Neutral Citation Number: [2025] EAT 115

Case No: EA-2024-SCO-000039-JP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 7 August 2025

Before :

THE HONOURABLE LORD COLBECK

MRS MARGOT McARTHUR

DR GILLIAN SMITH MBE

- -

Between :

NHS EDUCATION SCOTLAND **Appellant**

- and –

DR HAZEL HIRAM **Respondent**

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- -

Mr Brian Napier KC (instructed by NHS Central Legal Office), for the **Appellant**
Dr Hazel Hiram, the **Respondent**

Hearing date: 1 May 2025

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JUDGMENT

SUMMARY

Findings of fact - Tribunal making findings in respect of a witness who had not had the opportunity to address the allegations – Whether a serious procedural irregularity amounting to error of law

An Employment Tribunal erred by making findings in fact for which there was no evidential basis. The tribunal did not accept the evidence of a witness and held that he knew that there had been a previous dispute involving the claimant, without that ever having been put to him by either the claimant or the tribunal. The tribunal's failure amounted to a serious procedural irregularity. It will not usually be fair procedure for a tribunal to reach conclusions about a factual scenario if that scenario had not been put (**NHS Trust Development Authority v Saiger and others** [2018] ICR 297 applied).

The Honourable Lord Colbeck:

Introduction

1. The respondent is a dentist. From 2015 to 2022, she was engaged by the appellant to provide vocational dental training to dental graduates. Her claim principally relates to her application to be a vocational trainer ("VT") for the year 2023/24, which was declined by the respondent on 13 April 2023. As a consequence of the appellant declining to engage the respondent as a VT, the respondent brought certain claims against the appellant.

2. Following a hearing at Edinburgh on 12 – 15; and 18 March 2024, before Employment Judge Sangster and members, in a judgment sent to parties on 9 April 2024, the tribunal ("ET") unanimously held that (i) the appellant's decision not to appoint the claimant as a VT for the year 2023/24 amounted to victimisation and discrimination contrary to the **Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations 2018** ("**the 2018 Regulations**"); and (ii) the appellant also victimised the respondent and subjected her to a detriment as a result of making a protected disclosure in the feedback it provided to her on 28 April 2023. As a consequence, the ET ordered the appellant to pay to the respondent sums in respect of compensation and injury to feelings.

3. The appellant appeals against two findings of the ET. First, the finding that not appointing the respondent as a VT for the year 2023/4 amounted to victimisation, discrimination under the **2018 Regulations** and was a detriment for making protected disclosures contrary to s.47B of the **Employment Rights Act 1996**. Second, the finding that the appellant, through the feedback it provided to the respondent on 28 April 2023, subjected the respondent to victimisation and further detriment, contrary to s.47B, by taking further steps to justify its decision not to recruit, and to undermine the merits of the respondent's Response Document in which she had made a protected disclosure by raising concerns in relation to her 2023 application.

4. Central to those challenged findings is whether the ET erred in law in finding that CC, the chair of the panel which considered and refused the respondent's application to be a VT, had lied on

crucial matters when giving his evidence. The relevant paragraphs of the ET's judgment are as follows:

> "79. CC stated in his evidence that he knew that there had been a previous dispute involving the claimant, but did not know what that dispute was about and did not know that discrimination had been asserted. The Tribunal did not accept this. The Tribunal concluded that CC was well aware of the full circumstances of the previous dispute for the following reasons:
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> a. All witnesses spoke to the dental leadership team being a close and cooperative team. It consisted of only 4 individuals – DF, JB, CC and BC.
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> b. CC was a member of the review panel chaired by DF in April 2022. They were reviewing the decision to refuse the claimant's application. ACAS were already involved at that point. The Tribunal concluded that DF would have mentioned that, and the nature of that dispute, to CC, to provide context for the review they were undertaking.
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> c. The claimant raised Employment Tribunal proceedings in July 2022, asserting that the decisions of the Recruitment Panel and the Review Panel constituted race discrimination. The Tribunal determined it was inconceivable that this would not have been discussed within the dental leadership team, particularly given that they were a close knit team and all 4 individuals had been involved in decisions in relation to the claimant's application, so all 4 would likely require to give evidence, if the matter proceeded to a final hearing.
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> d. CC stated that he knew that JB was asking him to undertake screening of the claimant's application as JB had been involved in the previous dispute with the claimant. Again, the Tribunal concluded that it was inconceivable that JB would not have mentioned the nature of that dispute, particularly given that he was asking CC to chair the panel who would consider the claimant's further application.
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> e. CC stated in evidence, on several occasions, that he was aware that the dispute had been resolved and that there was a non-disclosure agreement attached to the settlement terms, indicating that he had been provided with significant detail in relation to the previous dispute. The Tribunal concluded that, if he was provided with that level of detail, he would also have been informed of the nature of the dispute.
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> f. CC stated that he was 'very aware of the sensitivity' in relation to the claimant's application and that he was taking significant and detailed advice from HR throughout 'for obvious reasons' as he realised it would be a 'contentious decision' and that 'there may be repercussions', again the Tribunal concluded that this demonstrated insight into the previous dispute and the nature of this.

