Neutral Citation Number: [2024] EAT 156

Case No: EA-2022-001133-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30 September 2024

Before:

HIS HONOUR JUDGE SHANKS

- -

Between:

DR A MOGHADDAM

Appellant

- and –

(1) CHANCELLOR, MASTERS AND SCHOLARS OF THE UNIVERSITY OF OXFORD

(2) PROFESSOR Q SATTENTAU

(3) PROFESSOR M FREEMAN

Respondents

- -

JESSE CROZIER (instructed by Lawrence & Co Solicitors LLP) for the **Appellant**
JENNIFER DANVERS (instructed by Eversheds Sutherland (International) LLP) for the **Respondents**

Hearing date: 11 July 2024

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JUDGMENT

- -

SUMMARY

UNFAIR DISMISSAL & WHISTLEBLOWING

C was employed by the R1 as a senior post-doctoral research scientist in R2's lab on a series of fixed-term contracts the last of which was extended from 1/4/16 to 31/3/19. His employment was dependent on funding from various grants. In 2018 R2 initiated an application for funding to the Wellcome Trust and prepared a "review manuscript" in support; C complained that R2 had plagiarised his work and acted in breach of academic ethics in so doing; those complaints amounted to "protected disclosures". The relationship between C and R2 broke down and both of them said he did not wish to proceed with that application and nothing was done to pursue other options. The claimant applied for permanent status but was told his contract would expire on 31/3/19. C suffered anxiety and depression and did not work from January 2019 and was not able to attend a meeting to discuss his situation. His contract terminated on 31/3/19.

He brought claims in the ET inter alia alleging (a) that he had become a permanent employee pursuant to reg 8 of the Fixed-Term Employees (Prevention of less favourable treatment) Regulations 2002, (b) that he had been unfairly dismissed, (c) that he had suffered detriments (in particular the deliberate failure by R2 and R3 to seek or secure further funding and the refusal by R1 to renew his contract) on the grounds that he had made "protected disclosures" and (d) that he was "disabled" and the respondents had failed to make reasonable adjustments in relation to the procedure leading up to the non-renewal of his contract.

The ET found that C was effectively dismissed on 31/3/19 by reason of redundancy and that he had made the protected disclosures alleged but rejected all his claims.

C appealed on four grounds. On appeal the EAT concluded:

(1) that although another ET might have concluded otherwise, the ET was entitled to find that the renewal of the claimant's contract of employment for a fixed-term from 1/4/16 to 31/3/19 was justified on objective grounds and that he had not therefore become a permanent employee;

(2) that the ET's reasons for concluding that any detriment C suffered was not on the ground that he had made protected disclosures did not justify that conclusion and the issue would have to be remitted;

(3) that in rejecting the claimant's claim of procedural unfair dismissal the ET made the error exemplified in the **Polkey** case of asking itself whether it would have made any difference

to the outcome if R1 had taken the procedural steps contended for and that that claim would have to be remitted;

(4) that there was evidence to support the ET's conclusion that C was not "disabled" at the relevant time and that conclusion was not perverse and was accordingly one that the ET was entitled to reach.

HIS HONOUR JUDGE SHANKS:

1. This is an appeal against a judgment of the employment tribunal sitting in Reading (EJ Gumbiti-Zimuto, Mr D Palmer and Ms S Hockey) sent out on 12 September 2022 dismissing a series of claims brought by Dr Moghaddam against the University of Oxford and Professors Sattentau and Freeman.

2. The judgment followed an eight day hearing which took place in January and February 2022. The tribunal heard evidence from Dr Moghaddam and six witnesses on the Respondents' side and there was a bundle running to 2,695 pages. The parties were represented by the same able counsel as have appeared before the EAT.

Factual background

3. Dr Moghaddam was born in Iran. He was employed by the university as a senior post-doctoral scientist from 1 May 2003 under successive fixed-term contracts until the expiry of the last one on 31 March 2019; the tribunal stated that his employment on these contracts was dependent on funding from various grants from both internal and external sources. He worked under Professor Sattentau in his laboratory at the Sir William Dunn School of Pathology. Professor Freeman was head of the Sir William Dunn School.

