Mr O A Ifere v North Cumbria University Teachings Hospitals Trust

Appeal No. UKEAT/0073/17/DM

Employment Appeal Tribunal

3 August 2017

2017 WL 04225112

Before His Honour Judge David Richardson (Sitting Alone)

At the Tribunal On 3 August 2017

Representation

For the Appellant Dr O Ogunsanya (Solicitor Advocate) Taylor Wood Solicitors 150 Minories London EC3N 1LS.
For the Respondent Ms Kirti Jeram (of Counsel) Instructed by: DAC Beachcroft LLP Wellbar Central 36 Gallowgate Newcastle Upon Tyne Tyne and Wear NE1 4TD.

RACE DISCRIMINATION - Other losses

In the course of assessing the Claimant's compensation for unlawful victimisation by the Respondent, the Employment Tribunal was required to consider whether it should award legal costs which the Claimant had incurred in defending proceedings before the Interim Orders Panel of the Medical Practitioners Tribunal Service. In its Liability Judgment and Reasons it had made findings which effectively precluded such an award. In its Remedy Judgment and Reasons it effectively reconsidered those findings and awarded compensation which reflected those legal costs. But, accepting that the Respondent had not understood it intended to take this course and had not made submissions upon it, the Employment Tribunal reconsidered the Liability Judgment; and revoked that part of the award. The Claimant appealed.

Held. The Employment Tribunal did not err in law in revoking that part of the award which required the Respondent to pay a sum to reflect the legal costs which the Claimant had incurred in defending proceedings before the Interim Orders Panel of the Medical Practitioners Tribunal Service.

Judgment

His Honour Judge David Richardson

1 This is an appeal by Dr Ochonu Akinwunmi Ifere ("the Claimant") against a Judgment of the Employment Tribunal ("the ET") - Employment Judge Jones, Mr Roberts and Mr Partington - dated 3 October 2016. By its Judgment, the ET reconsidered one aspect of an award of compensation which it had made in favour of the Claimant against the North Cumbria University Teaching Hospital NHS Trust ("the Respondent"). It revoked that part of the award which required the Respondent to pay a sum to reflect the legal costs which the Claimant had incurred in defending proceedings before the Interim Orders Panel of the Medical Practitioners Tribunal Service.

The Essential Facts

2 The Claimant was employed by the Respondent as a Consultant Paediatrician from 3 April 2006 until his resignation by letter dated 30 April 2014. As we shall see, the ET found that at the time of his resignation the Respondent was in fundamental breach of its contract with him. He was entitled to resign and leave.

3 During his employment the Claimant was involved in two clinical incidents concerned with the resuscitation of babies in neonatal care which led to concerns and criticisms about his abilities in that area. The incidents took place on 1 June 2013 and 19 October 2013. Both babies recovered. The Respondent instituted an investigation by Dr Cardwell. On 29 May 2014, Dr Cardwell sent a draft report to the Respondent's Medical Director, Dr Rushmer, which was critical of the Claimant's clinical

performance in both cases. The Claimant had resigned with notice. His notice expired on 31 May 2014.

4 On 3 June 2014, Dr Rushmer wrote letters to the National Clinical Advisory Service ("NCAS") and to the General Medical Council ("GMC"). He informed them of the incidents and gave a summary. He said the investigation was incomplete. He portrayed the Claimant as someone who had not adequately engaged with the investigation. In fact the Claimant, who was ill, responded to the investigation by 10 June in accordance with a deadline he had been given.

5 The letters which Dr Rushmer wrote resulted in a hearing on 11 July before the Interim Orders Panel. That Panel, as its name suggests, is not concerned to make definitive findings about the capability of a practitioner. It is concerned to assess risk on a provisional basis. At the hearing, nine conditions were imposed on the Claimant's right to practice. These included a requirement that he work only in the National Health Service; that he work only under the supervision of a named Consultant; and that he inform any prospective employer or contracting body of the conditions. This decision was the subject of a statutory appeal to the High Court, which was unsuccessful. The conditions were continued at a further hearing on 22 December 2014. At all these hearings the Claimant was legally represented.

6 The Claimant, in spite of the conditions, was successful in obtaining locum work as an Acute Paediatrician almost immediately. In a report produced in September 2014, his supervisor, Dr Cade, wrote positively about him. He said that the Claimant was "a very thorough, cautious and safe paediatric consultant who easily asks for support and help."

