Appeal No. UKEAT/0263/16/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 March 2017

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

DR V J LYFAR-CISSE — APPELLANT

(1) BRIGHTON AND SUSSEX UNIVERSITY HOSPITALS NHS TRUST
(2) MR G WHITE — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ALTHEA BROWN (of Counsel) Instructed by: Crown & Law Solicitors 120-121 Riverpark Business Centre Riverpark Road Manchester M40 2XP
For the First Respondent	MR THOMAS KIBLING (of Counsel) Instructed by: Messrs Cater Leydon Millard Limited 68 Milton Park Abingdon Oxfordshire OX14 4RX
For the Second Respondent	MR THOMAS KIBLING (of Counsel) Instructed by: Gowling WLG (UK) LLP 4 More London Riverside London SE1 2AU

SUMMARY

VICTIMISATION DISCRIMINATION - Detriment

VICTIMISATION DISCRIMINATION - Other forms of victimisation

The Appellant had brought a successful race discrimination claim against her employer, the First Respondent, in 2007. In 2011 she raised a grievance against two colleagues. The Second Respondent (the First Respondent's Human Resources Director) decided to intervene in the grievance in part because she had brought the previous claim, which was a protected act under section 27 **Equality Act 2010**. He approached the two colleagues without informing the Appellant and persuaded them to send her letters of apology which he had drafted and which were designed to look spontaneous. That was in breach of procedure and when she discovered what had happened the Appellant brought a grievance against the Second Respondent saying his actions were humiliating and insulting.

The Employment Tribunal found (on a remission from the Employment Appeal Tribunal) that although the Second Respondent's decision to intervene was because of the protected act, ***the way in which*** he had intervened was not. The Employment Tribunal's reasons for reaching that conclusion were not very clear and appeared inconsistent with express findings (at paragraph 38 in the Reasons) that the Second Respondent wished to avoid the matter escalating in part because of the earlier successful claim and that his actions were part of a plan designed to get the Appellant to decide to take her grievance no further.

The victimisation claim was remitted again to a fresh Employment Tribunal.

HIS HONOUR JUDGE SHANKS

1. This is an appeal against a decision of the Employment Tribunal sitting in Southampton (Employment Judge Coles sitting with Mr Bompas and Mr Purkiss) which was sent out on 17 December 2015, whereby they rejected claims of victimisation by the Claimant against her employer (Brighton and Sussex University Hospitals NHS Trust) and a Mr Graham White, who was the HR Director. Unfortunately, this case has already been to the Employment Appeal Tribunal once, and if the appeal is successful it will have to be considered for a third time by the Employment Tribunal.

2. The background is as follows. The Claimant is a black Afro-Caribbean woman. Since October 1985 she has worked as a Clinical Biochemist. She worked for the Respondent NHS Trust and was promoted to the position of Senior Clinical Biochemist at some point. In July 2007 she brought a successful claim for race discrimination against the Trust and received compensation and an apology. Fortunately she remained in employment with the Trust. Following an incident - which I will not give details of - that took place in November 2011, the Claimant lodged a grievance against two doctors (a Mr Bradley and a Mr Wardle) who had, quite unjustifiably, criticised her in a professional context. Mr White, the HR Director, decided to get involved in the matter. On 14 and 15 December 2011 he met Mr Bradley and Mr Wardle respectively and urged them to write letters of apology for what had happened to the Claimant. He drafted the apologies, and they were sent to the Claimant giving the false impression that they were spontaneous. When the Claimant found out what had happened, she lodged a grievance against Mr White and it was found by the Trust in due course that he had acted contrary to proper procedures in the process that he had adopted.

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3. In due course the Claimant brought claims against the Trust, against Mr White and against others arising out of this unfortunate incident, and among the many issues that the Employment Tribunal was invited to decide were the following two allegations (which are set out at page 92 in my bundle in the original Employment Tribunal Judgment): (4.1) the Second Respondent failed to speak to the Claimant about his intervention in the Claimant's grievance of 2 December 2011 against Mr Bradley and Mr Wardle, and (4.2) the Second Respondent failed to speak to the Claimant at all about the grievance. It was said that those allegations gave rise to claims of race discrimination, harassment and victimisation. There were many other issues, and the whole hearing took eight days. All of the Claimant's claims were dismissed.

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4. I shall say at this stage that although the way that those two allegations were put by the Tribunal was not the clearest, it is common ground and not in dispute that the actions of the Second Respondent that are those complained of and said to give rise to a claim, amongst others, of victimisation where that he spoke to Messrs Wardle and Bradley privately without involving the Claimant and persuaded them to write letters of apology to her that he drafted and that were designed to look spontaneous. So, the basis for the victimisation claim went rather wider than simply failing to speak to the Claimant and so on, but there is no dispute that that is the essence of the complaint.

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5. Following the Employment Tribunal's Judgment dismissing all her claims there was an appeal to the EAT, and on 22 October 2014 Simler J (who was not yet President) gave a Judgment. She remitted the claims that were described as issues 4.1 and 4.2 to the Employment Tribunal on the basis that they had not been addressed properly at all.