4. Dr Moghaddam had developed a "mini-group" within Prof Sattentau's lab. He had funding dedicated to his research and wanted to be seen as an independent researcher within the lab carrying out research as he saw fit. In 2015 Prof Sattentau was the lead applicant for a successful research grant application to the Biotechnology and Biological Sciences Research Council (BBSRC) which enabled Dr Moghaddam's contract of employment to be extended

from 1 April 2016 to 31 March 2019; that extension is recorded in a letter dated 4 April 2016 which is at p167 in the bundle prepared for the EAT.

5. In April 2016 Dr Moghaddam met Prof Freeman and expressed concerns about lack of support and recognition he was receiving from Prof Sattentau. Prof Freeman advised him that if he wanted to be recognised as an independent scientist he would need to apply for roles as a "principal investigator" outside the Sir William Dunn School.

6. In early 2018 a dispute arose between Dr Moghaddam and Prof Sattentau in relation to applying for a new grant to support his research. The professor initiated contact with the Wellcome Trust without Dr Moghaddam's consent and was pressing Dr Moghaddam for a paper to support an application to that body and told him that if he did not publish a paper that year there would be no funding to support his employment after the existing grant funding from BBSRC expired. Dr Moghaddam said that the data available did not justify a paper and that he would not accept his manuscripts or ideas being used without his shared authorship.

7. Dr Moghaddam told the tribunal that he was suffering symptoms of anxiety and exhaustion at the end of 2017 and early 2018 and that in April 2018 he was feeling very depressed and pessimistic and was suicidal, narrowly avoiding personal catastrophe in that month.

8. In September 2018 Prof Sattentau went ahead and prepared a "review manuscript" which described himself as the sole senior author and named Dr Moghaddam as the third author behind his (Dr Moghaddam's) two students. Dr Moghaddam complained that the document was based on his work and that the professor was acting in breach of academic ethics and guilty of plagiarising his work. The professor said that he found Dr Moghaddam's correspondence on the topic to be a "very personal attack" involving "hostile and abusive language" which made it incredibly difficult for them to continue working together. Each of

them said he did not want to pursue an application to the Wellcome Trust.

9. The tribunal found that the relationship between the two was "unravelling at this stage". They were not working together to find ways of securing funding to enable the claimant to continue to be employed and there were no other options being considered for funding the claimant's work. Dr Moghaddam was diagnosed as suffering from severe anxiety and depression in November 2018 and he was signed off work from 10 December 2018.

10. On 13 December 2018 Dr Moghaddam wrote to the university asking for a statement confirming that he was a "permanent employee pursuant to the Fixed-Term Employees (Prevention of less favourable treatment) Regulations 2002". On 20 December he was denied this and on 21 December 2018 he was sent a letter reminding him that his current contract was to expire on 31 March 2019. He went back to work around 6 January 2019 but he was unable to concentrate and had frequent panic attacks and was signed off work again from 21 January 2019. On 30 January 2019 he wrote to the HR manager saying he was not well enough to attend a meeting to discuss his current situation. His employment came to an end on 31 March 2019. At the time he was still on sick leave suffering work-related severe depression and anxiety and (as far as I can see) it appears that there had been no substantive consultation or consideration of alternative employment in the meantime.

11. On 22 March 2019 Dr Moghaddam appealed against the termination of his employment complaining that he had been subjected to discriminatory treatment. The appeal was not heard until May 2020, some 15 months later. He considers that the university ran a sham process with the aim of eliminating his resolve to obtain justice.

12. In May 2019 he brought proceedings in the employment tribunal. He claimed that he had

been discriminated against on grounds of his race for many years and inappropriately kept on fixed-term contracts and prevented from achieving independent researcher status. He also alleged that his employment had in fact become permanent under reg 8 of the 2002 Regulations; that he had been unfairly dismissed; that he had suffered detriment because of "whistle-blowing" protected disclosures based on his allegations about Prof Sattentau stealing his work; and that he was disabled in the period leading up to March 2019 and there had been a failure to make reasonable adjustments in that the university should have modified the procedure for ending his employment and postponed the dismissal to allow him to engage properly. All these claims were dismissed by the tribunal.