The Liability Judgment and Reasons

7 In February 2015 the ET heard liability issues in proceedings which the Claimant had brought against the Respondent. In a Liability Judgment dated 9 April 2015, supported by impressive Reasons, the ET upheld the Claimant's claims in two respects.

8 Firstly, the ET found that the Claimant had been unfairly and constructively dismissed. Its Reasons will be found in paragraphs 145 to 162. The Respondent had repeatedly failed to investigate or address his complaints of bullying and discrimination. It had treated what were really training issues as disciplinary matters. It had not dealt with his submissions about back pay. These matters were still outstanding when he resigned.

9 Secondly, of central importance to this appeal, the ET found that the Respondent's Dr Rushmer was guilty of victimisation. Its key findings are at paragraphs 172 to 182. It found that Dr Rushmer had given an inaccurate portrayal of the Claimant's cooperation with the investigation accusing him of failing to engage adequately with it. It found this amounted to victimisation:

> "181. We are satisfied that the circumstances in which Dr Rushmer incorrectly portrayed the claimant's input to the Cardwell investigation to the NCAS and GMC, when the discrimination proceedings were not only in his mind but referred to by him establish facts from which we could decide that the bringing of the discrimination proceedings were the reason for these inaccurate representations. It is sufficient for them to be a contributory reason and even a subconscious one.
>
> 182. For the reason set out above, we have not accepted Dr Rushmer's explanation as to why he had alleged to others that the claimant had not cooperated. He provided a partial and misleading impression. The respondent has not discharged the burden of proof under Section 136 , to establish that the bringing of the proceedings was not a reason for the inaccurate portrayal of the claimant's cooperation. Allegations twenty four, thirty two, thirty three and thirty five are well founded."

10 It reflected this finding in its Judgment in the following way:

"2. The respondent victimised the claimant by its medical director writing to NCAS and GMC, providing a partial history and inaccurately representing that the claimant had not engaged adequately with the investigation into concerns relating to his clinical skills thereby undermining his integrity and reputation."

11 The criticisms which the ET upheld included a criticism that the Respondent "failed to forward the Claimant's response to the alleged incident" (see allegation 35, upheld in paragraph 182 of the ET's Reasons).

12 It is important to note, however, that the ET did not find that Dr Cardwell's investigation, or the referral to NCAS or the GMC, was in any way unlawful. It made no finding that they were discriminatory, in breach of contract, or unlawful discriminate victimisation. It dealt with Dr Cardwell's report in the context of the constructive dismissal claim. It said that his discussion about the two cases and proposal for further training was "responsible and reasonable" (see paragraph 158). It had one criticism of Dr Cardwell, which it set out in paragraph 159, but overall it found his conclusions permissible:

"159. It is fair to point out that the final report of Dr Cardwell, in respect of case two, seems to be based upon a misunderstanding, namely that all consultants within the department were familiar with, and were professionally required to be familiar with, the Seldinger technique. The reference to this as a core skill which had been in use in the department for two to three years gives an unfair impression. From what Dr Lee said it was perfectly acceptable for a consultant paediatrician to adopt an alternative method to drain a pneumothorax. In West Cumberland the Seldinger technique was not used by any of the consultants and in Carlisle it had never been used by some. Dr Cardwell accepted that point when put to him in evidence. He also accepted the absence of any neonatal chest drains would have presented a significant problem to other consultants than the claimant. That is not to say there were not grounds for Dr Cardwell to propose training in this technique, given that, as he made clear, the situation could have been very serious if Dr Glyn Jones had not been able to attend. To require the consultants to have a broader range of skills is not to acquit the respondent of its failure to ensure that other, proper equipment is available. Moreover the criticisms Dr Cardwell made in respect of case one were perfectly permissible. It is not fair to underplay them by reference to an earlier investigation by Dr Lee. Dr Cardwell's investigation considered an earlier part of the incident to that of Dr Lee and he was fully entitled to prefer the account of the nurses to that of the claimant. Having undertaken further training the claimant is now displaying skills in these areas."

