Neutral Citation Number: [2024] EAT 158

Case No: EA-2023-000279-NT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30 September 2024

Before:

HIS HONOUR JUDGE JAMES TAYLER

- -

Between:

Dr. Bernadette McInerney

Appellant

- and -

Nottinghamshire Healthcare NHS Foundation Trust

Respondent

- -
- -

Elizabeth Grace (instructed by Weightmans LLP) for the **Appellant**
Betsan Criddle KC (instructed by Mills & Reeve LLP) for the **Respondent**

Hearing date: 29 August 2024

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JUDGMENT

SUMMARY

Victimisation

The Employment Tribunal did not err in law in its assessment of the claimant's loss resulting from an act of victimisation.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. The claimant was employed by the respondent as a Consultant Forensic Psychiatrist at Rampton Hospital from 2003 until her retirement on 1 February 2019. The claimant brought two claims in the Employment Tribunal. In a liability judgment, sent to the parties on 23 June 2021, the Employment Tribunal, Employment Judge M Butler sitting with members, described the complaints for determination:

> The claim of constructive unfair dismissal arises out of what the Claimant alleges are a number of acts, omissions and decisions by the Respondent's managers and clinicians, including the various investigations after the death of a patient in her care. She claims these matters constitute fundamental breaches of the implied term of trust and confidence culminating in her enforced retirement. Her victimisation claim is based on the Respondent's refusal to consider her application to work on a part-time basis as Forensic Psychiatrist in the Respondent's Forensic Gender Clinic and, specifically, refusing to allow her to apply for the role, not acknowledging or considering her subsequent application and not offering her the role. This was a role the Claimant had carried out one day each month for the Respondent whilst employed at Rampton. The protected act relied on by the Claimant is the submission of her first claim. The Respondent denies all claims.

The liability judgment

2. The claimant succeeded in both complaints. The Employment Tribunal was highly critical of the actions of the respondent that resulted in the claimant's resignation, concluding that the respondent had fundamentally breached the claimant's contract of employment:

> 157. We have concluded that at almost every point from the death of CW to the Claimant's notification that she would retire, the implied term was fundamentally breached by the Respondent. This effectively began with Mr Wright's failure to question Dr Silva's inappropriate conduct of the SUI as evidenced by the Claimant's evidence and serious concerns raised by others who were called upon to give statements. Whilst we accept that such inquiries should be independent, we take the view that Mr Wright, in particular, deliberately failed to look for documents and challenge Dr Silva's autocratic approach to the SUI.
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> 158. The final act meeting between the Claimant and Dr Packham was engineered in no small part by Mr Wright. In that meeting the Claimant was given no choice but to end her employment or face a conduct hearing under the control of Mr Wright. ...

The remedy judgments

3. On 30 November 2022, a judgment with reasons was sent to the parties in respect of remedy

for the complaint of unfair constructive dismissal. Compensation was agreed by the parties in the sum of £95,112.

4. This appeal is against findings made in a further reserved judgment in respect of remedy for victimisation that was dated 26 January 2023, and was sent to the parties on 15 February 2023. The claimant was awarded £20,000 for injury to feelings and £10,000 for aggravated damages. Those awards are not challenged. The claimant was also awarded £23,344.30 loss of earnings. The award was for losses resulting from victimisation that meant that the claimant was unable to work on a part-time basis as a Forensic Psychiatrist in the Respondent's Forensic Gender Clinic. The appeal is against the award for loss of earnings.

5. On 15 August 2022, the claimant served a final schedule of loss in which the compensation she claimed increased significantly, predominantly because the claimant contended she had very substantial losses because she had not been able to undertake medico-legal work because of damage to her reputation. Shortly before the hearing the claimant served a further statement in which she contended that her losses in respect of medico-legal work resulted from a loss of confidence caused by the victimisation. The final schedule put the claimant's losses at £2,114,140.90 gross. The claimant's losses were calculated on the basis that she would have retired at 75.

6. The Employment Tribunal was troubled by the lack of any significant medical evidence to support the very substantial asserted losses:

> 10. This is a very high value claim which primarily rests with the Claimant's financial losses she says arise as a result of her mental health issues caused by her victimisation by the Respondent. As a consequence, the Tribunal consider medical evidence to be essential to enable proper consideration of the effect of the victimisation on the Claimant's mental health. It is very unfortunate, therefore, that no independent evidence was produced giving a diagnosis and prognosis.
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> Mr Allen submitted that we did not need medical evidence because we could rely on the letter from Dr Patricia Hughes (to which we refer more fully below) and the Claimant's own evidence. Mr Allen suggested that the Claimant, as a Consultant Psychiatrist, was well placed to give evidence on her mental health. We cannot agree with that submission. Relying on a self-diagnosis in such a high value claim would in itself raise potential issues, not the least being the cynical view that she would know what to say to support her claim.
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> 11. The only written medical evidence in this hearing is a letter dated 28 October 2022

