Appeal No. UKEAT/0115/18/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 December 2018

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MR EPHREM UWALAKA — APPELLANT

SOUTHERN HEALTH FOUNDATION NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR EPHREM UWALAKA (The Appellant in Person)
For the Respondent	MR BRUNO GIL (of Counsel) Instructed by: Capsticks Solicitors LLP 1 St Georges Road Wimbledon London SW19 4DR

SUMMARY

VICTIMISATION – Protected disclosure

RACE DISCRIMINATION – Direct

The Appellant was employed as an agency worker by an NHS-owned agency company, NHS Professionals Ltd, his services being provided to the Respondent NHS Trust. He was suspended following an allegation of misconduct, and thereafter was placed in a state of limbo because NHS Professionals Ltd failed to carry out any or any proper investigation into the allegation. The ET was highly critical of both entities for the way in which the Appellant was treated. The EAT describes as "appalling" the fact that, even by the time of the EAT hearing, almost three years later, neither NHS Professionals Ltd the agency nor the Trust had taken steps to conclude the investigation and to lift the suspension, the fact of which the Appellant had to communicate to any prospective employer. The Appellant also remains unable to work for the Respondent.

Notwithstanding the shoddy treatment by the Respondent and NHS Professionals Ltd, the Tribunal's conclusion that the matters complained of did not arise from discrimination was upheld as being open to it on the evidence.

HIS HONOUR JUDGE MARTYN BARKLEM

1. This is an appeal against the Decision of an Employment Tribunal sitting in Southampton (Employment Judge Richardson sitting with lay members, Mrs Date and Mrs Goddard). The Decision was sent to the parties on 12 September 2017. I will refer to the parties as they were before the Tribunal.

2. The Claimant was an agency worker, working in the field of mental health and engaged by a company named NHS Professionals Limited ("NHSP"), but whose services were supplied to the Respondent: a Trust operating, as the Tribunal found, in four hospitals and four mental health in-patient units as well as other community-based facilities. The Judgment of the Tribunal explains that although NHSP had been the First Respondent to the claim, the matter had been settled on terms of which the Tribunal was unaware.

3. So far as is relevant to this appeal, the Claimant contended that he had been subject to detriments arising from his having made a protected disclosure and/or discriminated against on grounds of race. This took two forms: first, his suspension from work by NHSP at the direction of the Respondent and, second, the refusal by the Respondent to lift the restriction on his working for it.

4. Amended grounds of appeal alleging, in summary, perversity and misapplication of the burden of proof in a number of respects, were drafted by counsel instructed at the Rule 3(10) Hearing, at which the appeal was permitted to continue to a Full Hearing by Her Honour Judge Eady QC. The Appellant has represented himself before me today. He is clearly an intelligent man who feels, with good cause, that he has suffered an injustice in the way in which he was

A treated by the Respondent and NHSP. This has resulted in his being unable to work for anyone without disclosing the fact of an ongoing suspension. This is a suspension which he has been unable to lift for the simple reason that the enquiry - which I will describe in a moment - has fallen into an apparent state of limbo without any resolution having been reached.

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5. He also feels, although with less cause, in my judgment, that the Tribunal failed to examine the evidence in the case fully. He did not call witnesses, although witness statements were available, and he complains that the Tribunal did not read a 500-page bundle, which he felt was material to his claim. Indeed, he took issue with the Tribunal's comments that this was a relatively simple case which took only a day for evidence and submissions.

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6. Mr Gil, who appeared for the Respondent below and before me today, was able to assure me that all matters relevant to the issues were explored in the course of the Tribunal hearing; in relation to at least one issue the burden lay on the Respondent.

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7. It was common ground that the Claimant had a made a protected disclosure to the Care Quality Commission about understaffing and certain other incidents. This took place in about February or early March 2016. What then happened, I take from the Employment Tribunal's Judgment:

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> **"20. On 16 March 2016, a patient, when being transported to Southampton General Hospital, indicated to her support worker she had an inappropriate relationship with the Claimant. This triggered a safeguarding alert and a complaint incident management form from the Respondent to NHSP. The Respondent requested, under the protocol with NHSP, for a restriction to be placed on the Claimant working anywhere on the Trust's premises and for an investigation to be carried out (page 103-104). It was for NHSP to make the decision on what was effectively a suspension. The Respondent can only request that step be taken, albeit the expectation under the policy (page 36I) is that suspension pending an investigation will follow. The Claimant was initially informed on 16 March by email (page 102) and then a formal notice was sent to him on 17 March (page 105-107). The allegation was simply described as "*attitude and behaviour*". He sought clarification on 18 March (page 108) and continued to chase for clarification over the next six to seven weeks.**
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> **21. Understandably exasperated, on 3 May (page 121) the Claimant copied an email, complaining about his treatment to the Respondent's Chief Executive Officer. From the papers, it appears that not until his investigatory interview on 12 May 2016, or shortly beforehand, did**

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he learn about the precise allegations. NHSP's emails suggest this was because the Respondent did not provide the details but we did not ascertain where responsibility for this delay lay. Whoever was responsible, it is clearly unacceptable at any time, but certainly given the seriousness of the allegations, for an employee to have to wait so long to learn of the allegations against them.