13 The ET found that it was proper for Dr Rushmer to refer to NCAS and the GMC the clinical concerns arising from Dr Cardwell's report (see paragraph 173). It then set out the following Reasons, which have particular importance to this appeal:

"176. In her supplemental submissions Ms Jeram suggested that the claimant had not established a detriment. We accept that the claimant would and should have been referred to the NCAS and GMC as a consequence of the Cardwell report which had been written by Dr Cardwell in good faith and on the information as he saw it (albeit we have taken a slightly different view as to case two). The advice of NCAS was clear. We do not consider that Dr Rushmer can be criticised for taking that advice. Indeed he could well have been criticised for not having done so. We have not overlooked the claimant's argument that NCAS only advised as they did because of the skewed and inaccurate picture provided to them by Dr Rushmer, an account we have, in part, accepted. The claimant's case, however, does not give proper recognition to the concerns which had genuinely been held by Dr Cardwell and the circumstances and timing of his departure pending the conclusion of the investigation and his anticipated search for work elsewhere.

177. We are satisfied that the interim orders panel imposed the conditions to practice as a consequence of the Cardwell report and the arguments advanced to them on behalf of the GMC and having heard the representations of the claimant's solicitor. At that hearing the solicitor was able to point out the claimant's account of the incident and correct the misimpression given by Dr Rushmer in his referral letter. The interim orders panel summarised the arguments carefully. It is clear that it was the clinical concerns, not the alleged lack of cooperation of the claimant, which was the basis for the imposition of the order."

14 Given those findings the costs of legal representation before the Interim Orders Panel would be difficult to claim. The ET did not find that the referral to NCAS and the GMC was victimisation. On the contrary, the ET accepted that the Claimant would and should have been referred, and that the imposition of conditions by the Panel was because of clinical concerns not the alleged lack of cooperation.

Revocation of the Order

15 Following the Judgment and Reasons of the ET, there was a further hearing before the Panel on 21 May 2015. On the application of the GMC, the conditions which had been imposed were revoked. Counsel for the GMC said:

"… As this Panel no doubt appreciates, having reviewed the bundle in advance, the doctor recently had a hearing before the Employment Tribunal. Findings made by the tribunal were very much in the doctor's favour, and those findings in turn have undermined and cast doubt on the reliability of much of the evidence upon which the referral initially to the General Medical Council and then in turn to the Interim Orders Panel was first made. The concern raised in the expert report that the doctor's practice was seriously below the standard to be expected has been demonstrated to have been based on inaccurate underlying information as originally provided to us by the Trust who in turn were criticised by the Employment Tribunal."

16 There were also further positive reports from the Claimant's supervisor, saying he was impressed with the Claimant's conduct and clinical ability.

The Remedy Hearing

17 The Remedy Hearing before the ET took place in September 2015 and January 2016. The ET delivered a Remedy Judgment dated 1 April 2016. In the course of its Reasons, the ET effectively reconsidered the finding at paragraph 177 of its Liability Reasons. It was heavily influenced on the way counsel for the GMC put the case in May 2015. It concluded that its earlier reasoning must have been wrong. It said:

"33. Read together with the subsequent two reports which had separately been prepared by two pairs of case examiners, it is clear that the findings concerning the presentation of a partial picture to the GMC by the respondent including the misrepresentation about the claimant's refusal to engage with the investigation had a pivotal part in the way the GMC went about handling the referral. It is inconceivable that counsel for the GMC would have stated there was no evidence to warrant the maintenance of the conditions, if the clinical concerns of themselves in the Cardwell report gave rise to their imposition, as we had thought. The inaccuracies in Dr Rushmere's referral which amounted to the act of victimisation were clearly of real significance in elevating the clinical concerns to the degree of posing potential risks to the public. It was that which necessitated the imposition of the conditions.

34. We are now satisfied the claimant would not have been subject to conditions or an investigation into his conduct or fitness to practise had the respondent acted lawfully and not victimised the claimant. The apparent support of the independent expert was discarded by

the GMC case examiners as being only a paper based exercise on partial information, and it was that which the respondent place principal reliance upon, on this question.

35. In short we are satisfied that the new evidence is so compelling that it wholly undermines our earlier finding. Because this evidence could not have been adduced at that earlier stage, the interests of justice necessitate a correction of paragraph 177 of our earlier decision. We are satisfied that the claimant was put to the cost of defending the GMC proceedings, including the High Court application, in order to retain and retrieve his career. Those legal expenses were a loss which arose from the unlawful actions of the respondent and would not have been incurred otherwise."

