith submits the analysis might be said to that extent to be too simplistic, but it makes no

difference in the result and this is not, in our view, an error of law; it simply shows the Tribunal focusing upon the submissions which had been made to it.

22. Having raised those questions it said at paragraph 37 of its judgment that the answer to what was said before it to be a novel point was to analyse the case under section 47B in the normal way; no more and no less. On that approach it took the view that matter could be resolved only by hearing evidence. It rejected the Board's application, though emphasised that in due course evidence on the issue of causation, that is causation of the act which caused the detriment to be suffered, would be essential. The Tribunal was right to sound that clear note of caution.

23. It did not, in reaching that conclusion, distinguish between the five detriments which had been identified for its consideration by the Claimant. Had it done so it would have realised that there was a distinction which might be drawn between the first three and the fourth and fifth. Each of the first three began with the words, "The Respondent had failed …" the last two began with the words, "The Respondent had forced…" Those latter two are plainly allegations of acts, whereas the former three are of failures to act. If on the evidence the Tribunal were to find that those acts had subjected the Claimant to any detriment and, secondly, was able to conclude that the act had been done on the ground that the Claimant had made a protected disclosure then there would be a breach of the right. Remedy would follow commensurate with the wrong which the Tribunal had identified.

24. The same could not be said so easily of the first three. Here Mr Smith would argue that a deliberate failure to act presupposes that there is some obligation to act. A failure to act can only so be described against some standard. Otherwise it is simply not to do anything at all. There must be some limitation upon the circumstances in which the conduct of the "employer"

can be said to amount to a deliberate failure to act. Here he would argue that there had to be a duty; if so, he maintained that there could not be said to be any duty here resting upon the Health Board to act in the way in which the Claimant assumed by accusing them of having failed to do so.

25. Mr Johns in his submissions took a broader view of "failure to act". He did not contend that it was a phrase so general that any facts might fall within it. He argued that it extended to a case where there was, as Mr Smith would accept, an obligation to act. He submitted, however, that it had a broader scope than that. If there was a power to act that would suffice. He would not wish by using the word "power" to restrict his argument to a formal power such as conferred by a statute or instrument, but meant it in the more general sense of being legally entitled to do that which might have been but was not done.

26. Our conclusion is that a deliberate failure to act must be seen in context. The context here is the context of the relationship between a doctor and a Health Board. That has two parts to it. The first is contractual. The second depends upon the statutory provisions under which the Health Board operates. If within the contract the Health Board has a discretion to act, and if the statutory provisions which regulate the Board as a public authority permit it to take an action or actions ancillary to the discharge of its duties, then it has the power to do so within the broader sense which Mr Johns identified.

27. We do not think that the expression necessarily extends so far as to cover a failure to fulfil an expectation that the Board would act in a particular way. It would do so only if the board had the ability or power to do have acted within the principles we have just identified.

28. On that basis the "employer" here, the Health Board, would have a choice as to how it behaved. If it chose to exercise that choice by not taking action when it otherwise could have done so legitimately that is capable of being a deliberate failure to act. If it were established as a deliberate failure which, applying the words of the section, subjected the Claimant doctor to any detriment she would succeed in a claim if it were also shown that the Health Board had deliberately decided not to act as it did on the ground that she had made a protected disclosure. The questions of causation and of the "reason why" to which those words give rise will not be easy questions to answer. But the answers are, as we see it, heavily dependent upon the particular facts which emerge before the Tribunal.

29. We have had considerable reservations about approaching this appeal because we did not have before us the contract between the Doctor and the Health Board under which any duty or power to act might arise. Nor were we presented with the statute and statutory instruments which give the Board its functions. Without those we wondered whether we could properly resolve the appeal at all. However, it appears from what we have been told that the Tribunal also were not presented with either, and since our function is to consider whether there is any error of law in the Tribunal's decision made in the light of the information put before it, we proceeded.

30. It follows, however, that despite the invitation of the parties the Tribunal could not make any assumptions as to what the statutory powers of the Board might or might not be, nor what the contract might or might not require in any particular circumstances. It could not replace necessary knowledge by adopting a forensic assumption. This is not to blame the parties for failing to put the material before the Tribunal, since as Mr Smith very frankly recognised in the course of his submissions matters went at something of a rush before the Tribunal. It was only on the first day that the detriments the doctor claimed to have suffered were clearly identified;

the strike-out application necessarily had to follow very swiftly. There was limited time to prepare for it and to assemble any necessary evidence, let alone the statutory material and case law to assist.

31. This, however, colours the decision which the Tribunal was, in our view, bound to reach. It had to take the allegations made by the Doctor at their reasonable highest, this being an application to strike out parts of her case. In the course of argument it was conceded by Mr Smith that the second and fifth detriments were not subject of the strike out application. Before us, he thought the fourth could not properly be subject to it either. As to the first and third (at the Tribunal's paragraphs 15.1 and 15.3) he maintained his case. But on the basis that we have set out it seems to us the Tribunal was right to focus upon the words of the statute, and to ask not whether it was likely that that the Doctor would make out her case but whether legally the alleged facts taken at their highest in her favour might be such that she could.

32. On this basis the Tribunal was right in our view to reach the decision it did to reject the application for a strike out, and to proceed to hear the evidence.

33. We would add this final note. Applications for strike-out may in a proper case succeed. In a proper case they may save time, expense and anxiety. But in a case which is always likely to be heavily fact sensitive, such as one involving discrimination or the closely allied ground of public interest disclosure, the circumstances in which it will be possible to strike out a claim are likely to be rare. In general it is better to proceed to determine a case on the evidence in light of all the facts. At the conclusion of the evidence gathering it is likely to be much clearer whether there is truly a point of law in issue or not. Our decision is that this appeal must be dismissed

34. Finally, we would like to thank both counsel for their industry, and their assistance in resolving this case well within the time allotted to it.