Appeal No. UKEAT/0114/18/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 11 January 2019
Judgment Handed Down on 4 July 2019

Before

HIS HONOUR DAVID RICHARDSON

MR P M HUNTER

MR A STANWORTH

Dr J GOSALAKKAL APPELLANT

UNIVERSITY HOSPITALS OF LEICESTER NHS TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS KAREN MOSS (Of Counsel) Direct Public Access
For the Respondent	MR RICHARD POWELL (Of Counsel) Instructed by: Browne Jacobson LLP 15th Floor 6 Bevis Marks Bury Court London EC3A 7BA

SUMMARY

COSTS – Detailed Assessment

1. In conducting a detailed assessment of costs, the Employment Judge misunderstood the degree of overlap between (1) the Claimant's complaints of "whistleblowing" detriment and automatic unfair dismissal, in respect of which an order for costs was made, and (2) the Claimant's other complaints, in particular ordinary unfair dismissal, in respect of which no order for costs was made.

2. In assessing the proportionality of the costs, the Employment Judge relied on the Claimant's schedules claiming in excess of £2 million. These were the documents of a lay person. She ought to have asked herself what was really in issue in the proceedings, and in so deciding should have taken into account the lower and more realistic schedule lodged by the Claimant's representatives at a time when he was represented.

HIS HONOUR DAVID RICHARDSON

1. This is an appeal by Dr Jayprakash Gosalakkal ("the Claimant") against aspects of a judgment of Employment Judge Heap sitting in the Leicester Employment Tribunal dated 13 July 2017. There had been an order for costs against the Claimant in favour of the University Hospitals of Leicester NHS Trust ("the Respondent"). The Employment Judge undertook a detailed assessment of those costs. By her judgment she assessed the costs in the sum of £75,640.86, together with the further sum of £7,290 for the costs of assessment. The hearing of the appeal took place before us in January; but, as we will explain later in this judgment, we gave the parties an opportunity to research and make written submissions on a particular matter. They have done so; and this is our Reserved Judgment.

The background facts

2. The Claimant was employed by the Respondent as a Consultant Paediatric Neurologist with effect from 16 January 2002. He joined a department which had been through a time of difficulty. It was his case that there was a dominant clique of paediatricians loyal to a former consultant who were hostile to him, and that there were serious failings in the Paediatric department concerning which he was bound to speak out. Others, however, considered that he did not engage well, was intolerant of those who disagreed with his views on medical matters, and was prone to raising serious complaints about them if he was ever in conflict with them. On any view relationships within the department were poor. There were complaints and counter-complaints.

3. In 2010 the Respondent commissioned a report into these matters by Dr Gregory, an Assistant Clinical Director. The report highlighted concerns about the Claimant's personal

interactions and communication. It recommended an external specialist review of the Paediatric neurology service and a referral of the Claimant to occupational health. The Claimant was unhappy at the conclusions of this report. He wrote letters to colleagues suggesting that they had made derogatory and dishonest statements about him. He wrote in a Twitter message that for the welfare of paediatric and neurology at Leicester it was necessary to remove the medical director.

4. The Respondent commissioned an independent organisation, NICHE Health and Social Care Consulting, to carry out the review. It covered both questions about the care and treatment of children and about the functioning and effectiveness of the paediatric neurology service. An interim report in January 2011 raised specific concerns about the Claimant. Within a short time of receiving the report the Claimant had reported three of his colleagues to the GMC alleging serious concerns about their clinical practice and professional conduct.

5. On 7 February 2011 the Claimant was excluded from his position. The reasons were: a breakdown in relationships, the Claimant's use of social network sites to make defamatory statements, the continued use of emails in an unacceptable manner and a refusal to engage in a way forward in relation to the NICHE review. The Claimant remained under exclusion during the subsequent months, while final reports were obtained from NICHE and from another organisation, Edgecumbe Health.

6. On 29 July 2011 the Respondent gave the Claimant notice of a disciplinary hearing. There were six allegations against the Claimant. Following a disciplinary hearing on 21 October five of these allegations were upheld. They were as follows.

"Allegation 1.