18 Hence it awarded £41,331.46 legal costs.

The Reconsideration Judgment

19 The Respondent applied to the ET to reconsider its Judgment. Ms Jeram, who appeared then as now for the Respondent, had understood that paragraph 177 of the Liability Reasons would stand in the absence of an application for reconsideration, hence she had not made representations on the issue. The ET accepted that this was the case and ordered a hearing for reconsideration (see its Judgment dated 4 July 2016, especially paragraphs 29 to 32).

20 The Reconsideration Hearing took place on 14 September 2016. The ET approached the issue afresh, paying close attention to the transcripts of the three hearings before the Interim Orders Panel, and to other documents and correspondence concerning those proceedings.

21 The ET, in particular, quoted the conclusion of the first Interim Orders Panel:

"The panel concluded that an interim order is necessary. It considered that although there may have been systemic failures in the Trust the report from the Trust was critical of your clinical care. The report provided by Dr Lee in relation to the first incident also raised some criticisms of your practice. The panel therefore concluded that patient safety could be adversely affected if no order were imposed. Further it concluded that public confidence in the profession could be seriously undermined if no order were imposed given the allegations regarding your performance and the vulnerability of the patients."

22 In its discussions and conclusions, the ET referred to leading cases, including *Essa v Laing Ltd [2004] ICR 746* and *Abbey National plc v Chagger [2009] ICR 624* , and said the following:

"15. The claimant must establish, on a balance of probabilities, that there was a causal connection between the unlawful act and the loss. Such losses must flow naturally and directly from the act of discrimination. The loss need not be reasonably foreseeable. In Chagger the Court of Appeal held the Tribunal should consider what would have happened in the absence of the discriminatory act; for example how would a complainant's career have progressed had he not been subjected to the unlawful discrimination. In some cases that can involve quantification of loss by reference to a chance.

…

18. Critical to our determination as to whether or not the claimant can recover the costs of defending and challenging the proceedings is whether the MPTS would not, or might not, have imposed the same interim order in the absence of the allegation of failure to engage. If an order would have been imposed for the issues relating to the clinical concerns alone the claimant would have incurred the legal expenses regardless of the fact he had been subject to victimisation. It would only be if the decision of the MPTS to impose the conditions was influenced by the allegation of a failure to engage that the legal costs which ensued in defending those proceedings would flow from the discriminatory act."

23 In the event, the ET concluded as follows:

> "23. On consideration of the greater materials now available we are satisfied, for the reasons the original MPTS gave in July 2014, that the failure to engage was not determinative of its decision to impose conditions; indeed it played no part in it at all. Although it had been emphasised by Mr Ford, his submission was never accepted by the MPTS and that argument was not resurrected by Mr Cross QC at the December 2014 hearing. The inferences we had drawn in our Remedy hearing to reach the opposite view, from the way in which the GMC sought the removal of the conditions and the criticisms made by the subsequent case examiners, have been undermined by the fuller picture revealed in the transcripts and correspondence we have now seen. The clinical concerns warranted a referral to the MPTS interim orders panel by the case examiner of themselves and were the reason the order was imposed. Albeit one case of the two was based on factually incorrect information, that was not due to discriminatory factors."

Legal Principles

24 Compensation for unlawful victimisation is governed by section 119 of the Equality Act 2010 applied to proceedings before ETs by section 124(6) . The measure of damages is the measure which would apply to proceedings in tort (see section 119(2)). Leading cases are *Essa v Laing Ltd [2004] ICR 746* and *Abbey National v Chagger* in the Employment Appeal Tribunal [2009] ICR 624 and the Court of Appeal [2010] ICR 397. The measure of damages is the loss flowing directly and naturally from the act of discrimination or victimisation (see *Chagger* (Court of Appeal) at paragraphs 11 to 12). There is no requirement that the loss be reasonably foreseeable (see *Essa* at paragraph 37). It is necessary to ask what would have happened if there had been no unlawful discrimination (see *Chagger* (Court of Appeal) at paragraph 57). The loss must flow from the unlawful conduct found which is, therefore, the starting point for any inquiry (see *Chagger* (Employment Appeal Tribunal) at paragraph 88).