> from Dr Patricia Hughes, Consultant Psychiatrist in Psychotherapy ... Dr Hughes no longer practises as a doctor but as a psychotherapist. As a consequence, she does not make a diagnosis or give a prognosis in relation to the Claimant's alleged mental health issues of anxiety, low mood, social isolation and loss of confidence. Further, she says she first saw the Claimant only six months before this hearing in May 2022 and regularly thereafter. She records what the Claimant told her about suffering from, inter alia, anxiety and low mood and social isolation "**... since she was involved in a Serious Untoward Incident enquiry following the death by suicide of one of her patients in Rampton Hospital"**. This does not help the Claimant as she must show that the act of victimisation in not appointing her to the FGC role caused the mental health issues which prevent her from working. No doubt in order to cross this particular bridge, Mr Allen submitted that the Respondent must take the Claimant as they find her following the tortious principle of the egg shell skull rule. The problem with that argument is that, without proper medical evidence, how are we to find the Claimant?
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> 12. At the very least, we would expect the Claimant's GP records to be produced but there are none. This was not addressed in the hearing so we have no idea whether the Claimant consulted her GP. Further, and importantly, there is no evidence before us as to what, if any, medication the Claimant was prescribed for her mental health issues.

7. The Employment Tribunal also considered that the lack of medical evidence was problematic in relation to the claimant's contention that she would have worked to 75:

> 14. The Claimant further claims that, but for her mental health issues caused by the victimisation, she would have worked until she was seventy-five. Again, medical evidence would have been helpful by clarifying there were no other underlying medical issues which would have prevented this aspiration. In the absence of medical issues which would have prevented this aspiration. In the absence of an independently supported diagnosis and prognosis, we find difficulty in supporting the Claimant's arguments and submissions. In our view, the absence of an expert medical report is a surprising and fundamental omission.

8. The Employment Tribunal concluded that loss should be calculated to a retirement age of 67:

> Before moving on to detailed calculations, we must consider the age at which the Claimant says she will have worked until. As before, we were hampered in determining this point by the lack of medical evidence. At the time of the victimisation, was the Claimant fit and well with no underlying health conditions? She quotes a life expectancy of 87.3 years … but does not explain the source of this statistic. The Respondent, in arguing the relevant age should be taken to be 67, produces statistics from its own Consultant Retirement Data … taken from over 40 consultants who had retired over a period of 10 years. Of course, every one of them will be different and have different priorities, but an unchallenged statistical source must carry more weight and, for that reason, we accept 67 as being the likely age at which the Claimant would wish to cease work.

9. The Employment Tribunal rejected the contention that the claimant had suffered a loss of reputation.

> 17. One of the main threads of her argument was that her reputation had been demolished. The Employment Judge asked her whether there was any evidence of this which prompted a long, rambling answer which did not answer the question. The Judge then asked whether it would be accurate to say that the demolition of her reputation was her perception and she agreed it was. This was an important concession by the Claimant as she relies on her allegedly tarnished reputation for not pursuing medico-legal assignments for fear of being aggressively cross-examined by those with knowledge of that reputation. Again, she was unable to provide any corroborating evidence, even from her former friends/colleagues or her husband.

10. The Employment Tribunal returned to this issue in its concluding comments:

> 56. Mr Allen supports the argument around the loss of reputation point with references to paragraphs in the liability judgment. We do not accept that anything can rest on these comments. In the main, they are comments about the fact that the Respondent's management had no regard to the impact their conduct would have on the Claimant's reputation. Further, in one example given …, the reference to the Claimant's reputation was not a finding by the Tribunal but a submission made by Ms Grace. We would also comment that recording that a party had no regard for the other's professional reputation does not automatically lead to the conclusion that the reputation has actually been tarnished. It was open to the Claimant to produce evidence of this reputation does not automatically lead to the conclusion that the reputation has been tarnished. It was open to the Claimant to produce evidence of this but she did not. Ms Criddle also makes the valid point that the Coroner's comments of having no concerns with the Claimant's care of the patient who died, this Tribunal's liability judgment and press coverage illustrate a lack of damage to the Claimant's reputation.