"Your behaviour has resulted in the breakdown of working relationships with the Trust and with a number of professional colleagues, including paediatric consultants and members of the wider multi-disciplinary team and with your managerial colleagues. This put at risk the provision of high quality safe care to patients.

Allegation 2.

You have used e-mails and electronic communications in an unacceptable manner.

Allegation 3.

You have refused to engage with processes deemed fair and necessary by the Trust to ensure the provision of high quality, safe care for all patients.

Allegation 4.

Since your exclusion from the Trust, you have directly contacted the families of patients in a manner that is likely to cause them anxiety and to undermine their confidence in the care and treatment they have received. This has also undermined your clinical colleagues and the Trust.

…..

Allegation 6

You have repeatedly refused to comply with reasonable management requests."

7. The Claimant was summarily dismissed with effect from 1 November 2011. His internal appeal was rejected. It is relevant to note that he moved to the United States of America and obtained alternative employment at a higher salary almost immediately.

The ET proceedings

8. The Claimant brought ET proceedings alleging public interest disclosure detriment (section 47B of the **ERA 1996**), automatic unfair dismissal for making public interest disclosures (section 103A of the **ERA 1996**), "ordinary" unfair dismissal (section 98 of the **ERA 1996**), and wrongful dismissal. The public interest disclosures on which he relied were said to have taken place between 2009 and 2011, the last being the report of his three colleagues to the GMC in January 2011.

9. The proceedings were heard over some 13 days in October and November 2014 by an ET in Leicester EJ Ahmed and members (Mr Stopford and Mr Khan). The Claimant

represented himself. During the course of the hearing it was established that the detriment claims were out of time; they were effectively dismissed at the end of the Claimant's case. The remaining allegations of automatic and ordinary unfair dismissal proceeded.

10. In its Written Judgment with Reasons dated 8 January 2015 the ET dismissed these claims. It found that the alleged protected disclosures did not qualify for protection for various reasons: one was not made, some contained no information, in some cases the Claimant did not have the requisite reasonable belief, and in some he did not make the allegation in good faith. So, the claim of automatic unfair dismissal was not successful: see, for this part of the ET's reasoning, paragraphs 81-113 of its reasons. The ET went on to dismiss the allegation of ordinary unfair dismissal, working through the various allegations which I have already set out, and finding that the Respondent had reached reasonable views after a reasonable investigation and process: see paragraphs 114 – 138 of its reasons. Finally, it expressed its own conclusion that his dismissal for gross misconduct was justified and therefore dismissed the complaint of wrongful dismissal: see paragraph 140.

11. The Respondent made an application for costs against the Claimant. This application was referred to EJ Heap, an EJ with a speciality in detailed assessment, and she conducted the hearings on her own with the concurrence of the parties.

12. She first considered whether in principle an order for costs should be made. By a Judgment dated 5 June 2015 she found that the Claimant had been unreasonable in his conduct of the proceedings relating to his complaints of detriment and automatic unfair dismissal; but she held that no order for costs should be made in respect of the "ordinary" unfair dismissal claim and no costs should be ordered in respect of the period prior to 27 May 2013 when the

A Claimant ought to have reflected on his position following a deposit order. She directed a detailed assessment.

B 13. The effect of this order was summarised by Simler P in the course of a subsequent rule 3(10) Hearing. She said:

> **"14. …. At the detailed assessment the Judge conducting the detailed assessment will have to disentangle those costs that are only attributable to the whistleblowing complaints or only attributable to the ordinary unfair dismissal complaints and if and to the extent that the costs are attributable to both will have to make some form of apportionment…."**

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14. The subsequent detailed assessment proceeded on this basis (as indeed has this appeal). The EJ expressly undertook a disentanglement exercise; and the question whether she did so

D properly is an aspect of this appeal.

The detailed assessment judgment

E 15. Many aspects of the detailed assessment are not in issue on this appeal. The grounds of appeal mainly focus on disentanglement and proportionality.

F 16. The EJ dealt with the disentanglement issue in paragraphs 71 to 86 of her reasons. She quoted the dictum of Simler P which I have already mentioned. She said that the exercise was difficult and that she could only take a relatively broad-brush approach. In so doing she distinguished between the costs of the substantive hearing and the costs of preparation.

