Appeal No. EA-2019-000977-AT (previously UKEAT/0122/20/AT)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 23 February 2021

Before

HEATHER WILLIAMS QC, DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

SECURE CARE UK LIMITED — APPELLANT

MR R MOTT — RESPONDENT

Transcript of Proceedings

JUDGMENT

© Copyright 2021

APPEARANCES

For the Appellant	MR RAD KOHANZAD (of Counsel) Instructed by: Peninsula Business Services Ltd The Peninsula Victoria Place Manchester M4 4FB
For the Respondent	MR R MOTT (The Respondent in Person)

SUMMARY

Whistleblowing, Protected Disclosures

The Claimant claimed under section 103A **Employment Rights Act 1996** that he had been unfairly dismissed by reason of making protected disclosures. The Employment Tribunal ("ET"), finding that three of the nine communications relied upon by the Claimant were protected disclosures, upheld his claim.

The appeal succeeded and the case was remitted on the issue of causation as the ET had erred in two respects. Firstly, in applying the wrong causation test, namely the 'materially influences' test applicable to section 47B claims for detriment by reason of making a protected disclosure (see **Fecitt v NHS Manchester** [2012] ICR 372), rather than the sole / principal reason test required by the terms of section 103A. Secondly, in failing to distinguish the impact of the three protected disclosures, from the impact of all nine of the Claimant's communications about staffing levels, when considering the reason for the dismissal.

A

HEATHER WILLIAMS QC, DEPUTY JUDGE OF THE HIGH COURT

1. This appeal is brought by Secure Care UK Limited, who was the Respondent to a claim brought by Mr Mott. For clarity I will continue to refer to the parties as they were known below. At this hearing, the Respondent was represented by Mr Kohanzad, and the Claimant appeared in person, as he had done below. The hearing took place remotely. Both parties made very helpful submissions to me.

B

C

2. The appeal is from the reserved judgment of Employment Judge Siddall of the London South Employment Tribunal sitting at Ashford. The decision was sent to the parties on 21 August 2019. The claim before the Employment Tribunal ("the ET") was for unfair dismissal for making protected disclosures pursuant to section 103A of the **Employment Rights Act 1996** ("**the ERA**"). The ET upheld the claim following a hearing on 5 August 2019.

D

E

3. By an Order sealed on 30 July 2020, Mathew Gullick, sitting as a Deputy Judge of the High Court Judge, sifted the appeal to a Full Hearing. He accepted that the three grounds of appeal contained in the Notice of Appeal had real prospects of success. The grounds of appeal all relate to the Employment Judge's finding on causation. Ground 3 was withdrawn during the course of the hearing before me today.

F

G

The background circumstances and the ET's judgment

4. The Claimant was employed by the Respondent from 6 July to 13 November 2018 as Logistics Manager. The Respondent provided transport services to NHS Trusts for people with mental health problems, including people who were detained under the **Mental Health Act**. It was common ground that the Respondent was facing significant recruitment and retention

H

A

problems at the material time, particularly in relation to mental health transport assistants. Part of Mr Mott's role as logistics manager was to manage the control room, which was responsible for accepting transport assignments and deploying staff. The Respondent's case was that the Claimant was dismissed for redundancy and that two other members of staff, Ms Saxelby, the Human Resources manager (who the Claimant was in a relationship with) and one of the Operations Managers were also made redundant at the same time.

B

C

5. The Claimant relied upon nine protected disclosures which he said tended to show that the Respondent was in breach of a legal obligation or that the health and safety of a person was being endangered. The Employment Judge accepted that each of the communications took place and that three of the nine met the statutory test for a qualifying disclosure. Whilst I will need to refer briefly to her reasoning in that regard, because it has a bearing on the Respondent's Ground 2, neither party has appealed this aspect of her conclusions. The appeal solely relates to Employment Judge Siddall's conclusion that the requisite relationship of causation was shown between the protected disclosures and the Claimant's dismissal.

D

E

6. The Employment Judge set out her findings of fact at paragraphs 3 to 27 of her judgment. She found that soon after the Claimant started his employment, he raised concerns over staff shortages and the long hours that current staff were working, with Robert Taylor, a Director and Executive Chairman. The Claimant understood from the first conversation in early July of 2018 that there would be a reorganisation involving the creation of a senior management team comprising himself and others. This conversation was referred to as "Disclosure 1", and the Employment Judge concluded it did not amount to a qualifying disclosure.