> 80. The Tribunal also concluded that CC was aware of the terms of the claimant's emails of 13 and 17 March 2023 to GG. CC was taking extensive and detailed advice from the HR team as to how to address the claimant's application. They required to inform him of the allegations the claimant was making in her emails to provide appropriate advice to him."

5. The appeal is advanced on three grounds. First, it is asserted that the ET made findings in fact which contradicted the evidence of the appellant's witnesses. Those findings in fact were crucial to the ET's determination of the issues. Those matters were not properly put to the appellant's witnesses in cross examination. They had no opportunity to explain any contradictions. The ET's approach was a serious procedural irregularity, unfair and an error of law.

6. Second, in relation to the ET'S finding that CC had lied in his evidence, if conclusions of dishonesty are to be reached, it will usually be unfair to reach them unless the person likely to be condemned has had an opportunity to deal with them (**NHS Trust Development Authority v Saiger and others** [2018] ICR 297 at [99]). It was not clearly suggested to CC that he was lying. It was not clearly put to CC that he was being dishonest. The ET's finding that he was, without that having been put, is procedurally unfair and an error of law.

7. Third, it is asserted that the ET made findings which were not raised or contended for by either party, nor were raised by the ET at any stage. The first time the conclusions reached by the ET at paragraphs [79] and [80] became focused issues was in the judgment. The appellant had no opportunity to refute or explain any issues. In particular, it was not suggested by any party, in questions or in submissions, that CC was told of the content of an email sent by the respondent to GG. That is nonetheless the conclusion the ET reached at paragraph [80], based again on a hypothesis as to what must have happened rather than any evidence. It is an error of law for a tribunal to decide a case on points which parties have not had an opportunity to answer (**Neale v Hereford and Worcester County Council** 1986 ICR 471 at 486 D-F). In reaching the conclusions it did, at paragraphs [79] and [80], the ET erred in law.

Submissions of the parties

8. Put shortly, and with no disrespect intended to the written and oral submissions made by parties, the submissions can be summarised as the appellant contending that there was no evidential basis for the conclusions reached at paragraphs [79] and [80], whereas the respondent maintained that there was such a basis and the ET was entitled to reach the findings it did. The central issue in this appeal is whether or not there was a basis in the evidence for the ET to reach the conclusion it did.

Discussion of the evidence

9. As noted above, at paragraph [79] of its judgment, the ET did not accept the evidence of CC wherein he stated that he knew that there had been a previous dispute involving the respondent, but did not know what that dispute was about and did not know that discrimination had been asserted. The ET concluded that CC was well aware of "the full circumstances of the previous dispute". It set out six reasons for reaching such a conclusion, each of which we consider in turn.

10. The evidence of CC, GG and AM was transcribed and the appeal tribunal has had the opportunity of considering that in detail. The matters in issue were not ones the claimant could speak to, hence her evidence was not transcribed.

11. The first reason given [paragraph 79(a)] was that all witnesses who gave evidence spoke to the dental leadership team being a close and co-operative team. It consisted of only four individuals – DF, JB, CC and BC. It is notable that only one of those four individuals [i.e. CC] gave evidence. Additionally, GG and AM gave evidence for the appellant and the respondent gave evidence in support of her own case.

12. This finding alone cannot justify the conclusion reached by the ET, however, the closeness (or otherwise) of the dental leadership team was not spoken to in evidence by GG or AM. The employment judge raised the issue of the leadership team's working relationship in her questioning of CC. He did not say that the dental leadership team was close and co-operative. He said that the "working relationship was fine" and that it was a "comfortable working relationship". The evidence

of CC does not support the finding made.