The Appeal

25 I will begin with the grounds of appeal, which are to be found in the Notice of Appeal, and turn later to some further submissions which Dr Ogunsanya - who has throughout appeared for the Claimant - made to me today.

26 The first ground of appeal that it was procedurally irregular to order a reconsideration at all is no longer pursued by Dr Ogunsanya. He is plainly correct not to pursue this point. Once the ET concluded, as it did, that the Respondent had not had a fair opportunity to make submissions on the question, it was right to order a reconsideration.

27 The second ground is an argument that the ET took too narrow a view of the Claimant's case. The detriment was the referral of the Claimant by the GMC case examiner on the basis of false representations. The false representations were not merely failure to cooperate by the Claimant, but also false and inaccurate clinical concerns in the Cardwell report.

28 In my judgment, this ground must fail. As we have seen, the ET did not find that the Cardwell report was an act of discrimination or victimisation. The ET would have been wrong in law, given its findings in the Liability Judgment, to award compensation on the basis that the Cardwell report, or any of the conclusions in it, amounted to unlawful conduct. On the findings of the ET, the Claimant was not entitled to be compensated on the footing that the Cardwell report was inaccurate and formed a part of the unlawful conduct. On basic principles the starting point for an award of compensation must be the unlawful conduct actually found by the ET. It did not find the Cardwell report, or its conclusions, to be unlawful conduct. There is, therefore, in my judgment, no error of law of the kind which is asserted in ground 2 of the Notice of Appeal.

29 The third ground in the Notice of Appeal is that there was no evidential basis for the ET to reverse itself again and restore the finding at paragraph 177 of its Reasons. It was bound in effect to uphold findings in the Remedy Reasons. This ground, too, must be rejected. The ET had ample material on which to reach its conclusion. The conclusion could not possibly be described as perverse. It was bound, having correctly ordered a reconsideration, to consider the matter afresh as it did.

30 The grounds of appeal, therefore, in my judgment, do not establish any error of law on the part of the ET. I should, however, notice three arguments which Dr Ogunsanya has put forward today.

31 Firstly, he argues that the ET ought to have concentrated on the decision by the case examiner to refer the matter to the Interim Orders Panel at all. The costs of the first hearing were occasioned by this decision and everything flowed from this decision. Up to a point, I agree with this submission. The ET (in paragraph 18 of its Reasons) asked the question whether the decision of the NPTS to impose the conditions was influenced by the allegations of a failure to engage. This was an important question to ask and answer, so far as costs after that date are concerned, but it would also be appropriate to ask whether the decision to refer the matter to the Interim Orders Panel at all was caused by the allegations of failure to engage.

32 Secondly, Dr Ogunsanya refers to the finding that the Respondent failed to forward the written submissions of the Claimant to the GMC or to NCAS. He suggests that this is a factor left out of account by the ET when it considered the case and that it might particularly impact on a decision of the case examiner.

33 I am very doubtful whether the case was ever argued this way below (and that I think it is why it is not found in the Notice of Appeal). But, in any event, I consider that the findings of the ET sufficiently answer it. It found that the clinical concerns warranted a referral to the Interim Panel by the case examiner of themselves (see paragraph 25 of the ET's Reasons). The case examiner's task was only to engage in an examination of the papers to see whether the threshold for passing the matter to the Panel was satisfied. Given that the Panel concluded, as it plainly did, that the clinical concerns alone were sufficient to impose conditions, it is inevitable that the ET found that the clinical concerns warranted a referral to the Panel.

34 This leaves one final matter. In his skeleton argument and his submissions to me, Dr Ogunsanya has sought to draw a parallel between this case and cases of malicious prosecution. He submits that a remedy must be found for the deficiencies of the Respondent including the Cardwell report. He refers me to *Martin v Watson [1996] 1 AC 74* and other cases relating to malicious prosecution. This is an ingenious argument; but the correct law for the ET to apply was that which is set out in the decisions of *Essa* and *Chagger* , by reference to section 119 of the Equality Act 2010 . This was the law which the ET applied. It did not fall into error.

35 It follows that despite Dr Ogunsanya's excellent submissions to me, this appeal must be dismissed.

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