Grounds of appeal

13. Dr Moghaddam now appeals against the tribunal's decision to dismiss his claims on four main grounds:

(1) The tribunal was wrong to find that his continued employment under a fixed-term contract was "justified on objective grounds" and should therefore have found that he was a permanent employee in 2019 by virtue of reg 8 of the 2002 Regulations.

(2) The tribunal failed to resolve properly whether he had been subjected to specific alleged detriments and to consider properly whether the detriments were done on the grounds that he had made protected disclosures.

(3) The tribunal failed to consider at all whether his "dismissal" for redundancy was procedurally unfair for the purposes of section 98(4) of Employment Rights Act 1996.

(4) The tribunal's conclusions on "disability" were inconsistent with their own factual findings and the conclusions on the reasonable adjustments claims impermissibly focussed on whether funding would be available for the continuation of his specific projects.

Ground (1)

14. The relevant provisions of the 2002 Regulations are as follows:

> **8.**—(1) This regulation applies where—
>
> (a)an employee is employed under a contract purporting to be a fixed-term contract, and
>
> (b)the contract mentioned in sub-paragraph (a) has previously been renewed …
>
> (2) Where this regulation applies then, with effect from the date specified in paragraph (3), the provision of the contract mentioned in paragraph (1)(a) that restricts the duration of the contract shall be of no effect, and the employee shall be a permanent employee, if—
>
> (a)the employee has been continuously employed under the contract mentioned in paragraph 1(a), or under that contract taken with a previous fixed-term contract, for a period of four years or more, and
>
> (b)the employment of the employee under a fixed-term contract was not justified on objective grounds—
>
> (i)where the contract mentioned in paragraph (1)(a) has been renewed, at the time when it was last renewed;
>
> …
>
> (3) The date referred to in paragraph (2) is whichever is the later of—
>
> (a)the date on which the contract mentioned in paragraph (1)(a) was entered into or last renewed, and
>
> (b)the date on which the employee acquired four years' continuous employment.
>
> …

15. The law relating to this provision is helpfully set out in the judgment of HH Judge James Tayler in **Lobo v University College London Hospitals NHS Foundation Trust** [2024] EAT 91 at paras [3] to [8] which contain extensive citation from the judgment of Baroness Hale in the Supreme Court in **Duncombe v Secretary of State** [2011] UKSC 14. The purpose of regulation 8 is to prevent abuse arising from the use of successive fixed-term employment contracts by employers. The regulation provides in effect that, once an employee has been continuously employed for four years, the latest renewal for a fixed-

term or new fixed-term contract has to be justified on objective grounds; otherwise the contract is automatically transformed into a contract of indefinite duration, terminable as such. The objective grounds must arise from concrete factors which relate specifically to the relevant employment. Although it is the renewal of the most recent fixed-term contract that must be objectively justified, the number and cumulative duration of the previous contracts may be relevant to the overall assessment of objective justification. In order to justify the continued use of a fixed-term contract the employer must establish that (a) they have a legitimate objective (b) it is necessary to adhere to that objective and (c) the use of a fixed-term contract is an appropriate way to achieve that objective.

16. The tribunal's reasons for finding against Dr Moghaddam on the issue whether he was still subject to a fixed-term employment are at paras 82-94 of the judgment. They are not the clearest of reasons but the following can be deduced. The tribunal stated that they had to consider each of the fixed-term extensions of his employment after 1 May 2007 and, if any of them were not justified, Dr Moghaddam would have become a permanent employee. Although this appears to have been agreed by both parties I think that it was wrong: what needed to be justified was the renewal on a fixed-term basis from 1 April 2016 to 31 March 2019 (although, as stated above, the history of earlier renewals may have been relevant to the issue whether that extension was justified). In any event, the tribunal referred to the history of renewals of fixed-term contracts and the funding arrangements. They stated that the funding of researchers by means of grants was well-established and that there was no suggestion that it was misused in this case. They found (and Dr Moghaddam had apparently accepted) that there was never a permanent source of funding available for his research work, that it was funded by a limited pot of money derived from grants and that his ongoing role was dependent on such funding being available. While there was not always a direct correlation between available grants and

the length of his fixed terms, the tribunal found that it was appropriate to manage his "contracts in a time restricted manner that broadly fits with the funds available [and that] such an approach gives certainty to [both parties]".

