

Neutral Citation Number: [2023] EAT 127

Case No: EA-2022-SCO-000002-SH

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 26 September 2023

Before :

THE HONOURABLE LORD FAIRLEY

Between :

LINDSAY ANNE MCNICHOLAS

Appellant

- and -

CARE AND LEARNING ALLIANCE

CALA STAFFBANK

Respondents

Mr Hari Menon of the English bar (instructed by Swinburne Maddison LLP) for the
Appellant

Mr Neil McDougall of the Scottish bar (instructed by Jackson Boyd LLP) for the
Respondents

Hearing date: 24 May 2023

JUDGMENT

SUMMARY

Whistleblowing; protected disclosures; compensation; *novus actus interveniens*

The appellant, a qualified teacher, was employed by the respondents. She worked at a nursery operated by the first respondent which provided nursery places for Highland Council. As a result of protected disclosures by the appellant about practices within the nursery, she was subjected to detriments by both respondents. These included *inter alia* a complaint by both respondents to the General Teaching Council for Scotland about the appellant's fitness to teach. The Tribunal found that the complaint to the GTCS was not made by the respondents in good faith. The respondents knew that it was retaliation against the appellant for her disclosures. The respondents' true motive for the GTCS referral was to appease the first respondent's client, Highland Council. The Tribunal concluded, however, that a decision by the GTCS further to investigate the complaint was a *novus actus interveniens* that broke the chain of causation between the detriment of the complaint and the appellant's losses. It accordingly limited its awards for future loss, injury to feelings and psychiatric injury to losses which arose prior to the date of the GTCS decision. It also refused to make any awards for pension loss or legal costs incurred in defending the GTCS proceedings and refused an application for the expenses of the liability hearing before the Tribunal. The appellant submitted that the Tribunal erred in law in its conclusion about *novus actus*.

Held: The Tribunal erred in law in concluding that the decision by the GTCS further to investigate the referral to it by the respondents was a *novus actus interveniens*. On the facts found by it, that conclusion was not open to it. The appeal was allowed and the case remitted to the same Tribunal to re-assess compensation and the application for expenses.

THE HONOURABLE LORD FAIRLEY:

Introduction

1. This is an appeal by Lindsay Ann McNicholas (“the appellant”). It concerns the Judgment of an Employment Tribunal dated 29 November 2021 following a remedies hearing held in May and November 2021.

Factual background

2. Between 1986 and 2016 the appellant worked in England as a teacher. In 2016 she moved to live in Inverness where she began working for the second respondent under an agreement for casual work. In that role she was employed to provide relief staffing and support in early years childcare and one-to-one support for children with Autistic Spectrum Disorder.
3. In 2017, the appellant obtained further employment with the first respondent as a Family Support Practitioner.
4. The respondents are related organisations. The second respondent is a wholly owned subsidiary of the first respondent. The second respondent’s principal client is Highland Council. The first respondent operates a nursery which provides nursery places to the Council.
5. From around October 2017, the appellant continued to work as an employee for both respondents under the terms of her contracts with them.
6. In June 2018, the appellant presented a claim form to the Employment Tribunal. The basis of her claim was that she had been subjected to detriments by both respondents as a result of having made protected disclosures.

The Liability Hearing

7. Following a liability hearing in July and November 2019, the Employment Tribunal issued a liability Judgment (“LJ”). It found that the appellant had indeed made protected disclosures and that she had been subjected to detriments by both respondents as a result. No challenge is taken in this appeal to the Tribunal’s conclusions on liability and it is not therefore necessary to rehearse the protected disclosures in any detail. In general terms, however, they concerned arrangements for the care of a child with autism who attended the nursery run by the first respondent which provided nursery places to Highland Council.
8. The Employment Tribunal found five specific detriments to have been established. It found *inter alia* that the first respondent had forced the appellant to resign, that the second respondent had dismissed her in a way that was automatically unfair, and that both respondents had made a complaint to the General Teaching Council for Scotland about her fitness to teach.
9. The Tribunal found that the referral to the GTCS arose because of complaints made against the appellant by members of staff within the first respondent’s nursery. The Tribunal doubted that there was “any real or genuine substance” to the complaints against the appellant (LJ at para 129). It took the view that the complaints were “retaliation” against her (LJ, paras 82 and 130), which were “driven by the disclosures” (LJ, para 142), and that this was known by the respondents at the time of the GTCS referral. The Tribunal found that the true motive for the GTCS referral was to appease the first respondent’s client, Highland Council. Specifically, the Tribunal concluded that:

“We have no doubt that there was a joint decision taken to make

[the GTCS referral] and that it was not done in good faith but as a consequence of the disclosures made and as an attempt to pacify [Highland Council] and discredit the [appellant’s] observations of the practices she found at the nursery which we found wholly credible.” (LJ, para 142)

10. As a consequence of the detriments to which she was subjected, the appellant’s health suffered and she was prescribed medication for stress and depression. She was referred by her GP for counselling. She moved back to live in England because she could no longer afford to live in Inverness.

