Neutral Citation Number: [2022] EAT 45

Case No: EA-2019-000928-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24th June 2021

Before :

HIS HONOUR JUDGE SHANKS

- -

Between :

MR H FULLAH **Appellant**

- and –

THE MEDICAL RESEARCH COUNCIL & OTHERS **Respondents**

- -
- -

Mr H S Fullah the Appellant
Mr Jason French-Williams (instructed by Eversheds Sutherland (Int'l) LLP) for the **Respondents**

Hearing date: 24th June 2021

- -

JUDGMENT

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SUMMARY

VICTIMISATION

Following the hearing of a (second) ET claim against the Respondent (which included claims for race discrimination and victimisation) in February 2017 the Claimant was suspended and then dismissed by the Respondent on the grounds that there had been an irretrievable breakdown in the relationship between him and the staff in the Unit where he worked and the Respondent generally. On the Claimant's further claim for victimisation the ET found that the suspension did not amount to a "detriment" and that the protected act(s) were not cause of the dismissal.

The appeal was allowed and the case remitted to the ET:

1. **The ET were wrong to find that the suspension did not amount to a detriment: the Claimant had given evidence that he regarded it as a detriment and that opinion was reasonable in all the circumstances; the lack of medical or other evidence of detriment was irrelevant.**
2. **In considering the issue of causation the ET had not referred to the relevant case law (in particular Martin v Devonshire Solicitors [2010] UKEAT/0086/10) and had not considered what the cause of the breakdown in the relationship was and whether it was or was not properly separable from the making of the claims which amounted to protected acts.**

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HIS HONOUR JUDGE SHANKS:

1. This is an appeal against a judgment of the Employment Tribunal ("ET") sitting in Huntingdon (Employment Judge Ord, Mrs K L Johnson and Mr A Schooler) sent out on 28 August 2019 following a four-day hearing in April 2019 at which the Claimant, as he has today, represented himself. The ET rejected his claim of unfair dismissal and victimisation in suspending and then dismissing him.

2. HH Judge Auerbach allowed the appeal to proceed following a Rule 3 (10) Hearing on 2 September 2020 on the grounds that it was arguable that the ET had erred: a) in finding that the suspension did not amount to a detriment; and b) in its approach in relation to causation on suspension and subsequent dismissal.

The Facts

3. The Claimant was employed by the Medical Research Council ("the MRC") from 22 May 2001 until he was dismissed on 8 May 2017 as a computer officer in the IT department of the Cognitive and Brain Services Unit. He is black British.

4. In June 2010, he brought ET proceedings raising complaints of discrimination relating to his then line manager, Prof. Marslen-Wilson. The hearing took place in January and February 2012. His complaints were rejected by the ET. He appealed to the Employment Appeal Tribunal ("EAT") and that appeal failed in 2013.

5. By 2016, his ultimate manager was Prof. Gathercole, who is a Respondent to the Claim in this case. In 2015, he raised to complaints which led to a meeting with Prof. Gathercole on 29th March 2016. Prof. Gathercole invited him to explain the basis for allegations of discrimination and to explain his disability and referred to difficulties working as a team in high levels of stress which were causing

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her concern. The Claimant simply replied by asking if she had been contacted by ACAS.

6. In May 2016, the Claimant issued a second ET claim for race and disability discrimination and for victimisation, which raised specific allegations against Prof. Gathercole and against his immediate line manager, Dr Thompson. It raised matters not previously raised, which were then investigated as a grievance and dismissed by the MRC. The second ET case was heard in February 2017. The complaints were dismissed orally at the conclusion of the hearing on 25 February 2017. The Written Reasons, which were before the ET in this case, were sent out after the Claimant had been dismissed on 12 June 2017.

7. On the Claimant's return to work after the ET hearing in February 2017, on 1 March 2017, Prof. Gathercole informed him that he was suspended. He was told that he was suspended pending an investigation into the employer's concern that, in the light of events after May 2015, the relationship of trust and confidence between the Claimant and his colleagues, and the employer more widely, had deteriorated to the extent that it was no longer possible to continue any viable employment relationship. She then wrote a letter confirming the suspension which stated:

> **We are concerned that in light of events since you returned to work in May 2015 after your illness, the relationship of trust and confidence between yourself and your colleagues, and more widely the Medical Research Council, has deteriorated to the extent that it is no longer possible to continue any viable employment relationship. You have made numerous and serious unsubstantiated allegations of discrimination and victimisation, showed marked non-engagement with us and/or Occupational Health around your medical conditions, and displayed uncooperative attitudes and behaviours that are damaging the IT team environment for others working there. As I explained in our meeting, an independent third party will be appointed to investigate this issue and produce a report for the Council that would be considered by senior management in terms of reaching a decision on the way forward. Your suspension does not constitute**

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disciplinary action.