17. Mr Crozier says that the employment tribunal erred in four ways in making this decision. First, they did not engage with what was required to be justified, ie the use of a fixed-term as opposed to an indefinite contract, effectively finding in para 94 that "there was no alternative" to a fixed-term contract. Second, they failed to focus on the precise factors justifying each renewal on a fixed-term basis, which was particularly important in light of the finding that there was not always a precise correlation between the available funding and the length of extensions. Third, the history of Dr Moghaddam's employment indicated that the need for his work was not in fact temporary and to find otherwise was impermissible. Fourth, the tribunal placed heavy and impermissible reliance on the fact that the use of fixed-term contracts for post-doctoral researchers was a well-established practice by the university.

18. As I have said, the reasons given by the tribunal for their conclusion are not the clearest and Mr Crozier's points have some force (and furthermore, as I have also indicated, in my view the tribunal adopted the wrong approach in that they were only required to consider whether the last fixed-term extension was justified, rather than all the earlier ones too). Nevertheless it seems to me that, as Ms Danvers maintains, the tribunal had all the relevant facts in mind when reaching their conclusion and it cannot be classified as perverse. On the specific points raised by Mr Crozier: first, I agree with Ms Danvers that it is implicit in the judgment that the tribunal was considering the justification for a fixed-term, as opposed to an indefinite, contract; second, although the judgment could have been more specific and in particular focussed properly on the final renewal, there is no reason to think the tribunal did not have the specifics in mind (as to which see para 4 above); third, the

long history of renewals was a relevant factor but it did not mean there was only one permissible conclusion (this is effectively saying that the decision made was perverse which has not been maintained); fourth, the finding about the well-established practice was relevant to the case because Dr Moghaddem had alleged that he was being discriminated against by being given fixed-term contracts and it was also potentially relevant to whether the system as a whole was being abused.

19. For those reasons I consider that, although the tribunal's decision was not one that every tribunal would necessarily have reached, it cannot be classified as perverse and it should not be disturbed by the EAT. The interesting questions about the tribunal's jurisdiction to consider this issue at all in light of regulation 9(6) of the 2002 Regulations do not therefore arise.

Ground (2)

20. The tribunal found that during the period September to November 2018 Dr Moghaddam made ten "protected disclosures" in which he disclosed that Prof Sattentau had appropriated or stolen his research; these disclosures arose out of the review manuscript Prof Sattentau had produced in September 2018 and included two emails to the professor himself. Dr Moghaddam alleged that, contrary to section 47B of the Employment Rights Act 1996, Professors Sattentau and Freeman had deliberately failed to seek and/or secure funding (in particular "bridge funding") to continue his employment and the university had refused to renew his contract of employment "on the ground that" he had made the disclosures. The tribunal did not make express findings as to whether he had suffered these or the other detriments relied on (though they did state that there were other funding sources that could have been applied for: see para 148) but they stated baldly at para 160 of the judgment that they had " … not been able to conclude … that [any of the detriments relied on] were on the ground that [he] had made a qualifying disclosure or disclosures."

It was the respondents' case that it was the manner in which the emails to Prof Sattentau were written rather than the disclosures contained therein which caused him to change his attitude to seeking funding; this point was also not expressly considered by the tribunal although they do refer to the professor considering that he was being harassed by Dr Moghaddam and state at para 149 that:

> **… the breakdown in the relationship between the claimant and Professor Sattentau was the primary reason why Professor Sattentau felt unable to proceed with applications for grant funding. The lack of cooperation between [them] came about because they could not agree on the production of a published paper, without which Professor Sattentau considered there was no real prospect of an application for grant funding being successful.**

21. Mr Crozier criticises the tribunal's failure to make express findings as to the detriments which Dr Moghaddam relied on. He also points out that the tribunal failed to direct themselves in the judgment as to the proper causation test (ie whether a protected disclosure has "materially influenced" the employer's treatment of a whistleblower) and he says that the finding as to the "primary reason" for Prof Sattentau's change of attitude was not dispositive and in any event begged the question as to whether the "breakdown in the relationship" between the two was itself materially influenced by the disclosures.