11. The Employment Tribunal considered the claimant's contention that she had not been undertaking medico-legal work because the victimisation had resulted in a loss of confidence:

> 44. By far the most significant in terms of value of the Claimant's heads of claim is the alleged losses arising from her inability to undertake medico-legal work which she puts at £1,744,080 gross, £1,071,540.32 net (page 371). Once more, however, there is no medical report giving a diagnosis or prognosis. The Claimant says her mental health issues result in her not making herself available for such reports because she was unable and, therefore, unwilling, to appear in court to be cross-examined on the content of her reports. She maintains that her loss of reputation amongst others, which we have already considered above, her loss of confidence and the fact that she was no longer working in the NHS are factors which conspire against securing medico-legal work.
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> 45. At paragraph 7 of the joint report of Professor Rix and Dr Appleyard they say:
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> > "We are of the opinion that if the Claimant has the confidence and if there has been no reputational damage, she would be able to obtain instructions has been no reputational damage, she would be able to obtain instructions in criminal, family, civil (personal injury), mental health law, prison law asylum and immigration and employment law cases".
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> Further, at paragraph 12 of the joint report, they say:

> "We agree within a matter of two or three months it is probable that the Claimant could have started receiving instructions in criminal cases, personal injury and, specifically, medical negligence cases where psychiatric injury is alleged to have occurred, family court cases, cases of alleged clinical negligence related to medium and high secure care and cases that required expertise in gender identity issues".

At paragraph 16 of the joint report they say:

> "Not being any longer employed should not have an impact on the Claimant's ability to secure medical-legal work given that she has ongoing clinical experience as a mental health tribunal doctor and on the assumption that she would be able to obtain instructions through a medicolegal company".

They also agree that that the closure of the GMC investigation and favourable liability judgment by this Tribunal would have meant the Claimant could have resumed medico-legal work if mentally fit to do so.

46. The Claimant seems to have adopted the stance that she could not undertake any medico-legal work for fear of being cross-examined in court. Dr Appleyard in his evidence said that his own expert witness company had one psychiatrist on its register of experts who also did not wish to engage in preparing reports which might involve having to appear in court and that psychiatrist received as many instructions as others registered with the company. Specifically, Dr Appleyard said there was plenty of work available in the housing sector which never resulted in the expert having to attend court.

47. It was not until September 2022 that the Claimant registered with Expert Witness, a company which receives and gives to those registered with it, instructions to prepare medico-legal reports in exchange for a commission .... Very quickly after registering, the Claimant received 3 lots of instructions to prepare medico-legal reports and declined all of them. We were troubled by this apparent inconsistency. It is not clear to us why the Claimant did not register with such a company before or why she did so very recently whilst claiming not to be able to cope with the work due to her mental health issues. Did she now feel able to cope with such work or did she believe she could be instructed on matters which did not involve court attendance? More cynically, did she register with Expert Witness to support an argument that she had attempted to mitigate her loss?

48. As with the other heads of claim where the Claimant relies on her mental health issues, we do not have produced to us a diagnosis or prognosis as to the Claimant's health. There is no other witness to corroborate these undiagnosed mental health issues or at least give information of any prescribed medication. There is no witness evidence to corroborate the alleged reputational damage to the Claimant arising from the victimisation. There is no witness evidence to testify as to the Claimant's social anxiety. The experts, reporting jointly, say the Claimant could have obtained medico-legal work but she did nothing about this until a few months before this hearing. All we have in relation to her mental health issues is her own self-diagnosis and an inconclusive letter from Dr Hughes. Accordingly, the Tribunal makes no award for this head of claim.

12. The Employment Tribunal found as fact that the claimant had not suffered a loss of confidence

because of being victimised that prevented her from undertaking medico-legal work.

The Appeal

13. The claimant appeals on the following grounds:

> Ground 1: The Tribunal failed to apply a percentage chance approach to the medico-legal loss, or has otherwise failed to give adequate reasons as to its decision on this point;
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> Ground 2: The Tribunal applied the wrong approach to retirement age, and failed to engage with the Claimant's arguments as to the same, or has otherwise failed to give adequate reasons as to its decisions on this point;
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> Ground 3: The Tribunal erred in law by failing to apply the eggshell skull rule in respect of C's medico-legal losses;
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> Ground 4: The Tribunal erred in its application of the burden of proof in relation to a failure to mitigate.

The relevant law

14. Section 124 of the **Equality Act 2010** provides that:

> 124 Remedies: general
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> (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
>
> (2) The tribunal may—
> ...
> (b) order the respondent to pay compensation to the complainant;
> ...
>
> (6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119.

15. Section 119 **EQA** provides:

> (2) The county court has power to grant any remedy which could be granted by the High Court—
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> (a) in proceedings in tort;
>
> (b) on a claim for judicial review.