The Remedies Hearing

11. Following a remedies hearing held in May and November of 2021, the Employment Tribunal issued a remedies Judgment (“RJ”). It made awards against both respondents for past and future loss, injury to feelings and psychiatric injury. It limited the awards for future loss, injury to feelings and psychiatric injury to losses which arose prior to a date in late February 2019 when the GTCS decided further to investigate the fitness to teach referral by the respondents. The Tribunal reasoned that the decision by the GTCS further to investigate the referral was a *novus actus interveniens* which broke the chain of causation between the respondents’ detrimental action and her loss.
12. The Tribunal’s analysis of the issue of *novus actus* is seen in the following passages of its reasons for the remedies Judgment:

“Whatever the Tribunal’s views on the merits of the evidence (which were set out in the merits Judgment) [the GTCS] must have been persuaded that there was sufficient material before them to proceed after they had conducted their own interim investigation on 21 February 2019. It was in their competence to lawfully act in that way presumably after an assessment of the prima facie case against the claimant” (RJ, para 28)

“Although a referral may not be made in good faith that does not

necessarily mean that there is no factual basis allying (*sic*) the referral to be ultimately upheld. The evidence that led to us finding a detriment was the claimant's evidence that the respondent would know that such a referral itself would be damaging. If the referral had been disposed of in the claimant's favour then she would have been in a stronger position to succeed in this argument. We were not asked to sist the case to await the determination of the referral so we must reach our decision on the basis of what is before us which is that the current 'live' referral has a continuing effect on the claimant's ability to put these events behind her and for her condition to resolve." (RJ, para 29)

"Our view was that ending the causation of loss at the date of referral was not the correct approach given that the merits Judgment had held that the referral itself was a detriment. A better approach we concluded was to look at the point at which the continuation of the complaint was a matter in the hands of the GTCS. That properly seems to be in February [2019] after they had completed an interim report and concluded that the matter should proceed. That decision is in our view significant and is the intervening act that halts the chain of causation...We have no doubt that the continuing GTCS referral had had a significant effect on the claimant's health and mental well-being but that cannot be fully laid at the door of the respondents." (RJ, para 42)"

13. Due to its conclusion about *novus actus*, the Tribunal also declined to make any award to the appellant in respect of pension loss or for her legal expenses in defending the GTCS proceedings. It also refused her application for expenses in relation to the liability hearing.

Grounds of appeal

14. The appellant submits that the Employment Tribunal's conclusion that the decision by the GTCS was a *novus actus interveniens* which broke the chain of causation was perverse / wrong in law (Ground 1). She accordingly seeks to have paragraph (Three) of the remedies Judgment set aside and thereafter to have the case remitted to the same Tribunal (i) to re-assess its awards for future loss, injury to feelings and psychiatric injury; (ii) to make awards for pension loss (Ground 4)

and legal expenses in respect of the GTCS proceedings (Ground 2); and (iii) to make an award of expenses in respect of the liability hearing (Ground 3).

15. In addition, the appellant submits that the issue of ACAS uplift was not considered by the Tribunal (Ground 5), and that it failed to hold over the issue of grossing up for tax as had been agreed between parties at the remedies hearing (Ground 6). Grounds 5 and 6 are conceded by the respondents who agree that, at the very least, those matters require to be remitted to the Tribunal.

Relevant law

16. The rationale for the principle that a *novus actus interveniens* breaks the chain of causation is fairness. It would be unfair to hold a wrongdoer liable for loss caused to the claimant not by the wrongful act of the wrongdoer but by some independent, supervening cause for which the wrongdoer is not responsible (see **Corr v. IBC Vehicles Limited** [2008] 1 AC 884 per Lord Bingham of Cornhill at para. 15).
17. A *novus actus interveniens* must be the sole effective cause of the loss, damage or injury suffered such that the prior wrongdoing, whilst it might still be a 'but for' cause, has been eclipsed so that it is not an effective or contributory cause in law (**Clay v. TUI Ltd** [2018] EWCA Civ 1177; [2018] 4 All ER 672). Where the wrongdoer's conduct remains an effective cause of the loss, the chain of causation will not usually be broken (**Stacey v. Autosleeper Group Ltd** [2014] EWCA Civ 1551)
18. If the act of a third party is a natural and reasonable consequence of the wrongful act this will not interrupt the chain of causation (**Scott's Trustees v. Moss** (1889) 17 R 32; **Smith v Littlewoods Organisation** 1982 SLT 267 at 268).

Analysis and decision

19. I agree that the Tribunal erred in law in concluding that the decision by the GTCS further to investigate the referral to it by the respondents was a *novus actus interveniens*. On the facts found by it, that conclusion was not open to it.
20. On the face of matters, the decision by the third party – the GTCS – further to investigate the allegations was not an independent, supervening cause of loss. Rather, it was a natural and reasonable consequence of the respondents' wrongful act. The wrongful act remained the effective cause of the appellant's loss.
21. The Tribunal's conclusion on *novus actus* is also irreconcilable with its earlier findings in the liability Judgment that the joint GTCS referral by the respondents: (i) was not made in good faith; (ii) was based on allegations that probably had no real or genuine substance; (iii) was – as the respondents knew at the time of the referral – retaliation against the appellant for having made the protected disclosures about practices within the nursery; and (iv) was motivated by a desire to discredit the appellant and to appease Highland Council. On those factual findings the referral was, in law, malicious in that it was made by the respondents without proper cause and for improper purposes.
22. The Tribunal was, perhaps understandably, distracted by its uncertainty over what the final outcome of the GTCS proceedings would be and by its conclusions about the competence of the decision of the GTCS further to investigate the referral. Neither of those considerations was, however, a relevant or sufficient factual basis for concluding that the chain of causation was broken in February 2019.

Disposal

23. I will therefore set aside paragraph (Three) of the Tribunal's Judgment of 29 November 2021 and remit the case to the same Tribunal for it to:
 - a. re-assess the heads of future loss, injury to feelings and psychiatric injury;
 - b. re-consider the claims for pension loss and legal costs incurred in defending the GTCS proceedings;
 - c. re-consider the application for expenses in respect of the liability hearing;
 - d. consider the issue of an ACAS uplift; and
 - e. consider the issue of grossing up for tax.

24. Given the time that has passed since the Tribunal last considered remedy in 2021, it may need to hear further evidence. In the course of the appeal hearing I was told, for example, that the GTCS proceedings have now apparently been resolved in the appellant's favour.