22. Ms Danvers referred in detail to the email chain between Dr Moghaddam and Prof Sattentau and to the finding at para 125 of the judgment that the professor had concluded that their difference of opinion was extreme and that Dr Moghaddam had responded to his efforts to "rescue our project and your career" with "hostile and abusive language." She maintained that the tribunal had in effect found that the breakdown in the relationship was the *sole* cause of the treatment complained of and that the breakdown resulted from the

difference of opinion and the manner in which Dr Moghaddam had expressed himself.

23. I bear in mind the need to give a fair and generous reading to the tribunal's reasons but I have come to the view that their conclusion on this part of the case cannot be supported. The combination of the failure to make express findings on the detriments relied on and to consider whether the disclosures "materially influenced" them, and in particular to consider whether the breakdown in the relationship with Professor Sattentau was itself materially influenced by the disclosures or whether the manner of the disclosures (as opposed to the disclosures themselves) was the cause of any relevant detriment mean in my view that this ground of appeal must be allowed and parts of the "whistleblowing" claim must be remitted for further consideration as set out below.

Ground (3)

24. It was common ground that Dr Moghaddam was to be regarded as being dismissed by the university on 31 March 2019 by virtue of section 95(1)(b) ERA. The university's case was that the reason for the dismissal was that he was redundant. At para 105 of their judgment the tribunal accepted that in the absence of continued funding for his research work that was so. There is no appeal against that finding.

25. Dr Moghaddam claimed nevertheless that the dismissal was procedurally unfair under section 98(4) ERA because there was a failure to carry out reasonable consultation or to look for alternative employment for him (see list of issues at p227). In para 106 of the judgment the tribunal found in effect that the breakdown in the relationship between Dr Moghaddam and Prof Sattentau meant that they could not work together to apply for new grant funding and that they both recognised that the absence of such funding would have a terminal effect on Dr Moghaddam's employment. The tribunal then stated:

Nice considerations about whether there should have been adjustment to the procedure

> **in our view would have made no difference at all without grant funding. This is illustrated by the claimant's reaction to the offer of assistance to find alternative employment …**

The tribunal then quoted from a passage in Dr Moghaddam's statement setting out the difficulties he would have faced in starting new employment. No further consideration was given to the question of whether the dismissal was procedurally unfair and the claim of unfair dismissal was rejected.

26. Mr Crozier says that the tribunal here made the classic error exemplified by **Polkey v Dayton Ltd** [1988] 1 AC 344 of asking itself, in considering the test at section 98(4) of ERA, whether it would have made any difference if the employer had taken appropriate procedural steps (in particular properly consulting the employee) before dismissing him. It seems to me that, on the face of it, the point is a good one. Ms Danvers says in answer, first, that the tribunal must be taken as finding that the university reasonably concluded at the time that further consultation or looking for alternative employment would have been "utterly useless" or "futile" (see **Polkey** per Lord Mackay at 355C and Lord Keith at 364G) and, second, that an appeal on this basis is academic because the tribunal has made a finding of fact that Dr Moghaddam's employment would have ended in any event which means that the only compensation to which he would be entitled would be a basic award for unfair dismissal which he has in effect received already by receiving a redundancy payment.

27. I do not think that either of these answers meet Mr Crozier's point. As to the first, the tribunal do not expressly state that the university had concluded that it was futile to carry out further consultation or look further for alternative employment for Dr Moghaddam, still less whether such a conclusion would have been a reasonable one for the university to reach at the time; rather they state that it is their own view that adjustments to the procedure would have made no difference to the ultimate outcome. Given the fundamental importance of the **Polkey**

principle I do not consider that it would be safe to read the tribunal as reaching a conclusion that the employer had reasonably concluded that further consultation or search for alternative employment was futile. As to the second, the issue that the tribunal would have needed to address in relation to remedy was that set out in the list of issues at para 31a (see EAT bundle at p245), ie "whether C would have been dismissed fairly in any event and when". The tribunal's finding at para 106 is effectively that without grant funding Dr Moghaddam's employment would inevitably have terminated but there is no consideration as to whether such a dismissal would have been fair or, if so, when a fair dismissal would have taken place.

28. In my view this ground of appeal succeeds and the case will need to be remitted to the tribunal to consider whether Dr Moghaddam's claim of procedural unfair dismissal succeeds and (if so) what compensation he is entitled to.