8. An independent third-party HR consultant was then appointed to investigate and report, a Ms Emma Allchurch. She was asked to consider whether the relationship of trust and confidence between the Claimant and his colleagues had deteriorated to such an extent that it was no longer possible to continue any viable employment.

9. The ET in the judgment under appeal recites at paras. 35 to 43 details of the evidence collected by Ms Allchurch and, most importantly, that she interviewed Dr Thompson who was the main alleged discriminator in the ET proceedings. Dr Thompson made a number of comments relating to the ET which were cited at para. 37. He said that he had found the situation very stressful and had made efforts to introduce one-to-one meetings within the team when the Claimant launched his second tribunal claim. He said that having the tribunal claim hanging over him was stressful and had had an impact on the ability of the team to work together going forward. He said that to do so would need some form of mediation. He did not think the team could still work effectively together, as things stood, and he, personally, would need some form of guarantee that he was not put though another tribunal and, finally, going forward, Dr Thompson said he would need to watch everything he said or did for fear of further allegations and that it would be very stressful.

10. Ms Allchurch recommended that there was "a case to answer" with regard to the Claimant's relationship with the MRC and whether it had irretrievably broken down. A hearing took place before a Dr Peatfield on 8 May 2017. Dr Peatfield concluded that the relationship between the Claimant and his colleagues, and with the MRC more widely, had deteriorated so that the employment relationship could not continue. The basis for this decision was that the Claimant worked as part of a very small team and had, over time, since June 2010 raised serious allegations of racial discrimination or prejudice, disability discrimination and victimisation, including allegations against two successive

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line managers and the Unit Director. None of these allegations had been shown to be well-founded. The Claimant had not engaged in internal procedures, but raised matters externally first to ACAS and then the ET without a willingness to engage in internal procedures. He considered the Claimant had been unreasonably difficult in ignoring the Occupational Health advice. Dr Peatfield's view was that the relationship between the Claimant and his line manager had broken down and was non-functioning.

11. Dr Thompson's evidence to the investigation was that he felt unable to manage Mr Fullah because he was in fear of further personalised allegations being made against him, even in relation to routine line management actions. The issues raised by the Claimant were not true and went directly to the character and integrity of Dr Thompson. Dr Peatfield's conclusion was that the Claimant was unwilling to accept having a line manager in a position which he felt he deserved and was willing to raise unjustified issues to undermine the line manager.

12. Dr Peatfield, at para. 49, continued to say that he considered the situation so dire that there was a very genuine concern that Dr Thompson would choose to leave the organisation due to the stress of the circumstances he was working under, reminding himself that the First Respondent had a duty of care for all its employees. He also found that the team was working in a situation of heightened nervousness and was concerned that the Claimant had persisted with allegations after they had been dismissed and was thus unwilling to accept the findings of the tribunal. As I mentioned a number of times in the course of the hearing, that seems to me a puzzling statement, given that the Claimant had been suspended immediately after the tribunal reached its decision in February 2017.

13. But anyway, the decision by Dr Peatfield was put into a letter the same day, which is at pg. 98 in my documents bundle, and states:

> **I am writing to confirm the outcome of the formal hearing held by myself and Julie Kemp**

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> **from HR on Monday 8th May 2017.**

There are thanks for attending. There is reference to the report from Emma Allchurch and then it states:

> Based on the outcome of the investigation report and your responses during the **Hearing, it was clear to me that:**
>
> - **The relationship between you and other staff in the Unit and with the MRC more broadly had broken down and that this was irretrievable;**
> - **You had not followed the MRC procedures to resolve grievances and two consequent employment tribunals have not upheld your complaints;**
> - **You declined mediation in the past. We were not persuaded you would engage fully if this were offered again.**
>
> **In conclusion, we were not confident that things would change. We have a duty of care to all our staff and believe that your continuing employment would affect them negatively and would likely lead to further claims against them or the MRC with the consequent impact on staff and the ability of the Unit to function cost-effectively.**