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17. In dealing with the costs of the hearing, she said that if the only claim had been ordinary unfair dismissal just three witnesses would have been required for the Respondent: the persons responsible for investigation, dismissal and appeal. Three days for these witnesses would not

H have been disproportionate. The Claimant would still have been cross-examined, albeit more

briefly, and there would still have been submissions. She concluded that a period of no more than 5 days would have been required to hear all the evidence in the ordinary unfair dismissal claim. So, she reduced the cost of attendance of counsel and solicitors by 5 days. See paragraphs 77-80 of her reasons.

18. In the course of making this finding she mentioned the hearing bundles. She said the following within paragraph 79.

> **79. …. I have a copy of the hearing bundles before me, around 600 pages of which appeared to relate purely to the Whistleblowing complaints. That is not to say that there were not more than that, but certainly those 600 pages which pre-date February 2011 can only be said to relate to the Whistleblowing complaints. There would still therefore have been a sizeable bundle for the ordinary unfair dismissal complaint alone.**

19. The EJ went on to consider the costs of preparation: see paragraphs 81-86. In paragraph 82 she said the following.

> **82. Clearly, this was a case where costs would have been incurred if the Claimant had simply pursued the ordinary unfair dismissal claim. There can be no question about that. However, this is a case which generated a significant volume of correspondence. I have before me at least 27 lever arch files representing the original files of Brown Jacobson, which I cannot conceive in any circumstances would have been generated by what should have been an ordinary and straightforward unfair dismissal claim. The matter was clearly seriously complicated by the Whistleblowing claims, not only in respect of hearing time but in regards to disclosure, witnesses and preparation and dealing with the issues generally. It is impossible to go through each activity on the Bill of Costs and attribute them to either one or the other of the Whistleblowing complaints or the ordinary unfair dismissal claim. The two sets of complaints were inextricably linked; not least the fact that the Claimant was alleging automatically unfair dismissal contrary to Section 103A Employment Rights Act 1996. Therefore, in respect of those costs I consider that the only possible way forward is to make an assessment.**

20. The EJ recorded the positions of the parties on this question; they were diametrically opposed. She concluded as follows.

> **85. I have considered both aspects of those submissions carefully. I do not agree that either of them represent an accurate assessment, but the Respondent's position quite clearly is towards the more accurate end of the spectrum. It is very difficult to ascertain without going through each item individually what proportion of costs would have been incurred on the ordinary unfair dismissal claim, but I can certainly say that it would not have been the volume of work which I have before me in the 27 lever arch files. That much is clear and obvious having regard to the issues which were at stake in the unfair dismissal claim and the length of the hearing as I have ascertained it to be.**
>
> **86. I consider in the circumstances that an appropriate percentage reduction in these circumstances of the costs other than those in respect of the hearing is 20% to take account of**

> **the work which I am satisfied would have had to have been done in respect of the unfair dismissal claim in all events. That reduction is set out in the revised Bill of Costs submitted by the Respondent at my direction after the conclusion of the Detailed Assessment hearing and which is annexed to this Judgment.**

21. The EJ also dealt with the question of proportionality in a separate section of her reasons. She made two particular points of relevance to this appeal.

22. Firstly, she referred to the amount of compensation which the Claimant was seeking. She said:

> **98. I observe, however, in relation to the issue of proportionality what was at stake in this case. At one stage of the proceedings, the Claimant was claiming in excess of £2 million. The Claimant sought in the Detailed Assessment to downplay that position and that this was not, as he termed it, "a million dollar claim" but it is clear from the documents before me that that was not a matter that the Claimant recognised at the time as he continued during the course of the proceedings to submit updated schedules of loss in excess of £2 million. These were complex proceedings, with vast numbers of documents, where the Claimant was making his position abundantly clear that if he was to succeed he intended to ask the Tribunal to award very substantial compensation indeed.**

23. Secondly, after commenting on the unusually large amount of correspondence and documentation in the case, she said the following about the complexity of the proceedings.