F

G

H

7. On 21 July 2018 the Claimant emailed several people including Mr Sanusi, a senior manager, asserting that the shift arrangements were not possible, as the staff would not have

A adequate rest breaks. The Employment Judge found that this communication ("Disclosure 2"), was a qualifying disclosure.

B 8. Employment Judge Siddall rejected the contention that what were termed Disclosures 3 - 7 were qualifying disclosures. These were communications from the Claimant which the Judge accepted had taken place in the period 31 July to 14 August 2018. The contents included detailing C to Mr Sanusi problems with finding staff cover for assigned tasks and the Claimant explaining how much he was struggling with the staffing situation.

9. On 16 August 2018 the Respondent announced a new staffing structure. This caused the D Claimant some disquiet for reasons covered in the judgment, but which I do not need to go into. On 21 August the Claimant was instructed that a number of posts would have to be cut. He expressed his unhappiness about that and he emailed Mr Sanusi, copying in Mr Taylor, on 22 E August 2018, saying that the control room objectives could not be met with the staffing numbers. This was referred to as "Disclosure 8", and the Employment Judge found that this was a qualifying disclosure.

F 10. Employment Judge Siddall accepted that as of September 2018 the financial situation had deteriorated and the management accounts showed a significant financial loss for the previous month. Potential redundancies were discussed by email with a human resources consultant. At G paragraph 22 of her reserved judgment, the Employment Judge referred to Mr Taylor's evidence that the Claimant had been provisionally selected for redundancy because he was on a high salary and it was considered his role could be carried out by the Chief Executive Officer and one other person. Mr Taylor's evidence was that the Claimant had done lots of "pointing out problems but H less of coming up with solutions". I mention this because it was then referenced in a later paragraph of the judgment (paragraph 42) that I will need to consider.

A

11. The Employment Judge found that on 26 September 2018 the Claimant was instructed by Mr Sanusi to inform a client that they had available cover for an assignment when in fact they did not. The Claimant told Mr Sanusi that he was very unhappy about this and that the Respondent was in breach of the Care Quality Commission Regulations, health and safety law and the Working Time Regulations. He said that the health and safety of patients and staff was in danger, and he threatened to contact the Care Quality Commission ("CQC") and the Information Commissioner. This was referred to below as "Disclosure 9", and this was the third communication that the ET accepted was a qualifying disclosure.

B

C

D

12. The next day, 27 September 2018, the Claimant and Ms Saxelby and one of the Operations Managers were called into a meeting with Mr Taylor and Mr Sanusi. They were advised that they were at risk of redundancy. They were asked to leave the premises immediately and not to speak to staff. When the Claimant got home, he realised that his email access and access to the Respondent's IT systems had been removed.

E

13. The Employment Judge described how a consultation process was outsourced to an HR company, who the Claimant met with in October 2018. By a letter dated 7 November 2018 he was told he was dismissed on the ground of redundancy. A subsequent appeal was rejected.

F

G

14. At paragraphs 28 to 36 of the reserved judgment, the Employment Judge considered which of the nine disclosures relied on were qualifying disclosures. I have already summarised her conclusions in that regard. I note that her paragraph 28 begins with the following sentence: "The Claimant asserts that the principal reason for his dismissal was that he was making protected disclosures". I will return to the potential significance of this passage when I consider Ground 1. She also observed (at paragraph 31), that: "In a number of the communications referred to above the Claimant expresses his concern about the staffing arrangements that are operating but I find

H

A

that these do not amount to qualifying disclosures". I mention this passage because it underscores that some of the non-qualifying disclosures were also about staffing concerns.

B

15. At paragraphs 37 - 38 the Employment Judge concluded that the other statutory criteria for protected disclosures were met in relation to the three qualifying disclosures that she had accepted. Then at paragraph 39 she said:

C

> **"39. The Claimant can only succeed in his claim for unfair dismissal if he can show that 'the reason (or if more than one the principal reason) for the dismissal is that the employee has made a protected disclosure'."**

16. This in itself was a correct self-direction as to the applicable causation test under section 103A of the **ERA**, and therefore, understandably, Mr Mott relies on this passage in resisting

D

Ground 1. The Respondent, however, relies on several passages in the paragraphs that followed. In paragraph 40, Employment Judge Siddall said:

> **"40. …The case of *Fecitt v NHS Manchester* [2012] IRLR 64 makes it clear that there is a causal link if the protected disclosure materially influences in the sense of being more than a trivial influence, the employer's treatment of the whistle-blower."**

E

17. After noting in paragraph 41 that she accepted that there was a genuine redundancy situation in September 2018, the Employment Judge described the redundancy selection process

