Appeal No. UKEATS/0022/19/AT

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 16th October 2019
At 10.30am

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

Mrs M MacLeod — APPELLANT

The University Court of the University of Glasgow — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	Mrs M MacLeod In person
For the Respondent	Mr David Walker Morton Fraser LLP 145 St Vincent Street Glasgow G2 5JF

THE HONOURABLE LORD SUMMERS

1. In this case the Appellant represented herself and Mr Walker, solicitor, represented the respondents.

2. This is a case that has been before the Employment Tribunal for many years. There have been prolonged periods of inactivity. There have been many procedural delays. Throughout most of this time the Appellant has represented herself. The Appellant's case was struck out and after appeal to the Employment Appeal Tribunal came before me on narrow grounds. I was asked to consider whether the strike out could be said to have been properly granted if there was new evidence of irregularity at an early stage in proceedings.

3. An expert, Dr McLennan, who had supplied a Joint Expert Report in the Appellant's case had recently been struck off. The reasons for the expert's removal arose from conduct which the Appellant complained was similar to that of which she complained in the present case. In this case the Appellant had complained that the joint report written by Dr McLennan misrepresented her position. She complained that the expert had not conducted a proper interview and that the report was full of errors. These complaints had been voiced many years ago at the time the report was supplied. The Appellant had recently discovered that Dr McLennan had been struck off as a result of a complaint by another litigant in another Employment Tribunal case. He also claimed that the expert had inaccurately represented his position. In his case however he was able to demonstrate that she had done so because he had secretly recorded his interview with her. He was able to satisfy the British Medical Association's disciplinary body that she had supplied a report in connection with the litigant's Employment Tribunal case that was inaccurate in a variety of respects. The Appellant in this case made the same claim. What the expert stated in the joint report

prepared for her case was inaccurate and did not reflect what the expert had been told in interview. It was argued that the procedure from that point on was vitiated since it had proceeded on a report that was now subject to suspicion. It was suggested that it had affected her own health. She submitted that the damage and distress had contributed to her inability to participate effectively in the procedures of the Employment Tribunal thereafter. It was acknowledged that years had passed since the report was supplied and that there had been many twists and turns in her Employment Tribunal claim since the date of the report.

4. Mr Walker submitted that the rules of procedure did not permit the Employment Tribunal's Orders to be re-opened. There were no rules equivalent to the *res noviter* rules of civil procedure that permitted such a step. The Appellant was unable to gainsay this. I do not consider that Mr Walker's submission is an accurate statement of the law (see Harvey Employment Law para. 1586). I am persuaded however that the grounds of appeal do not permit me to make any order designed to explore whether Dr McLennan conducted herself improperly in giving a report in this case. I am equally persuaded that even if it were said that the issue of *res noviter* was properly before me, I could not be satisfied on the material before me that it was appropriate for the Employment Appeal Tribunal to open up the circumstances in which Dr McLennan's report was furnished or the contents of the report. Nor do I consider I can remit to the Employment Tribunal to address the issue. All that I have is a British Medical Association report and a disciplinary tribunal's conclusions in a case involving the same expert in another case in circumstances comparable to the present case. I have no concrete or persuasive indications of similar misconduct by Dr McLennan. There is a suspicion. But that is all.

5. The Appellant accepted she discontinued her complaint against Dr McLennan by a phone call and letter to the British Medical Association. Had she continued with that process it

may have been that these allegations would have resolved in her favour, as they were in the other case placed before me.

6. The complaint focuses on events many years ago. I am unable to speculate as to whether there is any connection between the complaints about the report and the conduct that led to strike out.

7. Mr Walker also argued that the complaints were too late in the sense that the time to make them had passed. I was directed to Employment Judge Cape's decision of 29 November 2010. It indicates that the Appellant did not complete her evidence to the Employment Tribunal. Mr Walker submitted that she could have voiced her complaints to the Employment Tribunal. In curtailing her evidence she lost the opportunity to do so.

8. I don't attach a great deal of weight to this submission. I am told that the Appellant did express her dissatisfaction with the report. It was not necessary her to do so in evidence. Given that it was a joint report it would have been difficult for her to undermine its reasoning or conclusions. Secondly there was no other material available to the Appellant to support or corroborate her complaint of professional impropriety by Dr McLennan. I do not consider that because she discontinued her evidence to the Employment Tribunal she cannot complain about the report. No doubt the fact that she parted company with her legal representative at an early stage in proceedings has contributed to the protracted and unsatisfactory course of this litigation.

9. I therefore hold that the appeal should be refused. The Employment Appeal Tribunal has no power to re-open Employment Tribunal Orders other than by the means stipulated in the rules and explained in the case law. No motion to challenge the report was placed before the

Employment Tribunal at the hearing when the expert's evidence was considered. Although the Appellant expressed her unhappiness with the report, I do not understand her to have asked for it to be disregarded and a new expert appointed. The attack on the report has only gained traction because of events long after the hearing. I accept that these cast a shroud of doubt over the expert's competence and objectivity but I do not consider that the Employment Appeal Tribunal is able to provide a remedy. The information supplied to me does not reveal an adequate basis upon which this appeal could be granted or any other order made. For all those reasons I refuse the appeal.