Appeal No. UKEAT/0279/19/DA (V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 16 February 2021
Judgment handed down on 19 March 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

(SITTING ALONE)

ROSEBERRY CARE CENTRES GB LTD
T/A VALLEY VIEW CARE HOME — APPELLANT

MS T JACKSON — RESPONDENT

Transcript of Proceedings

JUDGMENT

Full Hearing

APPEARANCES

For the Appellant	RAD KOHANZAD (Of Counsel) Instructed by: Peninsula Business Services Ltd The Peninsula Victoria Place 2 Cheetham Hill Road Manchester M4 4FB
For the Respondent	No attendance

SUMMARY

PROTECTED DISCLOSURES

The Employment Tribunal erred in failing to give a reasoned determination of the causation issue in this claim; was the Claimant subject to the detriments she established on the ground of having made the protected disclosures accepted to have been made by the Tribunal. The matter is remitted to the same Employment Tribunal to determine this issue.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against a Judgment of the Employment Tribunal; Employment Judge Garnon; Members Ms L Jackson and Mr R Greig. The hearing was held at North Shields from 25-27 February; with deliberations on 15 March 2019. The parties are referred to as the Claimant and Respondent as they were before the Employment Tribunal. The Tribunal upheld complaints of detriment done on the ground that the Claimant had made protected disclosures, wrongful dismissal and unfair dismissal. The Tribunal rejected a complaint that the dismissal was for the reason, or principal reason, that the Claimant had made protected disclosures.

The findings of the Tribunal

2. The following summary is taken from the Judgment of the Tribunal. The Respondent operates the Valley View Care Home. The Claimant worked at the care home from 20 September 2002 as a care assistant.

3. At paragraph 3.29 the Tribunal accepted that the Claimant had made protected disclosures:

> **3.29. The sheer volume of paperwork in respect of each resident can be seen from what the respondent did eventually provide to the claimant. The notes for two residents over a two-month period run to 247 pages. The broad nature of the main concerns the claimant claims to have reported are:**
>
> **(a) Mr G sexually touching another resident Ms B and the respondent not informing Ms B's family on a number of occasions---reported verbally to Ms Teasdale and Ms Terry and written in care files with the date**
>
> **(b) Kelly Smith and Ms Terry shouting at Ms L who kept asking for a man by name, that the man was dead--- reported verbally to Ms Teasdale and written in supervision documents.**

> **(c) Ms Terry leaving medication on dining room and bedside tables in reach of other residents ---reported verbally to Ms Teasdale**
>
> **(d) "Drag lifting" Ms E ---reported verbally to Ms Teasdale, written in supervision documents, and recorded on tape in May 2018 as said to Ms Hughes (HR) and Ms Dowson in the disciplinary meeting and to Ms Ward during the appeal.**
>
> **(e) Kelly Smith refusing to contact a GP or urgent care team when Mr A had an accident causing head injuries ---reported verbally to Ms Teasdale and written in Mr A's care plan and supervision documents. Other staff Sharon Field and Shane Ballas, a handyman, also reported this incident.**
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> **All the above tend to show the relevant failures identified in paragraph 2.2 above. We have no doubt the claimant reasonably believed they did and that any reports she made were in the public interest. Mr Lane did not argue otherwise. His instructions were the reports were not made. We find they were.**

4. The Tribunal found that the Claimant had been subject to two detriments. Other detriments alleged by the Claimant were rejected. The Tribunal considered the detriments from para 3.38:

> **3.38. The detriments of which the claimant complains are Ms Teasdale and Ms Terry**
>
> **(a) not letting her work with colleagues with whom she had a good relationship in particular Joan Trueman, Sharon Field and Liz Baron (ex-employee).**
>
> **(b) telling her to remove jewellery when other carers were allowed to wear it. Ms Terry wore a necklace and bracelet. A carer called Ms Curry wore a necklace and a carer called Ms Dixon (mother of Ms Teasdale) wore a ring and hoop earrings.**
>
> **(c) telling her at lunch breaks to remain on the premises when Mr Ballas went home for lunch, Ms Lyn went for sunbeds and Ms Middlemiss to see her horses.**
>
> **(d) "punishing" her for use of social media which other members of staff also did, but were not punished for.**
>
> **(e) not speaking to her, especially after she raised complaints.**

5. In its conclusions, the Tribunal held at paragraph 4.5 that the Claimant was subject to two detriments; "not being spoken to, after she made protected disclosures and normally being required to remain on the premises at lunchtime" (which is really two detriments) and "the sending of a one sided investigation to Ms Dowson".

