Case Number: 2401055/2014

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondents*
Dr S Saiger	**AND**	**(1) North Cumbria University Hospitals NHS Trust**
		(2) IRG Advisors Limited t/a Odgers Berndtson

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On: 13 October 2017 – reading day**
16, 17 & 18 October 2017

Before: **Employment Judge Hargrove** **Members:** **Ms D Winship**
Ms M Simpkin

Appearances

For the Claimant: **Mr R Powell of Counsel**
For the First Respondent: **Mr S Sweeney of Counsel**
For the Second Respondent: **Mr D Massarella of Counsel**

JUDGMENT ON REMISSION FROM THE EMPLOYMENT APPEALS TRIBUNAL

The unanimous judgment of the Employment Tribunal is as follows:-

The AS was not materially influenced by the fact that the claimant had done a protected act at the time of the telephone conference on 20 December 2013 when she confirmed the recommendations in the second respondent's longlist report including that the claimant should not remain on the longlist of applicants from whom the candidates were to be selected for interview on a shortlist.

REASONS

1 In its original decision to the Tribunal sent to the parties on 29 January 2015 the Employment Tribunal unanimously decided that the then first respondent (North Cumbria), the second respondent (the Trust Development Authority via PB, its Director of Nursing) and the third respondent (Odgers) had victimised the claimant contrary to section 27 of the Equality Act, the protected act being the claimant's bringing of successful proceedings against the first respondent in 2008/09 (and against at least 14 other individuals then employed by the first respondent – those claims were withdrawn during the course of the hearing), for race discrimination, including her dismissal from her post as Assistant Director of Nursing in May 2008. See hearing bundle pages 84-113.

2 The act of victimisation was found to have been a failure by the respondents to include the claimant in a long list for consideration for an interview for the post of Director of Nursing for which the claimant had applied in November 2013. The principle actors found by this Tribunal in that decision making process were found by the Tribunal to have been:-

2.1 AS, on behalf of R1, who was employed by Northumbria Healthcare NHS Trust as Head of HR but was assigned to work on at least two days per week at the first respondent in accordance with a buddying agreement with the first respondent which was perceived to be a failing Trust.

2.2 PB; and

2.3 Odgers.

The first and second respondents appealed to the EAT. The third respondent did not. The claimant appealed the Tribunal's further finding that there was only a 50% chance of her having remained on the longlist; and no chance of her being appointed to the vacant post, which went to GN. See the Employment Tribunal's judgment in the remedies bundle (RB) at pages 96-133. The claimant was unsuccessful in her appeal and the remedies issues remain outstanding at this hearing.

3 The then second respondent, TDA, was successful in its appeal in a decision promulgated by the EAT on 18 July 2017 (see RB pages 248-326). In summary it was found that the Employment Tribunal had reached conclusions unsupported by the evidence. Alternatively there was a serious procedural irregularity that the Employment Tribunal had made a finding of a significant telephone conversation between PB and an employee of R3 which had not been put to PB in cross-examination by the claimant.

The first respondent was successful only in that the finding in respect of AS's part in the decision were not supported by the evidence or by inferences which could be drawn from the evidence. There was also procedural irregularity. However the decision was remitted for further evidence to be heard from AS and the judgment reconsidered. The relevant part of the remission terms are contained at paragraphs 124-138 in RB pages 312-319.

4 At the remission hearing we have heard further oral evidence from AS who provided a second witness statement dated 3 October 2017 in addition to her original witness statement in the first hearing, dated 27 August 2014. She was cross-examined, very competently, by Mr Powell for the claimant who had not represented at the original hearing but did in the EAT. There was re-examination from Mr Sweeney for the first respondent, who did not represent at the original hearing, but did in the EAT. There were very useful written and oral submissions from Mr Powell and from Mr Sweeney.

5 A number of points need to be clarified at this stage. The EAT took the view that the Employment Tribunal's finding of liability in respect of the actions of the now first respondent via AS lay via the pathway of section 39(3) of the Equality Act. It is common ground that if the finding against AS is upheld, R1 will be directly liable. If however, the finding against AS is not upheld, R1 will remain liable for the victimisation of now R2 (Odgers) via the pathway of section 109 of the Equality Act as being the agents of the first respondent jointly and severally liable with the second respondent.

6 The parties do not dispute that the original Tribunal's directions of law as to what was required to be proved were correct (although wrongly applied). It is not sufficient for AS only to have had knowledge of the claimant's protected act; that act must have materially influenced her decision, consciously or subconsciously, made during the longlisting telephone conference on 20 December 2013, not to continue to include the claimant in the longlist from which candidates were later to be selected for interview. In this respect the burden of proof provisions in section 136 of the Equality Act apply.

7 It is common ground that AS confirmed on behalf of the first respondent in a telephone conversation which lasted about 15 minutes commencing some time shortly after 1:00pm on 20 December 2013. The recommendations in a longlist report prepared by the then third respondent on 17 December, which recommendations included that the claimant and one other applicant for the post, JMcS, should not remain on the longlist from which candidates were to be selected for interview.