13. The second reason given [paragraph 79(b)] that CC was a member of the review panel chaired by DF in April 2022. They were reviewing the decision to refuse the claimant's application. ACAS were already involved at that point. The ET concluded that DF would have mentioned that, and the nature of that dispute, to CC, to provide context for the review they were undertaking.

14. Regrettably, there is no evidential basis for such a conclusion. DF did not give evidence. The employment judge specifically asked CC if he knew there was ACAS involvement at the time of the review panel in 2022. CC said he did not. The employment judge did not question him further on this particular issue.

15. The third reason given [paragraph 79(c)] was that the claimant raised proceedings in July 2022, asserting that the decisions of the Recruitment Panel and the Review Panel constituted race discrimination. The ET determined that it was inconceivable that this would not have been discussed within the dental leadership team, particularly given that they were a close knit team and all four individuals had been involved in decisions in relation to the claimant's application, so all four would likely require to give evidence, if the matter proceeded to a final hearing.

16. There is no evidential basis for such a conclusion. It is, in part, based upon the presumed closeness of the dental leadership team (which is dealt with at paragraph [12] above). In terms, CC repeatedly stated in evidence that he had not been a party to any such discussion. A number of the claimant's questions were, in fact, predicated upon that hypothesis. No other member of the dental leadership team gave evidence.

17. The fourth reason given [paragraph 79(d)] was that CC stated that he knew that JB was asking him to undertake screening of the claimant's application as JB had been involved in the previous dispute with the claimant. Again, the ET concluded that it was inconceivable that JB would not have mentioned the nature of that dispute, particularly given that he was asking CC to chair the panel who would consider the claimant's further application.

18. There is no evidential basis for such a conclusion. CC was clear that he was not told of the

nature of the dispute. JB did not give evidence. There was no evidence upon which the ET were entitled to make such a finding.

19. The fifth reason given [paragraph 79(e)] was that CC stated in evidence, on several occasions, that he was aware that the dispute had been resolved and that there was a non-disclosure agreement attached to the settlement terms, indicating that he had been provided with significant detail in relation to the previous dispute. The ET concluded that, if he was provided with that level of detail, he would also have been informed of the nature of the dispute.

20. It is correct to say that CC did state in evidence that he was aware that the dispute had been resolved and that there was a non-disclosure agreement. It can fairly be implied from that evidence that the non-disclosure agreement related to the settlement terms. CC had, self-evidently, been provided with that level of detail. There is no evidential basis upon which ET was entitled to conclude that CC had been informed of the nature of the dispute. CC was clear in his evidence that he had not. Disbelieving his evidence does not mean that the opposite is true in the absence of other evidence to support such a conclusion.

21. The sixth reason given [paragraph 79(f)] was that CC stated that he was 'very aware of the sensitivity' in relation to the claimant's application and that he took significant and detailed advice from HR throughout, 'for obvious reasons', as he realised it would be a 'contentious decision' and that 'there may be repercussions'. Again, the ET concluded that this demonstrated insight into the previous dispute and the nature of this.

22. The ET chose not to engage (and analyse) CC's explanation for being involved in the review panel in the first place. He was asked to pre-screen because of the earlier dispute and because the claimant was from out with his region. His counterpart in the west (BC) had prior involvement with the claimant therefor JB felt it fairer if CC carried out the pre-screen. CC went on to explain that he was asked to chair the panel because he had no knowledge of the previous dispute. That awareness of a previous dispute explains why CC stated that which is set out in the preceding paragraph. There was no evidential basis for the ET to conclude that CC had insight into the previous dispute and the

nature of it. CC was clear in his evidence that he had no insight in to the nature of the previous dispute, only that there was one. It was his lack of insight that led to his involvement.

23. Turning to paragraph [80] of the ET's judgment, they concluded that CC was aware of the terms of the claimant's emails to GG of 13 and 17 March 2023. That conclusion was reached on the basis that CC was taking extensive and detailed advice from the HR team as to how to address the claimant's application. They required to inform him of the allegations the claimant was making in her emails to provide appropriate advice to him.