6. The Respondent has contended that the second detriment; the "one sided investigation" was not a detriment alleged by the Claimant. This was the basis of an application for reconsideration made on 10 April 2019. The application for reconsideration was rejected by the Employment Judge on 17 April 2019, because he considered that there was no reasonable prospect of the judgment being varied or revoked. The Claimant alleged that her dismissal was for the reason, or principal reason, that she had made protected disclosures. As part of that allegation she complained about the investigation. As the investigating officer was a different person from the dismissing officer, the Tribunal considered it appropriate to treat the investigation as a separate detriment because of the approach adopted by the Court of Appeal to such claims in **Royal Mail v Jhuti** [2018] ICR 982; which was yet to be overturned by the Supreme Court: **Royal Mail Group Ltd v Jhuti** [2020] ICR 731. The question of whether the Employment Tribunal was right to consider the one sided investigation as a separate detriment was the subject of a ground of appeal that was rejected at the sift. That decision was not challenged.

7. The Tribunal's reasoning in respect of the protected disclosure detriment and dismissal claims was set out from para. 4.5:

> **4.5. We have found the claimant made protected disclosures and she was subjected to the two of the five detriments listed in paragraph 3.38 ,not being spoken to, after she made protected disclosures and normally being required to remain on the premises at lunchtime. The most important detriment alleged is the sending of a one sided investigation to Ms Dowson … Why were these things done, and are they perhaps connected? The cases already cited which guide us are *ASLEF-v-Brady, Kuzel, Hadjioannou* and *Fecitt.***
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> **4.6. Evasive or equivocal replies by the respondent's witnesses and failure to give a credible explanation may be enough to establish the ground for the treatment was as the claimant alleges. However, the mere fact the employer acted unreasonably will provide no basis for inferring why it did so. In an old discrimination case *Law Society vBahl* Elias J as he then was said**
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> > ***101. The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility. If the tribunal does not accept the reason given by the alleged discriminator, it may be open to it to infer discrimination But it will depend upon why it has rejected the reason that he has given, and whether the primary facts it finds***

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provide another and cogent explanation for the conduct. Persons who have not in fact discriminated on the proscribed grounds may nonetheless sometimes give a false reason for the behaviour. They may rightly consider, for example, that the true reason casts them in a less favourable light, perhaps because it discloses incompetence or insensitivity. If the findings of the tribunal suggest that there is such an explanation, then the fact that the alleged discriminator has been less than frank in the witness box when giving evidence will provide little, if any, evidence to support a finding of unlawful discrimination itself.."

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4.7. In Eagle Place Services Ltd –v- Rudd Judge Serota Q.C. cited from Bahl in the Court of Appeal with approval and added inference of a reason for a person's behaviour *"may also be rebutted – and indeed this will, we suspect, be far more common – by the employer leading evidence of a genuine reason which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made. Even if they are not accepted, the tribunal's own findings of fact may identify an obvious reason for the treatment in issue, other than a discriminatory reason."*

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4.8. The difficulty for Mr Lane in this case was that he was shackled by his instructions and the evidence of his witnesses, that the claimant made no disclosures. There is then little or no room to argue any other defence. An analogy may help to explain. Suppose Mr A and Mr B are enemies. One night A spots B and attacks him. B defends himself successfully leaving A badly injured. When arrested and questioned B denies he and A are enemies, denies he fought with A and says he was elsewhere at the time, so has an alibi. He maintains that position up to his trial where the alibi is blown apart and the jury convict. It is too late to say he was acting in self defence. Even a plea in mitigation at sentencing that B provoked him would have a hollow ring to it.

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4.9. In Panayiotou-v-Kernaghan a tribunal concluded the employer acted as it did because of the manner in which the claimant had pursued his complaints which was separable from the fact he had made protected disclosures. There have been cases in which a respondent says the claimant raised so many concerns it did not appreciate some were a protected disclosure. We checked with Mr Lane in his closing submissions he was not saying Ms Teasdale or Ms Terry took objection to the way in which the claimant raised concerns, the defence in Panayiotou, or felt the concerns were invalid or did not understand them or had other reasons for disliking the claimant .He confirmed those were not his instructions and no part of the respondent's case. At one point he properly objected to the Employment Judge putting to witnesses the possibility Ms Teasdale resented the claimant, especially due to the post she had put on Facebook, on the basis of that was not part of the claimant's case. He was right, but as the Employment Judge explained in the absence of any other explanation we could be driven to the conclusion it must have been, at least in part, the making of protected disclosures which caused them to act as they did, because under section 48 the burden is on the employer to show it was not.