16. The parties relied on the helpful recent summary of the correct approach to assessing compensation for discrimination in **Edward v Tavistock and Portman NHS Foundation Trust**

[2023] EAT 33, [2023] IRLR 463 at paragraphs 18 to 26. Compensation is to be awarded for losses that flow directly and naturally from the tort. The Employment Tribunal should seek to ensure that as best as money can do it, the claimant is put into the position she would have been in but for the unlawful conduct of the respondent. When assessing what may or may not happen in the future the Employment Tribunal should generally assess the chances of the various possibilities occurring.

17. When assessing future loss of earnings, where the loss will not be career long, the general approach is to fix on a date that is treated as the date on which the loss will end, not on the basis that on balance of probabilities the loss will end on that date, but to reflect the chances that the loss will end sooner or later.

18. If it is asserted that a claimant has failed to mitigate her loss the burden is on the respondent to make good that contention. To establish a failure to mitigate, the respondent must establish that the claimant has acted unreasonably, not that she failed to act reasonably.

19. A discriminator must take their victim as they find her. If, because of particular vulnerability, the acts of the discriminator cause the claimant much greater damage than might usually be expected, the discriminator is liable for the actual damage caused. This is known as the eggshell skull principle.

20. An appellate tribunal is not entitled to interfere with the Employment Tribunal's conclusions on remedy because it would have reached a different conclusion on the same materials: **Vento v Chief Constable of West Yorkshire Police** [2002] EWCA Civ 1871 [2003] ICR 318, CA at paragraph 38.

21. The obligation to give reasons requires that a party knows why she lost: **Simpson v Cantor Fitzgerald Europe** [2020] EWCA Civ 1601, [2021] ICR 695, CA at paragraphs 29 to 31 and 46.

Ground 1 - Medico-legal loss

22. I do not consider that the Employment Tribunal erred in law in failing to apply a percentage chance approach to the medico-legal loss. On a proper reading of the judgment, the Employment Tribunal found as a fact that the claimant had not suffered a fundamental loss of confidence that prevented her from carrying out medico-legal work. The Employment Tribunal was entitled to take into account the lack of significant supporting medical evidence. The Employment Tribunal was not

bound to accept the claimant's evidence because she is a psychiatrist. This was not, as the claimant asserts, treating the claim as if it were for personal injury, but assessing whether the claimant had been caused a loss of confidence as a result of being victimised by the respondent. The Employment Tribunal was not assessing the likelihood of future events, which would generally require the assessment of the possibilities, but determining whether the claimant had established that she had suffered a loss of earnings for medico-legal work that flowed from the action of the respondent in not considering or appointing her to the role of Forensic Psychiatrist in the Forensic Gender Clinic.

23. The reasons of the Employment Tribunal were more than sufficient for the claimant to understand why she failed in this element of the claim for loss of earnings.

24. In argument, Ms Grace, for the claimant, asserted that there was a period during which the claimant was limited in undertaking medico-legal work by loss of reputation, before it was repaired by the determination of the Employment Tribunal and favourable press reporting. This was not a ground asserted in the ground of appeal. It would not be fair to permit it to be raised in argument.

Ground 2 - Retirement age

25. I do not consider that the Employment Tribunal erred in law by applying the wrong approach to determining the retirement age of the claimant for the calculation of future loss. The claimant's assertion that she would have worked to 75 was unsupported by any independent evidence. The Employment Tribunal was not required to accept the evidence of the claimant on this point. The Employment Tribunal fixed on an age that was common for people in comparable roles. This was an assessment that, in effect, provided for the possibility of earlier or later retirement. I do not consider the Employment Tribunal erred in law in the approach it adopted. The Employment Tribunal gave sufficient reasons for its decision.

Ground 3 - eggshell skull

26. I do not consider that there was a failure to take account of the eggshell skull principle. I cannot see anything in the judgment to suggest that the Employment Tribunal failed to take the

claimant as she was when assessing whether she had established that she had suffered a fundamental loss of confidence because of being subject to victimisation. The Employment Tribunal rejected the claimant's evidence on this point. It was entitled to do so.

Ground 4 – mitigation

27. I do not consider that the Employment Tribunal erred in law in its application of the burden of proof in relation to a failure to mitigate. The Employment Tribunal held that the claimant had not suffered the loss of earnings for medical-legal work, rather than that she had failed to mitigate a loss. The Employment Tribunal noted the limited efforts that the claimant made to obtain medico-legal work. This was as a subsidiary component of its reasoning. It suggested that the claimant did not wish to undertake medico-legal work rather than that she was unable to do so because of a loss of confidence. It was a matter that the Employment Tribunal was entitled to take into account.

28. I do not consider that any of the grounds of appeal are made out. The appeal is dismissed.