The ET's decision

14. The ET's reasons for rejecting the Claimant's claims are set out at para. 59 and following:

> **60. It is clear that as early as 30 March 2016, when the Claimant met Professor Gathercole, both had substantial concerns about the relationships within the Unit where the Claimant was working. She had a meeting with the Claimant on 29 March 2016 and the following day confirmed the terms of the meeting in writing to the Claimant. She described the situation within the department as "close to unworkable due to lack of trust" and recorded the Claimant as having agreed to this. ...**
>
> **61. … between April 2016 and the Employment Tribunal Hearing in February 2017, the Respondent took a decision to simply leave matters until the Tribunal process was concluded. We can understand that. Dr Thompson was in the unenviable position of having to cope with the day-to-day running of a department where one of his three**

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> **members of staff had accused him of treating him unfavourably on racial grounds. In those circumstances, even the most reasonable management instruction can be misinterpreted, particularly as the Claimant was wont, in the words of the Tribunal Judgment of February 2017, to cast about for allegations of discrimination and pursue them regardless of their lack of merit.**

(I should say that, actually, there was no written decision until 12 June 2017, although it may have been said in the course of the oral judgment).

> **62. We accept that at the conclusion of the second Tribunal case, Professor Gathercole, in particular, had serious concerns about the sustainability of a working relationship between the Claimant and the First Respondent generally and between the Claimant and the small unit in which he worked, including crucially, his relationship with his line manager. To instruct an external HR Consultant to analyse the position and make recommendations was an entirely reasonable step for the Respondent to take and it cannot be said that it was outside the range of reasonable responses to suspend the Claimant whilst that investigation took place. That prevented any further deterioration or conflict in the work place whilst the matter was assessed."**
>
> **63. We are satisfied that the reason why the Claimant was suspended was to enable that investigation to take place uninhibited and to avoid problems which may have arisen, particularly for Dr Thompson, had the Claimant simply returned to work immediately. The genesis of the decision was in March 2016, the timing of the decision was predicated upon the conclusion of the Tribunal case as the Respondent took the entirely reasonable position that to take further action during the currency of the second Employment Tribunal case would simply serve to exacerbate matters.**
>
> **64. Thus, the Claimant was not suspended because of any protected act. In any event, the Claimant has not indicated that he suffered any detriment by virtue of his suspension which was on full pay. He was asked specifically how he considered suspension to be a detriment and said it was "because of the effect it had on me", but he had not led any evidence to indicate what effect the suspension had on him, either from himself or from**

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> **any medical report, if it was suggested that it had a detrimental impact on his health. Suspension is usually considered to be a neutral act and we find in this case that it was a neutral act and the Claimant has not suffered any detriment by virtue of his suspension.**

15. Then at para. 65 there is a section which begins: "Why was the Claimant dismissed?", there is reference to the independent report, the "case to answer", and the conclusions I have already cited. At paras. 67 to 69, the Tribunal stated:

> **67. The Claimant does not criticise that report either as to its methodology or its conclusions.**
>
> **68. The matter then proceeded to a hearing. The sole decision maker was Dr Peatfield. He was satisfied that the relationship between the Claimant and in particular his line manager [Dr Thompson], had broken down as non-functioning. The line manager could not manage the Claimant because of the constant fear of further personalised allegations against him even in relation to routine line management actions. Those working in the IT team felt unable to undertake their roles in a reasonable or normal manner, due to the fear of being cited in subsequent allegations. Despite repeated efforts by the First Respondent, including offering mediation which had been declined, the situation had not improved. There was a clear concern of future unmeritorious allegations being advanced against the First Respondent and its employees.**
>
> **69. We note that Dr Peatfield's reasoning was not questioned by the Claimant who did not ask him, or challenge him, about the decision making process, or the bases upon which he had come to the conclusions he did.**

Paras. 70 and 71 deal with the appeal and then at para. 72 the ET states:

> **72. … we have unanimously concluded that the reason for the Claimant's dismissal was the breakdown of a working relationship between the Claimant and his line manager, his other working colleagues and the senior management within the first Respondent generally, including Professor Gathercole. The relationship was unworkable in March 2016, but the First Respondent generally, and the line manager in particular, felt unable**

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> **to take any steps pending the outcome of the second Employment Tribunal claim. Once that was concluded, an external analysis took place to determine whether the relationship could proceed and it was recommended that there was a case to answer in that regard so that a hearing should take place.**

Para. 73 is really the conclusion of that:

> **73. Accordingly, the Claimant was not dismissed as a result of his having carried out a protected act. The reason for his dismissal was a fundamental breakdown of the working relationship he had with his line manager which the Respondent concluded, reasonably, was beyond repair**.