> **100. I also take into account in dealing with the question of proportionality the complexity of these proceedings. As can be seen by the judgment of Employment Judge Ahmed and members, the Claimant had made a number of allegations of detriment and alleged that he had made a considerable number of protected disclosures. All of those matters had to be dealt with in the context of the Whistleblowing claim. They were matters which the Respondent was perfectly entitled to divest resources into dealing with and, indeed, given what was at stake which it was necessary for them to do.**

24. Although we have concentrated on these parts of the EJ's reasons, we should make it clear that she carried out a conscientious assessment of the various objections made by the Claimant and took some important points which he had not taken. In particular she disallowed from the bill substantial amounts of VAT which ought not to have been included because they were recoverable through the VAT process itself.

Submissions

25. Three grounds of appeal were permitted to proceed to this Full Hearing following a rule 3(10) application before Simler P. On behalf of the Claimant Miss Karen Moss supported each of these grounds. On behalf of Respondent Mr Richard Powell resisted them.

26. Firstly, Miss Moss submitted that the EJ reached what must be a perversely low estimate of the cost of the ordinary unfair dismissal claim because she did not appreciate the extent to which the issues overlapped between ordinary unfair dismissal and automatic unfair dismissal. It would still have been necessary for the Respondent to introduce and explain the complaints made during the period 2009 to 2011 which led to the Claimant's suspension; what happened prior to suspension was part of the Respondent's reason for dismissal. The Claimant would still have alleged that his complaints caused a conspiracy which led to his suspension and subsequent dismissal; so, he would still have been entitled to put his side of the story regarding those matters of complaint. The ET would still have had to deal with these matters both in connection with unfair dismissal and in connection with wrongful dismissal, where the ET was required to reach its own conclusions.

27. It was therefore wrong to say that there would ever have been a "straightforward" unfair dismissal claim (see paragraph 82). On any possible view there would have been a need for more than 5 days. The Respondent additionally called a witness from HR on ordinary unfair dismissal issues; there would still have been substantial reading and submissions; and it is unlikely that the Claimant's evidence would have been reduced to just a small fraction of the time it actually took. It must be perverse to attribute only 20% of the documentation and

preparation to ordinary unfair dismissal when so much of the same ground would have to be covered by this complaint.

28. In response Mr Powell submitted that the EJ expressly considered and took into account the degree of overlap between the issues. Her conclusion cannot be said to have been perverse; the EAT should be particularly slow to interfere with it because she had many materials before her which the EAT does not have. Many of the detriments alleged pre-dated 2011 and had nothing to do with the disciplinary process or dismissal.

29. Secondly, Miss Moss submitted that the EJ in assessing proportionality erred by taking into account what was obviously an unrealistic assessment of value by a litigant in person. The Claimant had obtained alternative employment at a higher salary; realistically there could be no question of a large loss of earnings claim. When he was briefly represented a schedule was put in for £116,425 which included both pecuniary loss and other heads of compensation (this schedule was provided to me after the hearing). The claim for costs was disproportionate to the true amount at stake in the litigation.

30. Mr Powell answered that the schedule for £116,000 was unrealistically low because it did not take account of several heads of loss, including pension loss, income from private practice and reputational damage. The Claimant for these and other reasons put in higher schedules subsequently. The EJ did not err by having regard to the higher schedules.

31. Finally, Miss Moss submitted that the EJ did not have regard to burden of proof: see CPR 44.3. Mr Powell accepts that the EJ did not expressly refer to CPR 44.3, but he says that her reasons are entirely consistent with its application.

32. It will be recalled that the EJ said in paragraph 79 of her Reasons that 600 pages of the bundle which predated 3 February 2010 could only be relevant to the whistleblowing complaint. During submissions it became clear that this remark might be indicative of the EJ's understanding of the degree of overlap between the different complaints. Counsel did not have the bundles from the original hearing. They were given an opportunity to provide the EAT with the relevant index and to make written submissions on this issue following the hearing.