22. The Claimant in his email of 3 May stated that he assumed this treatment was because of the report to CQC, an understandable assumption given the timing of these events and the silence from NHSP on the nature of the allegations.

23. The Claimant attended a meeting on 12 May (page 132) with Mr Monfort. There appear to be no minutes produced by NHSP, although the Claimant prior to the meeting (page 133) had asked for them to be prepared.

24. Following that interview, a report was sent on 26 May (albeit the report itself is dated 26 October - page 134-136) by NHSP to the Respondent and the Claimant was told the outcome in an email on the same day (page 138-139). The report described the outcome as inconclusive. The report itself is barely more than a page. The way it is set out raises more questions than it answers and during his evidence, the Claimant challenged the accuracy of what was said to him. Had NHSP produced agreed minutes, this point could have been addressed and possibly alleviated some of the concerns of the Respondent on the quality of the report.

25. In our view, to describe the report as inadequate does not do justice to it. It falls well below the standards that might reasonably be expected. There was no investigation to talk of, only the Claimant was spoken to and no-one else. We understand why the Respondent was concerned at the report's contents, which hint at possible misconduct, but without any actual evidence or attempts made to see what evidence could be obtained.

26. Not unreasonably, the Respondent decided it needed a fuller report. During her evidence, Ms Mills told us she was further alarmed by the Claimant's evidence, before the Tribunal, challenging what NHSP record him as having said to them. Mr Monfort supports the Claimant's version of that conversation at the investigatory meeting.

27. There are then a series of rather circular emails between the Respondent and NHSP (and indeed within the Respondent) on the investigation, and one meeting between Ms Mills and NHSP on 15 June. In July NHSP sought to lift the restriction on the Claimant but, was unable to get an answer from the Respondent and, in the end, lifted the restriction itself save in relation to the Respondent (page 152). It appeared to be the Respondent's position that nothing had changed and so the restriction should stay in place (paras 20-23 of Ms Mills' statement). The communications between NHSP and the Respondent are confusing and do not provide any further clarity on the Claimant's position save to the extent that he is unable, to this day, to work at the Respondent."

8. The Tribunal directed itself correctly on the burden of proof applicable in this case, namely the burden being on the Respondent under section 48(2A) of the **Employment Rights Act 1996**, having established a protected disclosure and a detriment, and to the shifting burden of proof under section 136 of the **Equality Act 2010**. The Tribunal noted that by that stage **Efobi v Royal Mail Group Ltd** UKEAT/0203/16 had been decided by the EAT. However, it went on to say that it had considered the position under the conventional approach prior to **Efobi** in the event the decision in **Efobi** was reversed in another case, as indeed happened.

9. The Tribunal expressed its conclusions in relation to each of the detriments at paragraph 32 and in relation to discrimination at paragraph 33:

> **"32. There are two detriments complained of and we take each in turn.**
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> **32.1. <u>Suspension/restriction imposed on 16 March 2016</u>**
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> **It is admitted the Claimant made a protected disclosure. However, it is denied that the Respondent subjected the Claimant to a detriment. The suspension/restriction in the circumstances of this case does not amount to a detriment. The safeguarding protocol makes suspension a reasonable step for the Respondent to request and NHSP to implement. Were we wrong and this did amount to a detriment, it was NHSP who subjected the Claimant to the detriment. Only they had the power to impose that suspension/restriction. Again, if we are wrong on that point, we would find that the detriment was not on the ground of the protected disclosure but because of the alleged inappropriate behaviour with a patient and the need to conduct an investigation following the safeguarding protocol.**
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> **32.2. <u>Refusal to lift the suspension/restriction in July or August 2016</u>**
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> **Again, the protected disclosure is admitted. We do not regard the refusal to lift the restriction as a detriment since the Respondent was seeking a proper investigation and report into the allegations. It has a duty to its patients and was entitled to have the matter properly addressed. If we are wrong on this point, and it is a detriment, then it is one that the Respondent has subjected the Claimant to since, on this occasion, it is the Respondent who took the decision not to lift the suspension/restriction rather than NHSP. However, even if that were the case, the Respondent has been able to demonstrate to our satisfaction that such action was not taken because of the protected disclosure but because of the failure by NHSP to complete an investigation it was obliged to undertake.**
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> **33. In relation to the discrimination claims, and conscious of the burdens of proof dealt with in paragraphs 29 - 31 above, in respect of both alleged detriments we have found no evidence whatsoever from which we could conclude there was discrimination. If we were wrong on that point we consider that the Respondent has provided a satisfactory explanation, namely the need to carry out a proper investigation into the allegations of the patient. We do not know if the decision in *Efobi* is being appealed, and which might mean the reinstatement of the guidance from *Barton* and *Igen* but, if that were the case, our view is that there are no facts from which we could infer discrimination and which requires an explanation from the Respondent."**