16. At para. 74 the ET turns to unfair dismissal and states that was a substantial reason justifying termination; there is no appeal against the rejection of the unfair dismissal claim.

The appeal

17. The law in relation to victimisation is at Section 27 of the **Equality Act 2010** which says:

> **27 Victimisation**
>
> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because—**
>
> **(a) B does a protected act, or**
>
> **...**
>
> **(2) Each of the following is a protected act—**
>
> **(a) bringing proceedings under this Act;**
>
> **…**
>
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**

There is no doubt whatever that Mr Fullah had done a number of protected acts, at the very least he had brought two ET claims alleging breaches of the **Equality Act**.

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18. The Grounds of Appeal are helpfully set out in the Respondent's Skeleton Argument at para. 8. It is most logical to take Ground C (as it is described) first, which relates to the question of suspension and whether it was a detriment.

Detriment

19. Ground C is as follows:

> **The ET erred in its conclusions that the suspension was not a detriment by relying on the proposition that suspension is "a neutral act" and by failing to give sufficient consideration to what may reasonably be viewed by an individual as a detriment.**

20. The law in relation to detriment is to be found in a House of Lords case called **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL11 in two passages: one at para. 35, where the question is posed:

> **35. … Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment" … it is not necessary to demonstrate some physical or economic consequence**."

And one of the other judges deals with it at para. 105:

> **105. "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment", must be applied by considering the issue from the point of view of the victim. If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice.**

21. I have already read para. 64 of the ET's judgment where the tribunal recites its decision in relation to whether the suspension was a detriment. It records that the Claimant said it was a detriment: "because of the effect it had on me". It seems he also gave evidence that it prevented him

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having access to IT systems whilst he was suspended. The question then was not whether there was evidence to indicate the effect it had had on him from a medical point of view, as the ET seemed to approach it, but whether it was a reasonable position for him to say that he regarded it as a detriment. It seems to me that it was a perfectly reasonable position to say that being suspended amounted to a detriment and that the Tribunal simply approached the matter in the wrong way in para. 64. And, to that extent, I have no hesitation in allowing the appeal, though, of course, unless it is allowed on other grounds, it does not get the Claimant very far.

Causation

22. The more substantial grounds relate, as I have said, to the question of causation, as between the detriment of being suspended and then dismissed, and the protected acts. In relation to both suspension and dismissal, the Grounds of Appeal are put in the following way: that the ET erred by failing to consider whether the Claimant's prior protected acts played any part in influencing the decision, consciously or unconsciously, and by way of making a material contribution to it; alternatively, if it did consider that, that the ET did not provide sufficient reasons to explain why it came to the conclusion that the prior protected acts did not materially influence the decision to dismiss.

23. The law in relation to this issue is to be found mainly in the decision of this Tribunal, presided over by Underhill P called **Martin v Devonshires Solicitors** [2010] UKEAT/0086/10, and in particular paras. 22 and 23 where the EAT stated:

> **... The question in any claim of victimisation is what was the "reason" that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and if not, not. In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say,**

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> **a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the manner of the complaint.**

Underhill P then gives examples of ways of making complaints that might come within this characterisation, but he then turns at para. 23 to say this:

> **We accept that the present case is not quite like that. What the Tribunal found to be the reason for the Appellant's dismissal was not the unreasonable manner in which her complaints were presented (except [in one irrelevant respect]). Rather, it identified as the reason a combination of inter-related features – the falseness of the allegations, the fact that the Appellant was unable to accept that they were false, the fact that both those features were the result of mental illness and the risk of further disruptive and unmanageable conduct as a result of that illness. But it seems to us that the underlying principle is the same: the reason asserted and found constitutes a series of features and/or consequences of the complaint which were properly and genuinely separable from the making of the complaint itself. Again, no doubt in some circumstances such a line of argument may be abused; but employment tribunals can be trusted to distinguish between features which should and should not be treated as properly separable from the making of the complaint.**