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6. A further hearing took place before the same Employment Tribunal as had dealt with the first hearing on 18 and 19 March 2015, and then there was a further hearing on 25 November 2015. No further evidence was received at those hearings. The Employment Tribunal again rejected all of the claims and in particular those based on 4.1 and 4.2. This appeal relates only to the victimisation claim arising out of those allegations. So, the Claimant has accepted that she cannot pursue any further a claim of race discrimination or harassment arising out of those matters.

7. It is worth just reminding ourselves what victimisation is. Section 27(1) of the **Equality Act 2010** says:

> **"(1) A person (A) victimises another person (B) if A subjects B to a detriment because -**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act."**

Subsection (2) then lists protected acts, and the first one is simply "bringing proceedings under this Act". The protected act relied on here which undoubtedly took place was, as I mentioned earlier, that the Claimant brought a successful claim for race discrimination back in 2007.

8. The Employment Tribunal in the Remission Judgment - if I can call it that, which is what I am dealing with today - said again that contrary to his own evidence Mr White had known about the 2007 claim by the Claimant and that he had decided to intervene in the grievance relating to Messrs Bradley and Wardle because of that previous claim, at least in part. That is an express finding at paragraph 39, which relates back to paragraph 38, in the Judgment. However, the Employment Tribunal said that the Second Respondent's decision to intervene in the particular way that he did, namely by secretly approaching Messrs Bradley and Wardle and persuading them to send letters of apology that he drafted and that were made to look

spontaneous, which, as I have said, was the essence of the Claimant's complaint, was not because she had done the protected act.

9. I accept that in principle that is a permissible approach, but I look at the detailed reasons that the Tribunal gave for that conclusion. The reasoning for the suggestion that the way that the Second Respondent acted was not based on a protected act is really at paragraphs 42 and 43 of the Judgment. At paragraph 42 the Tribunal say:

> **"42. … The Tribunal specifically found that [the Second Respondent's] actions in dealing with the claimant's grievance <u>in the way he did</u> were aimed at one objective only and that was to address swiftly the claimant's perception that she had been unjustifiably personally criticised for the events that had occurred. The words "in the way he did" are important. They relate to the fact that [the Second Respondent] had determined that the best way forward was for letters of apology to be issued by Mr Bradley and Mr Wardle as if they were "spontaneous", without speaking to the claimant. …" (Original emphasis)**

They then refer to the fact that the Second Respondent had been an HR Director in "the Northern Ireland Police Authority" and that he was keen on restorative justice, and then, later on, at paragraph 43, they go on:

> **"43. … However, the Tribunal was unanimously satisfied that the reason [the Second Respondent] elected not to involve the claimant was his belief that in the particular circumstances of this case an apparently spontaneous letter of apology from both alleged perpetrators would be more likely to achieve success than going through the route of involvement of the claimant at that stage. That decision on the part of [the Second Respondent], determined by senior management as having been wrong and inappropriate, was made, in the Tribunal's judgment, for reasons in [the Second Respondent's] mind that had nothing to do with the fact that the claimant had done protected acts. His intervention in the grievance may well have been motivated by a desire to "calm troubled waters" and avoid potential litigation but his decision to do so in the way that he did was for the reason identified above. …"**

10. That reasoning really begs the question what "the reason identified above" is and what "success" it was that the Second Respondent wished to achieve. Given that those questions are begged, I then look at an earlier paragraph, paragraph 38, where the Tribunal said this:

> **"38. … The Tribunal is … satisfied, in fact, that one of the reasons that it was felt that the matter could escalate was because the claimant had acquired not only a reputation for robust action in response to any alleged or perceived discriminatory behaviour against any employees to whom she gave support but had also successfully pursued a discrimination claim through the Employment Tribunal which had resulted in a substantial financial payment to her. The Tribunal was satisfied that [the Second Respondent], following this meeting, decided to intervene with a plan which would hopefully "nip the problem in the bud". He decided, as a**

major plank of that plan, to explore the possibility of Mr Bradley and Mr Wardle apologising to the claimant, hopefully resulting in her deciding to take her grievance no further."

That indicates to me that the Tribunal are saying that Mr White used the particular method he did because he thought that would nip the grievance in the bud at the earliest possible moment and that the reason he wished to do that was in part because of the fact that the Claimant had brought a successful discrimination claim in the past. It certainly throws the earlier reasoning into yet further doubt. I do not think that the way that the Tribunal put matters at paragraphs 42 and 43, sitting alongside paragraph 38, really stands up to scrutiny, and it indicates that they have erred in their approach to the causation question.

11. In those circumstances, regrettably, I have decided I have to allow this appeal and remit the matter yet again to the Tribunal. The Tribunal did not decide whether what the Second Respondent did amounted to a detriment at all, because they went straight on to look at causation, so that both detriment and causation will have to be remitted. It is accepted on all sides that it cannot be remitted to the Tribunal that has dealt with the matter up until now, not least because Employment Judge Coles has retired, and it is also accepted on all sides that the new Tribunal will just have to do its best with the material that has already been presented and with the decisions made by the Employment Tribunal up until now.