10. They went on to make some critical observations about the handling of the matter by NHSP and the Respondent:

> **"35. Finally we have some observations to make on the way this matter has been handled between the Respondent and NHSP. While we have no powers in this respect, we hope that the Respondent will draw our comments to the attention of the relevant management group within NHSP and indeed within the Respondent it will ensure that some of our concerns are again shared with the relevant management teams.**
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> **36. During the hearing, Counsel for the Respondent made it clear in defending the claim it was not suggesting there was any improper conduct on the part of the Claimant. How could it, given the inadequate investigation? However, given the Respondent's feedback in 2015 described the Claimant as excellent, he has been left in a very unfortunate position and the Respondent has to bear some of the blame for this.**
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> **37. Firstly it is clear that NHSP needs to undergo training on how to conduct an investigation particularly in a timely manner and to prepare a report which deals with such serious allegations. Its inability to then investigate matters was significantly impaired by a deterioration in the patient's help so she could not later be interviewed.**

38. The Respondent itself let matters drift. It does not appear to have provided details of the allegations in a timely way for those to be passed on to NHSP who in turn, needed to tell the Claimant. It also allowed matters to drift in July and August in coming to some sort of conclusion as to the Claimant's position and ability to work for them.

39. Had matters been dealt with then there was a reasonable prospect that this matter need never have come before the Tribunal, the Respondent (and therefore public funds) have been put to some expense but have brought this matter on itself. It needs to be borne in mind that the inadequacy of the investigation has had a real and lasting effect on the Claimant and the ability of the Claimant to work within a reasonable area from where he lives. He and the patient deserved a properly conducted investigation.

40. Despite our concerns about the way in which the complaint was handled, none of those failings had anything to do with the Claimant's age, race or sex nor were they on the grounds of the protected disclosure. The action taken related to the complaint from the patient and the necessary requirement to investigate the complaint and accordingly this claim must be dismissed."

11. It seems to me that these comments were entirely justified. I am told today that the Claimant continues to be unable to work without disclosing his suspension; that is an appalling situation. However, the EAT is no more able than the Tribunal was to intervene. I can only suggest to the Claimant that when making such a disclosure in the future, should it remain necessary, he shows any prospective employer a copy of this Judgment and that of the Employment Tribunal - each being available online.

12. As far as the protected disclosures element of the case is concerned, issues of the correctness of the approach to the burden of proof in assessing whether there was a detriment and/or as to perversity in the findings made, are of no relevance unless there is a valid challenge to the elements of causation. This point was made by His Honour Peter Clark at the sift stage, and I consider him to have been correct. Unless any detriment was a result of the protected disclosure, the earlier stages are academic.

13. The ground of appeal asserting that the decision in relation to causation was "totally flawed and perverse" deals only with the detriments themselves and the approach to the investigative links, and not to the ultimate causation point as to why the Respondent acted as it did. In the present case, the Tribunal has made the entirely permissible finding in relation to each

of the alleged detriments, that the actions taken were for reasons other than the making of the protected disclosure.

14. Turning to the discrimination claim, the Tribunal has taken a prudent belt and braces approach to the question of the shifting burden of proof and has made a finding that there was no evidence whatsoever from which they could infer, far less conclude, that discrimination played any part. I have heard nothing that suggests that the Tribunal failed to apply the correct test.

15. I recognise the difficulty an unpresented litigant has when seeking to advance grounds formulated by a lawyer. The Claimant told me today that he found the legal discussion at the Rule 3(10) Hearing difficult to understand. An appeal on perversity will only "*succeed where an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached*", as per Mummery LJ from the case of **Yeboah v Crofton** [2002] IRLR 634, at paragraph 93.

16. There is simply nothing before me to suggest any body of evidence which the Tribunal failed to have regard to. The hearing, plainly, went faster than the Claimant expected, but there is no basis for concluding that the Tribunal failed to have regard to evidence.

17. For all those reasons, the appeal fails.