F

that was applied to the Claimant, Ms Saxelby and the Operations Manager. She said that this selection process was questionable, noting some particular elements. She concluded her paragraph 42 as follows:

G

> **"42. … In the case of the Claimant, the fact that he had been 'pointing out problems' (in a number of communications some of which amounted to qualifying disclosures) clearly had a material effect on his selection."**

18. The Employment Judge then observed in paragraph 43:

H

> **"43. … The Claimant had, on numerous occasions, expressed his concerns about the staffing situation within the company and the need for investment to address this. He had on at least two separate occasions suggested that the staff situation was putting the Respondent in breach of legal obligations."**

A

19. After noting that there seemed to have been a deterioration in relations between the Claimant and the Respondent when the former had suggested that the staffing situation was putting the Respondent in breach of its legal obligations, the Employment Judge said at paragraph 45:

B

> **"45. Taking all these matters into account I find that the fact that the Claimant kept raising his concerns about the staffing levels and their impact had a more than trivial impact on the decision to provisionally select him for redundancy."**

C

20. Employment Judge Siddall then explained that the Claimant's provisional selection for redundancy was not the end of the matter, but that just prior to the 'at risk of redundancy' meeting held on 27 September 2018, the Claimant had had a confrontation with Mr Sanusi, in which Mr Mott had said that he would not lie for the company and that they were in breach of a number of obligations (this was "Disclosure 9"). In the opening sentence of paragraph 48, the Judge continued, "I find that this made the Claimant's dismissal all but certain".

D

E

21. At paragraphs 49 - 51 the Employment Judge addressed the fact that the two other members of staff were also made redundant. She explained why, in her judgment, this did not show that the Respondent was not motivated by the fact the Claimant "had made disclosures when it decided to dismiss him".

F

22. The Employment Judge's overall conclusion was then set out in paragraphs 52 and 53 as follows:

G

> **"52. I have to conclude from the Respondent's evidence that the entire process of redundancy selection was tainted by a significant degree of subjectivity relating to the Respondent's views of the actions and performance of these members of staff. Therefore I find that the fact that the Claimant was not alone in being made redundant does not lead me to a conclusion that his dismissal was unaffected by the disclosures he had made.**
>
> **53. Having considered the chronology of events and the communications between the parties I conclude that the fact that the Claimant had made protected disclosures had a material influence upon his selection for redundancy and eventual dismissal. I find that his claim under section 103A of the Employment Rights Act 1996 is made out."**

H

A

The grounds of appeal

23. In summary, in Ground 1 the Respondent contends that the Employment Judge applied the wrong causation test, namely the test applicable to a section 47B **ERA** claim for subjecting a

B

worker to a detriment on the ground that the worker had made a protected disclosure, rather than the test to be applied under section 103A **ERA** to an unfair dismissal claim. As established by the Court of Appeal in **Fecitt v NHS Manchester** [2012] ICR 372 ("**Fecitt**"), in a section 47B

C

claim, causation is established if the protected disclosure materially influences the treatment in question; whereas section 103A requires in terms that the protected disclosure is the sole or principal reason for the dismissal.

D

24. In Ground 2 the Respondent contends that when considering causation, the Employment Judge failed to distinguish between the communications that she had found were protected disclosures and the effect more generally of the Claimant's expressions of concern about staffing

E

levels to his managers. In this regard, the Respondent relies in particular on paragraphs 42 - 43 of the reserved judgment.

25. The Claimant's response to Ground 1 is that the Employment Judge did correctly apply

F

the sole or principal reason test, as shown, in particular, by paragraph 39 of her judgment, which contained the correct self-direction. He describes her later references to "materially influences" as "moot" given that she had already applied the correct test.

G

26. As regards Ground 2, the Claimant submits, firstly, that the judgment shows that the Employment Judge did carefully distinguish between those communications that were qualifying

H

disclosures and those that were not; and, secondly, that she plainly did this for a purpose, namely

to then apply the causation test only to those communication that she found met the statutory definition.

The legal framework

27. Section 103A of the **ERA** provides:

> **"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."**

28. As relevant, sections 47B(1) and (2) of the **ERA** state:

> **"47B Protected disclosures.**
>
> **(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.**
>
> **(1A) ….**
>
> **(2) … this section does not apply where -**
>
> **(a) the worker is an employee, and**
>
> **(b) the detriment in question amounts to dismissal (within the meaning of Part X).**

29. The effect of section 48(2) **ERA** is that in detriment claims, the onus is on the employer to show the ground on which any act or failure to act was done.