24. That case was decided in 2010, it was then commented on in a case of HH Judge Hand QC called **Woodhouse v West North West Homes Leeds Ltd** UKEAT/0007/12/SM decided in 2013 and he referred to **Martin** at para. 101 and said:

> **The real question is: can a judgment be supported on the basis of genuinely separable features? Obviously, the ET felt that, as in Martin, there was a mixture here of the subjective state of mind of the appellant and the future impact of his behaviour, but we think a further note of caution ought to be added to the one embedded in the judgment by Underhill J.**

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> **102. In our judgment, Martin cannot be regarded as some sort of template into which the facts of cases of alleged victimisation can be fitted. There are no doubt exceptional cases where protected acts are not causes of dismissal or whatever the other detriment is at issue. Martin is an example of such an exceptional case but we emphasise the word 'exceptional', very few cases will have grievances based on paranoid delusions about events that never happened. It seems to us the process of measuring cases against such a yardstick is a dangerous one, one person's conviction may be discriminated against is very likely to generate the polar opposite, i.e. that the complaint is irrational in the person or organisation complained about. Experience of this type of litigation teaches that grievances multiply, so the fact that here are a series of them is not unusual, it is a slippery slope towards neutering the concept of victimisation if the irrationality of multiplicity of grievances can lead as a matter of routine to the case being placed outside the scope of s27 of the Equality Act, all the more so when the origin of the problem is established, as here, to have been a real, as opposed to an imaginary race discrimination.**

25. In a subsequent case, decided after this one, in February 2021, **Page v The Lord Chancellor** [2021] EWCA Civ 254, Underhill LJ made some comments on what Judge Hand had said and it is just worth quoting those. He refers to paras. 101 to 102 of Judge Hand's judgment and the further note of caution that he had mentioned and the fact that **Martin**'s circumstances were exceptional and that if it was followed indiscriminately when complainants acted in an irrational way, it would undermine the protection provided by the anti-victimisation provision. Underhill LJ said:

> **I agree with him that it is important that that should not occur … But I do not, with respect, believe it is necessary to go beyond what I said in Martin as quoted above. Employment tribunals can be trusted to recognise the circumstances in which the distinction they are describing can be properly applied. I do not believe it is useful to apply a requirement that those circumstances should be exceptional.**

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26. So that is where the law on this issue has got to. Given the circumstances in this case and, in particular, the timing of events, with the suspension followed by dismissal coming immediately after the rejection of the complaint to the ET, it seems to me that this was clearly a case in which the ET needed to distinguish carefully between features which were and those which were not separable from the making of the complaint or the other protected act. It is notable that the ET did not recite the case law to which I have referred in relation to causation, in particular the well-known passage from the decision of Underhill LJ in **Martin** (although, clearly, it would not have been able to cite the last case). The question really is whether, notwithstanding that they did not refer directly to the case law, they considered the issue sufficiently or, at least, whether they gave sufficient reasons to indicate that they had.

27. I look back to para. 73 of the decision where it states in terms:

> **The Claimant was not dismissed as a result of his having carried out a protected act. The reason for his dismissal was a fundamental breakdown of the working relationship he had with his line manager which the Respondent concluded, reasonably, was beyond repair.**

It seems to me that that that summary position really begs the question whether the breakdown was in substantial part because the Claimant had brought ET proceedings naming, in particular, his line manager, or whether the breakdown resulted only from the manner (or other features) of those proceedings which were properly separable from the fact of the bringing of the proceedings. It seems to me that that question was something that the Tribunal ought really to have expressly addressed.

28. I have considered the matter anxiously because there is a lot in the Judgment, and I have borne in mind that the ET's reasoning should not be over-analysed, and that there is no attack on the findings of fact and no perversity appeal. But in the end, with some hesitation, I have come to the view that the ET did not sufficiently focus on the question which Underhill P says needs to be considered. And,

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if they did focus on it, it does not seem to me that they gave any sufficient explanation as to the conclusion they reached.

29. I have therefore decided to allow the appeal and to remit to the ET the question of whether the detrimental acts of *suspension* and then dismissal were because of the protected acts. It seems to me there may be some merit in this question going back to the same ET, although there are always problems with such an approach. On balance, I am going to say that it should be remitted to the same tribunal who should reconsider it specifically in the light of the authority I have referred to.

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