Ground (4)

29. The relevant provisions of the Equality Act 2010 in relation to this ground of appeal are very familiar to all concerned. Section 6 provides:

> A person (P) has a disability if—
>
> (a)P has a physical or mental impairment, and
>
> (b)the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Para 2 of Schedule 1 provides:

> 2(1)The effect of an impairment is long-term if—
>
> (a)it has lasted for at least 12 months,
>
> (b)it is likely to last for at least 12 months

30. Dr Moghaddam claimed that the university failed to make reasonable adjustments during the period 10 December 2018 to the end of his employment on 31 March 2019 by insisting on

face-to-face meetings and failing to extend the procedural timeline ending with the expiry of his contract; he relied on depression and anxiety as causing him to be "disabled" for the purposes of the Equality Act 2010; his case (as recorded in para 240 of the judgment and in para 21 of the list of issues at p243 in the EAT bundle) was that he was suffering with those conditions as at 10 December 2018 when he was signed off work and that he was likely to remain unwell for at least twelve months, so that the effect of the impairment was "long-term" and he was therefore disabled at the relevant time.

31. The tribunal found that he was not disabled at the relevant time. Their reasons are set out at paras 240-243 of the judgment. In para 242 the tribunal set out in short form the history of his depression and anxiety from late 2017 to his being signed off work for the last time in January 2019 (including the episode in April 2018). In para 243 they stated that they were not satisfied on the evidence that he had suffered substantial adverse effects on his day-to-day activities for 12 months by December 2018 or that by December 2018 the impairment was likely to last 12 months (noting in particular that in December 2018 he was expecting to be back at work in January and stating that the position between January and March 2019 was not such that it was likely to continue for 12 months).

32. Mr Crozier says in effect that based on their findings of fact the tribunal should have concluded that Dr Moghaddam had been suffering from the relevant impairment for at least nine months by December 2018, either starting with the episode in April 2018 or from the end of 2017, so that he had been suffering for at least 12 months before the end of his employment or it was more likely that the impairment would last a further 12 months as at December 2018. It is fair to say that the tribunal do not make an express finding in relation to whether he had suffered the relevant impairment between April and December 2018 but this was not directly relevant to the way Dr Moghaddam was putting his case and it is clear I think that the tribunal was of the view that, however serious matters were in April 2018, his day-to-day activities

had simply not been substantially adversely affected in 2018.

33. In any event, the tribunal plainly had the relevant statutory provisions and evidence well in mind when they reached their conclusions on the question of disability and those conclusions cannot possibly be categorised as perverse. They were therefore entitled to conclude that the claimant was not disabled at the relevant time in December 2018 to March 2019 and this ground of appeal must fail. Any question relating to "reasonable adjustments" in the technical sense does not therefore arise, though it may be that the adjustments relied on remain relevant in the context of Dr Moghaddam's claim that the dismissal was procedurally unfair.

Disposal

34. For those reasons the appeal is allowed on ground (2) and (3) only and the following issues will need to be remitted to the tribunal:

(a) Was the claimant subjected to any of the following behaviour and did it amount to a detriment:

(i) the second and third respondents deliberately failing to seek and/or secure funding for his continued employment, in particular "bridge funding";

(ii) the first respondent refusing to renew his contract which expired on 31 March 2019?

(b) If so, did the protected disclosures made by the claimant as found by the tribunal in paras 109-120 of the judgment materially influence the relevant behaviour?

(c) Was the failure by the first respondent to renew the claimant's employment contract which expired on 31 March 2019 by reason of redundancy unfair under section 98(4) of ERA 1996 because of any failure to carry out reasonable consultation with the claimant and/or to look for alternative employment for him?

(d) If and in so far as the claims for whistleblowing detriment or unfair dismissal are well-

founded, what remedies should the claimant receive?

35. Subject to any further submissions the parties may wish to make it seems to me that given the history of this case and my views on the judgment it will have to be remitted to a fresh tribunal. However, the parties will remain bound by the findings of primary fact and conclusions of the current tribunal save in so far they are inconsistent with this judgment. It will be for the fresh tribunal to give directions as to what, if any, further evidence it requires to hear before deciding the remitted issues.