30. In **<u>Fecitt</u>** the Court of Appeal considered the appropriate causation test in relation to a section 47B detriment claim. The leading judgment was given by Elias LJ. The appellants (who were the respondents below) submitted, firstly, that whichever causation test applied, it was clear the Tribunal had been satisfied that the treatment in issue was not on the ground of protected disclosures; and secondly, that the Tribunal had erred in the test it applied, as the proper test was the sole or principal reason test that applied to unfair dismissal claims under section 103A. In the

A

event, the appeal succeeded on the first ground, but Elias LJ went on to consider the issue raised by the second ground.

B

31. Elias LJ said that he agreed with the submissions of counsel:

> **"43. … that liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act. I agree with Mr Linden that *Igen Ltd (formerly Leeds Careers Guidance) v Wong* [2005] ICR 931 is not strictly applicable since it has a European Union context. However, the reasoning which has informed the European Union analysis is that unlawful discriminatory considerations should not be tolerated and ought not to have any influence on an employer's decisions. In my judgment, that principle is equally applicable where the objective is to protect whistleblowers, particularly given the public interest in ensuring that they are not discouraged from coming forward to highlight potential wrongdoing.**

C

> **44. I accept, as Mr Linden argues, that this creates an anomaly with the situation in unfair dismissal where the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair. However, it seems to me that that is simply the result of placing dismissal for this particular reason into the general run of unfair dismissal law…**

D

> **45. In my judgment, the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. If Parliament had wanted the test for the standard of proof in section 47B to be the same as for unfair dismissal, it could have used precisely the same language, but it did not do so."**

E

32. Accordingly, there can be no doubt that the causation tests to be applied under section 103A and section 47B respectively are distinct. Counsel's submission to the contrary was explicitly rejected in **Fecitt**. In the present case, Mr Mott, the Claimant, accepts that the sole or principal reason test is the correct test to apply to a section 103A claim, but he submits that the Employment Judge did in fact apply that test.

F

G

Conclusions

Ground 1: Applying the wrong legal test

H

33. As I have indicated, the issue is whether Employment Judge Siddall directed herself in accordance with the sole or principal reason test and applied it to the facts she had found. Mr

A

Mott has rightly drawn my attention to paragraph 39 of her reserved judgment, where the Employment Judge gave a correct self-direction by reference to the sole or principal reason statutory test. I also note that at paragraph 10 she correctly observed that as he had less than two years' service, the burden was on the Claimant to show the reason for his dismissal; and at paragraph 40 she recognised that she must consider the decision-maker's mental processes rather than apply a 'but for' test. However, whilst she was correct in these respects, paragraph 39 in my judgement represented only the start of her consideration of the causation issue in this case. She then went on to explain her understanding of that test and to assess whether the test, as she saw it, was satisfied.

B

C

D

34. I have already quoted part of paragraph 40 of the reserved judgment. It was here that the Employment Judge referred to **Fecitt** and the "materially influences" test; and she did so in the context of setting out her understanding of what the sole or principal reason test entailed. This is quite clear both because paragraph 40 followed on immediately from paragraph 39, and also because there would have been no reason for her to refer to the **Fecitt** test in this context unless she believed it to be the test that she was to apply. Moreover, I find that she did then apply the materially influences test - in other words, the wrong test - to the facts that she had found. In this regard I bear in mind in particular the last sentence of paragraph 42 and the contents of paragraphs 45, 52 and 53 of her judgment (all of which I have already set out). In my judgment these passages indicate that she was wrongly applying the **Fecitt** materially influences test to the section 103A claim.

E

F

G

35. Mr Mott told me that when he was cross-examined during his evidence to the ET Mr Taylor acknowledged that the reason the Claimant was removed from the Respondent's IT and email system on 27 September 2018 was the fear that he would bad-mouth the Respondent to the NHS and the CQC (amongst others). I do not have the benefit of the notes of evidence given

H

A

below, but assuming this in Mr Mott's favour, it does not follow that even if this was the reason for terminating his access to the IT and email system, it was also the sole or principal reason for his dismissal. Furthermore there is nothing in the Employment Judge's judgment to indicate that she made any such findings or adopted that line of reasoning. It is not an aspect of the evidence that she referred to.