33. In subsequent written submissions Mr Powell accepted that some of the pages within the first 600 were relevant to ordinary unfair dismissal: they had subsequently been part of the material on the basis of which the Respondent was dismissed. He put the number at 137 pages. He suggested, however, that if the bundle as a whole was considered there were 600 pages which were irrelevant to the ordinary unfair dismissal claim. He argued that there was at most a modest degree of error on the part of the Employment Judge; and that her estimate was necessarily broad brush and not perverse.

34. Ms Moss responded that Mr Powell had substantially underestimated the number of documents in the first 600 which were relevant to the ordinary unfair dismissal claim; and in any event the key point was that the EJ's reasoning in this respect was erroneous.

Discussion and conclusions

35. The EAT is empowered only to hear appeals on questions of law. Where, as here, an EJ is required to make an evaluative judgment, a question of law will seldom arise. The EAT will intervene in such a case only if the EJ has approached the task on an erroneous legal principle or reached a conclusion which is unreasoned or perverse. The test for perversity is high: see

Yeboah v Crofton [2002] IRLR 634 at paragraphs 93-95 for what is, in the context of the work of the EAT, a classic statement of the test.

36. The law relating to "ordinary" unfair dismissal is well known. We can summarise it quite briefly. It is for the employer to establish the genuine reason for dismissal: see section 98(1)-(3) of the **ERA 1996**. Once the reason is established the Employment Tribunal's task is set out in section 98(4):

> **"….the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a). depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b). shall be determined in accordance with equity and the substantial merits of the case"**

37. The ET is expected to review all aspects of a dismissal. In a case where the reason for dismissal is in dispute it will have to evaluate and make findings as to the evidence given on this question. If the reason for dismissal relates to conduct, the ET will then consider the investigation, the disciplinary process, the findings made by the employer and the sanction adopted by the employer. It will apply at every stage the standards of a reasonable employer, recognising that in some circumstances there may be a range of ways in which a reasonable employer may act. This is usually called the "range of reasonable responses" test.

38. There are two dangers for an ET to avoid in applying section 98(4). The first danger is that an ET may substitute its own view for that of the employer, forgetting that in some circumstances there will more than one course of action an employer can reasonably take. The second is that the ET may adopt too lax an approach to the "range of reasonable responses" test. The cases are clear: the application of the test must not degenerate to the point where an ET

only intervenes if it finds an employer to have been perverse or (to use a lawyer's phrase) "Wednesbury unreasonable". It is well established that the standard of review is higher than this: an ET is expected to engage carefully with the different aspects of the dismissal process and apply objectively reasonable standards to the section 98(4) question. What is reasonable may also depend on what is at stake. More may be expected of a reasonable employer where the allegations of misconduct or the consequences to the employee, if they are proven, will be particularly serious.

39. We have reached the conclusion that, in attributing only 20% of the preparation work to that which would have had to be done in any event for the ordinary unfair dismissal claim, the EJ has plainly misunderstood the degree of overlap between the whistleblowing complaints and the complaints of unfair dismissal and wrongful dismissal.

40. That she has made this mistake is to our mind at its clearest in her statement that the first 600 pages of the bundle which pre-dated February 2011 could only relate to the whistleblowing complaints. That was not correct, for at least two reasons. Firstly, two disciplinary charges which the Respondent brought were not limited to the period after 3 February 2011. Allegation No 1 in particular rested to a significant extent on matters prior to that date. Secondly, the Claimant did not accept that the Respondent gave a true reason for his dismissal; whether or not the acts concerned were properly defined as public interest disclosures, he was saying that he was dismissed for raising proper complaints and concerns over a protracted period. Even if he had not relied on the "whistleblowing" provisions of the **1996 Act** here the ET would have had to form a view about his case: was the real reason for his dismissal that he raised proper, but inconvenient, complaints and concerns? Documents prior to 3 February 2011 were therefore

relevant. We agree with the submission of Ms Moss that many of the documents in the first 600 pages will have been relevant to ordinary unfair dismissal.