It is agreed that the appropriate test to be applied is as follows, under the burden of proof provisions. Were there facts found from which the Employment Tribunal could reasonably conclude that AS had acted in contravention of the Act? If so had the first respondent via AS proved on the balance of probabilities that she did not act in contravention of the Act, ie that her decision was not materially influenced by her knowledge of the protected act.

8 There are the following factors to be considered:-

8.1 The claimant alleges that AS was less than frank as to the extent of her knowledge of the claimant's PA. In her evidence to the Tribunal AS alleged that the original source of her knowledge was Mr Gallagher, the then Director of HR at the first respondent, who approached her in November/December 2013 to notify her that she, the claimant, was an

applicant and that she had brought successful Tribunal proceedings against the Trust some years before which had caused considerable upset to individuals involved in the proceedings who were employed by the Trust one of whom had been reported to their professional bodies. She accepted that she had a vague recollection of previous proceedings but not the name of the claimant. She also accepted knowledge that the claim had been a race discrimination claim or at least had included claims of race discrimination. She also admits that she was aware of provisions protecting people who had brought discrimination claims from being thereafter subjected to detriments. The claimant's case is that these admissions were not an adequate reflection of the truth of the claimant's knowledge because as the claimant suggests AS must have been aware of the extent of the claims she, the claimant, had made since. AS was a Senior HR Officer in the neighbouring Trust and it was a matter of common knowledge amongst NHS staff particularly in the light of the considerable press publicity at the time of the hearing. This is the start of a more general attack on AS's credibility. During the course of her evidence before this Tribunal AS was asked who was the source of the information given by Dr Gallagher that senior staff were upset by the claimant's activities in connection with the earlier proceedings. She named Isla Edgar, who is one of the original respondent's to the claimant's 2008 proceedings and who remained as Deputy Director of HR at the first respondent in 2013. The claimant had apparently reported her to her professional body. The provision of this further information is said also to be a new addition to AS's evidence, which she had failed to provide before. We do not regard the claimant's attack upon AS's credibility in respect of her knowledge of the claimant's PA as in anyway demonstrating a general lack of credibility. We think that the claimant was frank about her source of knowledge of the earlier proceedings.

8.2 The next area of contention concerns AS's decision to proceed with her participation in the longlisting of candidates notwithstanding her knowledge of the PA by the claimant. This was prefaced by cross-examination of the claimant upon the basis that with her vaunted knowledge and experience of victimisation/whistle-blowing claims she was aware of the importance of keeping those aware of earlier Pas away from the investigation or conduct of disciplinary matters against those who had done PAs or whistle-blown, which ought to have been applied also to applicants for employment. AS agreed that she adopted this as a general policy. It was then pointed out that she herself had not complied with that policy because she had remained as a decision maker in relation to the claimant's application for the Director of Nursing post notwithstanding her knowledge of the claimant's PA. It was also elicited that there had been other adequately senior members of staff at both the first respondent in Northumbria who would have no knowledge of the claimant's PA and that in those circumstances AS should have stood down. We think there is something in this argument because clearly AS's knowledge gave her at least the opportunity to victimise the claimant. It does not however lead to any inference that she did do so. In addition, the involvement of someone else would have required AS to have made some enquiries of that person

or people as to his/her knowledge of the claimant's previous proceedings or of the claimant which could well have been counterproductive. In this context we are satisfied that AS did in fact take care not to speak to anyone about the claimant's application or her history except Mr Mackie, her Chief Executive at Northumbria. That is consistent with her recognition of the sensitivity of those facts and the importance of it not leaking out to those who were likely to be involved more closely in the later stages of the selection process.

8.3 We next considered a more serious criticism of AS's evidence. This arises from the fact that AS never said in her first witness statement to the Tribunal in 2014 that she had herself examined the applications made by the prospective candidates prior to receiving the longlisting report; and in consequence assessed their suitability independently of the contents of the longlist report. It was only in her second witness statement that she gave some details – see paragraph 13 thereof. It is a fact, as found in the original Employment Tribunal judgment – see RB page 104, paragraph 8.19 – that LS had at 12:15pm on 17 December 2013 sent to AS "the applications so far received". There were at that time seven applicants, not six as that part of the judgment states, but at least one of them withdrew before the longlist call on 20 December. They included DM, JMcS, AC, DR and SS. They did not include GN, which the claimant claims is significant. In her second witness statement AS said that she had read them on either 18 or 19 December when working at home at her kitchen table before going to a Trust meeting in Hexham. This is heavily challenged by the claimant. It is claimed that AS had not read them and cannot have independently have relied upon her own assessment of the candidates but must have relied upon the contents of the tainted longlist report, which she did not receive until 20 December, before the telephone conference.

However, we note that there is an internal e-mail from LS to AMcD timed at 16:18 hours on 17 December at page 390A (HB 2). This is four hours after the applications were sent to AS. Material parts of the e-mail read:-

> "I have sent the applications over to AS today and subsequently gave me a call. She says that she didn't think the field was that strong. I assured her that it's a really difficult market and that there are a few people there and I thought we should see. I think would really help if we could get Gail (GN) and Lynn (LS) in especially now Camilla is out".