24. The starting point in a proper analysis of this issue is the direct evidence relative to the emails in question. CC was asked by the claimant about the email of 17 March 2023. He was asked when he had first seen it. He responded that he had not seen it until the bundle for the ET was sent to him. The claimant did not challenge that evidence. The claimant did not ask CC about the email of 13 March 2023. She did not ask GG (the interim HR director) about either email. GG was asked about it in examination in chief. She spoke of discussing it with the dental leadership team, not with CC. Considering her evidence in context it appears that she was referring to DF and JB when she spoke of the dental leadership team in this passage if her evidence. There was no direct evidence before the ET that entitled them to find CC was aware of the terms of the claimant's emails of 13 and 17 March 2023.

25. In fairness to the ET, the finding they made was not based on direct evidence, although the ET's failure to engage with the direct evidence when reaching the conclusion it did at paragraph [80] is regrettable. CC spoke to taking advice from HR.

26. In addition to the finding at paragraph [80], in their response to the application for reconsideration, the ET referred to "*CC's repeated statements in his evidence that he took extensive and detailed advice (from) the HR team as to how to address the claimant's application*". CC spoke to taking guidance (not advice) from HR. He did not refer to it as either "extensive" or "detailed". He referred to taking "some guidance" and then to taking "a lot of guidance", before clarifying that, "*So I took advice, most of my HR advice was after the panel for the response to the feedback.*" The term

"advice" was first used by the employment judge (suggesting it had been used by CC when it had not), not CC. We draw no distinction between the terms "guidance" and "advice", however, the lack of precision by the ET in this respect is regrettable.

27. There is, again, no evidential basis for the conclusion reached by the ET. Both GG and CC could have been asked about this. They were not – by either the claimant or the ET. It follows that the appellant succeeds in relation to the first ground of appeal. The ET made findings in fact which contradicted the evidence and upon which there was no evidential basis. Those findings in fact were crucial to the ET's determination of the issues. The ET's approach was a serious procedural irregularity, unfair and an error of law.

28. The second ground of appeal relates to the ET's finding that CC had lied in his evidence. If conclusions of dishonesty are to be reached, it will usually be unfair to reach them unless the person likely to be condemned has had an opportunity to deal with them (see **NHS Trust Development Authority v Saiger and others** [2018] ICR 297 at [99]).

29. The claimant did not suggest to CC that he was lying. Rather than assert that, or challenge CC's evidence, a number of the claimant's questions were predicated upon the fact that his knowledge was, in fact, that which he spoke to in evidence. In her questioning, the employment judge did not challenge CC's evidence when he insisted that he was unaware of matters the ET (erroneously) concluded he was aware of. Whilst it would have been inappropriate for the employment judge to suggest CC was lying, she should have posed questions in such a way as to give CC the opportunity to deal with the issue. In light of the conclusion the ET reached, her failure to do so was both procedurally unfair and an error of law.

30. The appellant succeeds also in respect of the second ground of appeal.

31. The third ground of appeal asserts that the ET made findings which were not raised or contended for by either party, nor were raised by the ET at any stage prior to its judgment. The first time the conclusions reached by the ET at paragraphs [79] and [80] became focused issues was in the judgment. The appellant had no opportunity to refute or explain any such issues.

32. The appellant is correct in their argument that it was not suggested by any party, in questions or in submissions, that CC was told of the content of the email of 17 March 2023 sent by the respondent to GG. CC was asked about it by the claimant. He was asked when he had first seen it. He responded that he had not seen it until the bundle for the ET was sent to him. The claimant did not challenge that evidence. She did not assert, as the ET found, that CC was aware of the terms of her e-mails of 13 and 17 March 2023. That is nonetheless the conclusion the ET reached at paragraph [80], based again on a hypothesis as to what must have happened rather than any evidence.

33. Whilst it is an error of law for a tribunal to decide a case on points which parties have not had an opportunity to answer (see **Neale v Hereford and Worcester County Council** 1986 ICR 471 at 486 D-F) that is not the position in relation to the email of 17 March 2023. CC was asked about that email and answered the question he was asked. Nevertheless, for the reasons we give above, in reaching the conclusions it did at paragraphs [79] and [80] of its judgment, the ET erred in law. It is therefore unnecessary to consider the third ground of appeal.

Disposal

34. The appellants succeed in their appeal. The claimant's claims which were successful before the ET are dismissed.