41. We think this error also lies behind the EJ's remark that, absent the whistleblowing claims, there should only have been "an ordinary and straightforward unfair dismissal claim". This was by no means a straightforward unfair dismissal claim, given that the first allegation involved a breakdown of relationships over a significant period between the Claimant and various colleagues and managers. If the ET's examination of this question was to be meaningful it had to engage with the material upon which the Respondent relied in support of this and other charges; and it also had to engage with the Claimant's case in answer. Only by this kind of engagement could it form a judgment as to whether the Respondent acted reasonably in dismissing the Claimant. Section 98(4) is not just about process: it requires the ET to consider the substantive merits of the dismissal.

42. We think that this misunderstanding by the EJ lies behind her attribution of only 20% of the costs of preparation to the unfair dismissal claim. We think that the degree of overlap is such that this attribution cannot be justified.

43. We think the EJ must have had the same reasoning in mind when she made her assessment of the amount of time at trial which would be required by the ordinary unfair dismissal complaint, though we note that the proportion of time attributed to the unfair dismissal complaint was significantly higher than 20%. So, the whole of the EJ's reasoning on attribution must be reconsidered, although the impact of her reasoning on the assessment of trial time may not be the same.

44. It is, we think, also important to mention the wrongful dismissal complaint. For the purposes of this complaint the Respondent had to prepare its case and set out to prove that the Claimant was guilty of gross misconduct, including allegation 1. The EJ did not make any order for costs in favour of the Respondent in respect of this allegation. The order for costs was only in respect of the conduct of proceedings relating to the complaints of detriment and automatic unfair dismissal.

45. For these reasons we consider that ground 1 of the appeal succeeds. We will return to the disposal of the appeal at the conclusion of this judgment.

46. We turn to ground 2, which involves the EJ's approach to the question of proportionality. The challenge is to her use of the extravagant schedules of loss put in by the Claimant when he was a litigant in person, rather than the more moderate schedule put in by his lawyers when he was represented.

47. When costs are to be assessed on the standard basis only those costs which are proportionate to the matters in issue may be allowed: see CPR 44.3(2). CPR 44.5 provides that costs incurred are proportionate if they bear a reasonable relationship to a variety of factors. One of those factors is "the sums in issue in the proceedings": see CPR 44.5(a). We think this requires a broad and realistic assessment to be made of what sums were really in issue. In this case, although the Claimant had lodged substantial schedules, his solicitors put in a properly worked schedule which claimed past loss, pension loss, a modest amount of future loss and non-pecuniary loss as well. In determining the sums in issue in the proceedings the EJ ought to have referred to and had regard to this schedule. We do not say that she was bound by it; but it

provided a realistic starting point for assessing what sums were really in issue in the proceedings.

48. Ground 2 is therefore made out, and the issue of proportionality is remitted. We are far from saying that the EJ's overall assessment will necessarily be affected by this point: she made entirely permissible findings about other factors which are taken into account in assessing proportionality, and she also found that the general level of fees charged by the Respondent's solicitor and counsel was eminently reasonable. But, if only £116,000 was in reality at stake, the exercise of assessing proportionality is not the same as if £2 million was at stake.

49. As to ground 3, while it would have been helpful if the Employment Judge had made specific reference to the burden of proof in CPR 44.3(2), we detect no error of law in her reasoning. It seems to us that on all important points she was able to and did make findings on the material available without the need to resort to this burden of proof provision.

Outcome

50. It follows from what we have said that the appeal must be allowed and the detailed assessment remitted for reconsideration in respect of the issues of disentanglement and proportionality. We will give the parties an opportunity to make written submissions in the light of this judgment as to whether remission should be to the same EJ: see, in this respect, **Sinclair Roche & Temperley v Heard** [2004] IRLR 763.

51. We also think that the parties would be wise to consider whether they can compromise this issue. As we have seen, they took diametrically opposite approaches before the EJ. In a sense it is not difficult to see why they did so. The degree of overlap enabled the Respondent to

say that a great deal of the costs related to the whistleblowing complaints and at the same time enabled the Claimant to say that a great deal of the costs related to the unfair dismissal complaint. But the parties have accepted, as Simler P observed, that an apportionment of the overlapping costs must be made. The result must lie between the extremes. The parties would do well to consider whether they can save further costs by reaching a compromise in the light of this judgment. In our order we will build in a short stay to enable the parties to see whether this is possible before the matter goes further.