This is a contemporaneous document which, although it comes from in some senses a discredited source, came into existence in circumstances where LS would have no motive to tell an untruth. We conclude that AS had examined the application forms to date by that stage including the claimants, and had formed a view of their qualities. In her evidence to the Tribunal at the remitted hearing AS said that she looked at them again on 18 December.

We have accepted that AS did in fact examine the application forms accordingly prior to receiving the longlist report.

As to GN, AS had known since at least 12 December that PB was interested in GN becoming a candidate and was intending to speak to her.

The longlist report was copied to AS at 11:37 on 20 December (see HB page 468A onwards). AS copied it within ten minutes or so to Jim Mackie. In that e-mail she stated:-

> "GN is extremely sensitive about anyone knowing that she has applied therefore do not plan to share with everyone until interviews are scheduled".

This is evidence that GN had clearly expressed an interest in the job and was considered to have applied although as the claimant stated in her evidence, no formal application was received from her until 9 January 2014.

There is a considerable amount of information about GN in the longlist report which must have come from somewhere. This must have been the source of the information which informed AS's view as to the suitability of GN to remain within the longlist.

8.4 A further matter of some significance is that LS told AS that the longlist report had been "put together in conjunction with PB". Whether it is correct or not that PB did participate, AS was entitled to conclude that it was correct and that that provided some support for the conclusions including that the claimant be not kept on the longlist.

The claimant nonetheless relies upon a later exchange of e-mails between AS and LS on or about 5 February 2014. The context is that at this stage the claimant was making detailed enquiries of Odgers as to why she had not been shortlisted and had asked a whole series of questions in an e-mail of 29 January 2014 (see HB page 627). In her reply Helen Haddon of Odgers had included the comment:-

> "Additionally, we did not select the candidates for interview or shortlisting – this was the client's decision".

This was copied to AS who responded on 7 February 2014 at page 625:-

> "I would however like to advise that we took our decision on the shortlisting based on the ranking you provided within your longlist report".

Mr Powell relies upon that statement as demonstrating that AS cannot have made her own assessment of the strengths and weaknesses of the applicants for the post. When pressed, AS stated that she was annoyed that Odgers, having been paid a £25,000 fee for producing the report were

no longer taking responsibility for their own recommendations. We do not think that this materially discredits the evidence which AS gave, albeit late in the day, about her own assessment of the candidates.

8.5 There is a further factor for us to consider. This is the fact that at no stage did AS challenge the fact that Odgers was ostensibly relying upon the claimant's protected act in support of its recommendations that may not arguably have been obvious from the concluding passage in Odgers assessment of the claimant contained in the longlist report although it should have but AS on enquiry. There is then the e-mail sent to PB on 23 December which was forwarded to AS, but which she did not read until her return from the Christmas break on 2 January 2014. See HB page 478 – cited in full at paragraph 8.27 of the original ET judgment. AS failed to follow this up with PB at all after 2 January, nor did she challenge Odgers at any time then or since. At paragraph 16 of her original statement (see paragraph 8.29 of the Tribunal's earlier judgment) she said:-

> "When I read by Mr Blythin's e-mail however I did not think that the e-mail from Odgers to Mr Blythin contained anything inappropriate or giving rise to any significant concern. It seemed to me that Odgers were simply stating as matters of fact, the basis on which they were not recommending that she be shortlisted …".

This in our view shows at least remarkable naivety on her part if she was so conscious of the risk of victimisation. The claimant puts a different interpretation – namely that in fact this was evidence that AS was colluding with Odgers in victimising the claimant.

9 Taking all of these factors into account we conclude that there are sufficient facts proved from which we could reasonably conclude that AS's decision was materially influenced by her knowledge of the claimant's protected act. The burden accordingly shifts to AS if she is to escape liability to satisfy us on the balance of probabilities that her knowledge of the claimant's protected act did not in any way influence her decision not to continue the claimant on the longlist. We have concluded that AS's decision was based upon her own informal assessment of the claimant's CV and in particular the weakness of the claimant's practical experience of service delivery, of patient care and improving nursing standards. For example she noted that the claimant had spoken of leading a team of 32. DR by comparison spoke of leading teams of 2,000 and 3,000 in separate units. Though we did not entirely agree with the longlisting assessment of the claimant's application as being at level C, the same as JMcS's, our conclusion on the **Polkey** issue points to the weaknesses in the claimant's application. See paragraph 10.16 of the original judgment. In short, there are some unsatisfactory elements to the claimant's evidence and a notable failure by her to challenge Odgers' ostensible victimisation, we have accepted on the balance of probabilities that her decision was not materially influenced by the fact that, as she knew, the claimant had done a protected act.

EMPLOYMENT JUDGE HARGROVE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
25 October 2017
JUDGMENT SENT TO THE PARTIES ON

25 October 2017

AND ENTERED IN THE REGISTER

P Trewick

FOR THE TRIBUNAL