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4.10. We conclude Ms Teasdale and Ms Terry did not like the claimant and part of the reason was she raised protected disclosures. That other parts emerge from certain comments the claimant is recorded as making in documents, the evidence she gave at the hearing and the argumentative opinionated way in which she dealt with cross examination of her and by her. She had worked at the home for over 15 years under different owners and managers. She showed no respect for Ms Teasdale or Ms Terry to whom she was subordinate. She said during her appeal when asked why they did not like and why they would not give a correct account "Because I get on with it and do it." On 27 April if the claimant, who had been given a job by Ms Teasdale of bringing residents to the dining room

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> **and making up beds, had done what she was told , no less and no more, or if she had nothing to do had asked Ms Teasdale or Ms Terry if they would like her to do the charts of the five she had helped, or at the least told one of them she was going to do it , this case would not have arisen. In short, the claimant by her actions made it difficult for Ms Teasdale and Ms Terry to manage her.**
>
> **4.11. Whilst in the claim of ordinary unfair dismissal, the dismissal is plainly unfair both substantively and procedurally, we do not find on the available evidence the making of protected disclosures was the principal reason in the mind of Ms Dowson when she took her decision, still less in the mind of Ms Ward when she rejected the appeal. Applying Jhuti, although it is a possibility the reason Ms Dowson acted as she did was because she was aware of the claimant had made protected disclosures, there is no positive indication that was her motivation or her principal reason. We do not think Ms Teasdale would have told Ms Dowson why she found the claimant so difficult to manage.**
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> **4.12. The claimant made disclosures to Ms Dowson and Ms Ward during their hearings. The law is meant to prohibit detrimental treatment on the ground of the making of the disclosure, not to enable an employee to render herself immune from disciplinary action. A small but significant minority of claimants use the protection given to whistleblowers in a cynical attempt to defeat legitimate disciplinary allegations. It is the respondent's case the claimant did so but we conclude she did not. However, we accept Ms Dowson and Ms Ward thought she was and that is why they ignored her disclosures. They dismissed her despite the fact she was making them, not because she was.**

The Appeal

8. This appeal was considered at the sift stage by the President of the Employment Appeal Tribunal, Choudhury J; who permitted the appeal to proceed on one ground only, for the following reasons:

> **Paragraph 5 of the Grounds of Appeal suggests that the Tribunal decided the issue of whistleblowing detriment on the basis of a correlation rather than causation.** I **do not consider that the extract from paragraph 4.5 of the Tribunal's Reasons relied upon represents the entirety of the Tribunal's reasoning on the point, especially as the Tribunal asks itself at the end of that paragraph why the detriments occurred. However, I do consider it to be arguable that the Tribunal did not in fact go on to complete its analysis as to the question of causation.**

The Law

9. The Tribunal carefully directed itself as to the relevant law. Much of the law relevant to this appeal is uncontroversial and can be taken from the Tribunal's analysis. At paragraph 2.8 the Tribunal set out the relevant provisions of s47B Employment Rights Act 1996 ("ERA 1996"):

2.8. Section 47B includes

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done –

(a) by another worker of W's employer in the course of that other worker's employment,
…
(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer."

10. The Tribunal considered the burden of proof provision in section 48 ERA 1996:

2.9. Section 48 adds

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B."

(2) On (such a complaint) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

11. The Tribunal correctly directed itself as to the test for causation in protected disclosure detriment cases at para 2.11:

2.11. In s47B, one is not looking for the principal reason, but an effective cause. Elias LJ said in *Fecitt v NHS Manchester [2012] ICR 372, s 47B will be infringed "if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower"*

12. In the appeal the Respondent relies on **London Borough of Harrow v Knight** [2003] IRLR 140, for the fairly self-evident proposition that to establish that the Respondent subjected the Claimant to a detriment done on the ground of having made a protected disclosure, the Tribunal had to find that: (i) the claimant had made a protected disclosure(s); (ii) the claimant had suffered some identifiable detriment(s); (iii) the respondent had "done" an act or deliberate failure to act (for short, an "act or omission") by which the claimant had been "subjected to" that detriment; and (iv) the act or omission had been done by the respondent "on the ground that" the claimant had made the protected disclosure identified at (i).