B

C

36. In light of the fact that Mr Mott was unrepresented, Mr Kohanzad very fairly drew my attention to two further paragraphs in the reserved judgment that the Claimant might place some reliance on. He referred to the first sentence in her paragraph 28, which I have already cited. However, I do not consider that this assists the Claimant, given that, like paragraph 39 (which I have already considered), the passage appears earlier in the judgment, prior to the Employment Judge's erroneous articulation of what the sole or principal reason test entailed and prior to her application of the test, as she understood it to be, to the facts found. Secondly, he referred me to the first sentence of paragraph 48, namely: "I find that this [Disclosure 9] made the Claimant's dismissal all but certain". However, I accept Mr Kohanzad's submission that in this passage the Employment Judge was commenting on the *likelihood* of dismissal occurring, not evaluating what the sole or principal *reason* for it was. The probability of an event taking place can stem from a multiplicity of reasons for taking that action and that concept is not the same as the reason/s for taking the action.

D

E

F

G

37. I therefore uphold the Respondent's Ground 1. I find that the Employment Judge erred in applying the wrong legal test when she assessed causation.

H

A

Ground 2: Failure to distinguish between disclosures which were protected and those that were not

B

38. I also consider that Ground 2 is well founded. As Mr Mott rightly points out, at paragraphs 29 – 36 of the reserved judgment, the Employment Judge undertook a careful assessment of which communications met the statutory test for qualifying disclosures and which did not. However, when she came on to address causation, her reasoning indicates that she did not confine her consideration to the effect of the three protected disclosures that she had identified but, rather, she considered the combined impact and effect of the Claimant's communications about staffing levels and the associated problems he considered this gave rise to. In this regard, I have in mind in particular the last sentence of paragraph 42 and also paragraph 45 (which has to be read in the context of the reference in paragraph 43 to the Claimant raising his concerns about staffing situations on numerous occasions). I have already set out those paragraphs when summarising the judgment below. I also note the broad reference at paragraph 52 to the Respondent's "views of the actions and performance of these members of staff".

C

D

E

39. Accordingly, in my judgment the Respondent has shown that the Employment Judge further erred in failing to focus her causation assessment on the impact of the three protected disclosures.

F

40. In arriving at this conclusion, I have, of course, borne in mind paragraph 53, where the conclusion is expressed in terms of the impact of the protected disclosures. However, this paragraph is by way of setting out the Judge's overall conclusion and does not of itself redeem the position if an erroneous chain of reasoning has already been engaged in to arrive at that point. I also bear in mind Mr Mott's submission that earlier in the judgment, the Judge had carefully distinguished between qualifying disclosures and his other communications. However, that

G

H

A

distinction is simply not maintained in the passages that I have highlighted and therefore I uphold Ground 2.

B

Outcome

41. In light of Grounds 1 and 2 succeeding, the Employment Judge's conclusion on causation cannot stand and must be set aside. Absent the errors disclosed by Grounds 1 and 2, there was factual material that supported each of the parties' respective positions on causation.

C

Accordingly, in the circumstances, I consider that remission of the case to the ET is inevitable, and this is accepted by the Respondent. The Respondent also accepts that the Employment Judge's factual findings in relation to the protected disclosures, which have not been criticised in

D

this appeal, should stand. Accordingly, remission will simply be on the question of whether the three protected disclosures identified by the ET were the sole or principal reason for the Claimant's dismissal.

E

42. I have been addressed on whether remission should be to the same ET, as the Claimant favours, or to a different Tribunal, as the Respondent favours. I have borne in mind the factors identified in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. This is not a case where

F

it could be said that the ET's judgment was totally flawed. As I have indicated, both parties accept its correctness in relation to the findings concerning the protected disclosures. In my judgment the successful grounds of appeal are not of a kind that should cause any reasonable doubt as to

G

the Employment Judge's ability to look at the matter again afresh, conscientiously and in light of the guidance provided by this judgment. Accordingly, I do not consider it inappropriate for the remitted hearing to be conducted by the same Employment Judge. However, the entire hearing only lasted one day, and there will likely be around a two-year gap between that hearing and the

H

remitted hearing, such that the Judge who heard this matter previously could not be expected to have a clear recollection of the evidence given on the earlier occasion. In these circumstances, it

A

is in the interests of justice not to restrict the hearing of the remitted case to Employment Judge Siddall, although, for the reasons I have given, there is no reason why she cannot hear it if she is available. It is likely that not limiting the remitted hearing to the Judge who heard the matter previously will result in an earlier listing of this matter, which is already relatively old. Furthermore, I do not consider that the length of the hearing is likely to be significantly impacted, one way or the other; in all likelihood the remitted hearing will be listed for a day whoever is assigned to hear it.

B

C

D

E

F

G

H