13. In analysing the reasoning of the Employment Tribunal I have considered the statement by Sedley LJ at paragraph 26 of **Anya v University of Oxford** [2001] ICR 847:

> **"The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues."**

The Appeal

14. The Respondent accepts that the Tribunal found that the Claimant had made a number of protected disclosures. The Respondent accepts that the Tribunal determined that the Respondent had done acts by which the Claimant had been subject to two detriments (although properly analysed there are probably three). The appeal rests on the contention that the Tribunal "failed to consider whether the acts done by the Respondent were done on the grounds that the Claimant had made the protected disclosure."

15. With considerable regret, I conclude that the Tribunal did not determine the causation issue in respect of the protected disclosure detriment claim. The Tribunal did carefully consider the law of causation in detriment claims including the burden of proof provisions. The Tribunal held at para. 4.9 "the Employment Judge explained in the absence of any other explanation we could be driven to the conclusion it must have been, at least in part, the making of protected disclosures which caused them to act as they did, because under section 48 the burden is on the employer to show it was not". This clearly suggested the possibility of the Tribunal concluding that there was sufficient evidence to establish the possibility that the detriments had been done on the ground that the Claimant had made the protected disclosures (a prima facie case), that the Respondent had failed to establish some other reason why the Respondent had subject the

Claimant to the detriments, and that on a proper consideration of the evidence it should conclude that the making of the protected disclosures was a material cause of that treatment. The Tribunal also recorded that "We conclude Ms Teasdale and Ms Terry did not like the claimant and part of the reason was she raised protected disclosures". However, the Judgment thereafter goes on to consider the dismissal claim. It does so without any express conclusion on, or further reasoning in respect of, the detriment claim. This may well be an oversight in this otherwise carefully considered Judgment; but there is insufficient for me to infer that a conclusion was reached on the causation issue, or to draw out the full reasoning for any such conclusion. Accordingly, the matter must be remitted for a specific determination on the question of whether the detriments found by the Tribunal were caused in material part by the protected disclosures that were established. The proper analysis of the burden of proof is not entirely straightforward; Mr Kohanzad referred briefly in oral argument to **Serco Ltd v Dahou** [2017] IRLR 81 in which similar provisions were considered in the context of trade union detriment claims, and to the judgment of Simler J in **International Petroleum Ltd and others v Osipov and others** UKEAT/0058/17/DA, UKEAT/0229/16/DA; but without making detailed submissions, and without the Claimant who did not attend, because she was content to rely on the reasoning of the Tribunal, having an opportunity to respond. That will be a matter to be investigated on remission. When Mr Kohanzad makes submissions on the point on remission he will need to ensure that all relevant authorities are put before the Tribunal.

16. I raised with Mr Kohanzad during his submission the determination of the Supreme Court in **Royal Mail Group Ltd v Jhuti** [2020] ICR 731 that if a person in the hierarchy of responsibility above an employee determines that, for reason A, the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts, it is the court's duty to penetrate through the invention rather than to allow it also

to infect its own determination. I raised the possibility that if he was successful in his appeal, the issue of causation might be remitted in toto, including whether the "detriment" of "sending of a one sided investigation to Ms Dowson" should properly be analysed as part of the dismissal. I have concluded that this would be inappropriate because 1) the argument that the Claimant was not entitled to rely on the "one sided investigation" as a detriment was rejected by the Employment Tribunal on reconsideration, 2) a ground of appeal on that basis was not permitted to proceed, and 3) there was no cross appeal seeking to raise a ground that the investigation should have been treated as part of the dismissal claim.

Disposal

17. I consider it is appropriate for the matter to be remitted for consideration by the same Employment Tribunal if practicable, having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763: it is proportionate to do so as this is a relatively small part of an otherwise comprehensive judgement upon which only an award of injury to feelings of £5,000 turns, there will be no need to hear further evidence, this was far from a totally flawed decision, there is no possible issue of bias or partiality and there can be no doubt as to the tribunal's professionalism that would cause a concern that it would seek to take a second bite of the cherry. The delay that will be caused by the remission is regrettable, but does not outweigh the other factors. In submissions Mr Kohanzad, for the Respondent, stated that they accept that remission should be to the same Tribunal.