EMPLOYMENT TRIBUNALS

Claimant: Mr D Hoppe

Respondents:
1 HM Revenue & Customs
2 Health Assured Limited
3 National Audit Office
4 Independent Office for Police Conduct

HELD AT: Manchester **ON:** 8 February 2018

BEFORE: Employment Judge Tom Ryan

REPRESENTATION:

Claimant: No attendance, written representations
Respondents:
1 Mr J Hurd, Counsel
2 Mrs S Afshad, Solicitor
3 Miss R Thomas, Counsel
4 Written Representations

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The complaints made against the 3rd and 4th respondents are dismissed on the ground that they have no reasonable prospect of success.

2. The application by the 2nd respondent that the claim against it should be dismissed on the ground that it has no reasonable prospect of success is postponed.

REASONS

Introduction

1. This preliminary hearing had initially been listed to determine the issues and to make case management orders.

2. On 22 January 2018 Regional Employment Judge Parkin had directed that it should also address the issue of whether the claims against the 2nd 3rd and 4th respondents should be struck out as having no reasonable prospect of success and whether any claim should be stayed to await the outcome of the reconsideration hearing in case number 2408988/2015.

3. On 31 January 2018 a letter was sent to the parties of the direction of REJ Parkin confirming that this hearing would take place.

4. On 8 February 2018 at 9.25 a.m. the claimant wrote to the tribunal, the Employment Appeal Tribunal and the office of the President of the Employment Tribunals (England and Wales). Amongst other things the claimant confirmed that he could not attend the hearing due to "significant distress" and saying that he would be at a disadvantage as he would "not function due to the health issues identified." He referred having provided medical evidence on 25 January 2018. That medical evidence was a letter to a Dr Edwards, whom I seem to be the claimant's general practitioner, from a clinical psychologist, Dr Naomi Allen. Dr Allen summarised her assessment of the claimant as:

> "Suffering from chronic long-term high levels of stress, significant low mood and anxiety following a very difficult time in his life where he raised concerns of malpractice at work. The implications of this over a number of years, and the ongoing employment tribunals appear to be having a significant impact on his mental health."

5. Shortly before the hearing was due to start I was informed by a tribunal staff that the claimant had telephoned the tribunal asking if the hearing was going to go ahead, reiterating that he was unable to attend due to stress and anxiety and asking for the hearing to be dealt with on papers. I asked the clerk to confirm that REJ Parkin had directed that the hearing was to remain in the list. I was then informed that the claimant had asked for his email of that morning to be shown to me. It was. I then instructed the staff to call the claimant by telephone again and enquire whether he would be able to take part in the hearing by means of a telephone conference link. I asked that the claimant be told that if he wished to attend in that way, a telephone conference would be arranged.

6. I was then informed that the claimant said that he found the "issues around stress as overwhelming and that if he hasn't had a good night sleep and can think rationally he cannot represent himself." He described [my proposal] as a reiteration of "EJ Ross's suggestion of having tea breaks." He said that the case needed to be dealt with by correspondence.

7. I informed the other parties who attended of these exchanges. I indicated that I considered that the hearing should proceed and that I should treat the claimant's correspondence to the tribunal which had been copied to them as his written representations.

8. In deciding to proceed in that way, a course with which the attending parties agreed, I had in mind that notwithstanding the report of Dr Allen there was no medical evidence that the claimant was unfit to attend the hearing. Nevertheless

I recognised that that was his stated position. Moreover, I took into account the claimant was not asking that the hearing be postponed but that it should be dealt with "by correspondence". It seemed to me to be reasonable to conclude that the claimant was asking me to deal with it on the basis of his correspondence and I treated that correspondence as his written representations.

9. In my judgment to proceed in that way was to proceed in accordance with the overriding objective.

10. In addition to the judgment set out above I made case management orders. In that separate document I have also explained the basis upon which the tribunal may proceed in the absence of a party. I have also described what is necessary in terms of medical evidence in relation to a party's fitness to attend a hearing. I have also set out orders consequent upon the postponement of the application to strike out the claim against it by the 2nd respondent, HA. Those orders are designed to ensure that so far as possible the parties on an equal footing when the matter returns for determination bearing in mind the claimant's request that the matter be dealt with by correspondence and reflecting the rights of the other parties, if they wish, to make oral representations and call evidence. It may be helpful to refer to the case management orders that I have set out in this regard.

Background

11. By a claim presented to the Tribunal on 18 August 2017 the claimant made complaints of unfair dismissal and detriment as a result of having made a protected disclosure.

12. The respondents defended the complaints. I shall refer to them respectively as: HMRC, HA, NAO and IOPC. For the sake of clarity I should explain that the Independent Police Complaints Commission has recently been renamed the Independent Office for Police Conduct.

13. The case was considered by Employment Judge ("EJ") Ross at a preliminary hearing on 6 November 2017. She attempted to identify the allegations of detriment which appeared to be alleged to have arisen after 2015. She summarised those at paragraph 9 (1) to (6) of her order. EJ Ross also required the claimant to give further information in respect of the following matters:

    13.1. What protected characteristic he relied upon, if he was making a complaint under the Equality Act 2010;

    13.2. Whether the claimant considered the summary of the detriments to be inaccurate;

    13.3. Whether the complaint in respect of detriment 1 in the list, "failing to advise and invite the claimants to make a claim under the Civil Service Injury Benefit Scheme [hereafter "CSIBS"] at the point of dismissal", was made against HMRC or HA or both;

13.4. How HA was said to be liable on the basis it did not employ the claimant;

13.5. In relation to detriment 1 the date upon which the claimant says the respondent should have advised and invited him to make a claim.

14. The claimant responded to that request for information by a letter of 30 November 2017 and also in a letter of 8 December 2017. In the first of those he interposed his comments into a copy of EJ Ross's order. From that response I was able to distil the following contentions.

14.1. The claimant clarified that he was not making a complaint of discrimination under the Equality Act 2010 saying, "the protections against discrimination on the basis of the characteristic of raising concerns is in PIDA".

14.2. The claimant accepts that EJ Ross's summary of the detriments is correct.

14.3. The claimant contends that detriment one is alleged against both HMRC and HA.

14.4. He contends that HA was acting on behalf of HMRC.

14.5. He said that the failure to determine the CSIBS claim was "within a reasonable period of termination of employment" but remained ongoing until HMRC ceased to be the assessor for the purposes of those claims which, in the claim form, the claimant alleged occurred on 30 June 2017.

15. In this letter the claimant responded to the observation by EJ Ross that there appeared to be no contractual connection between IPOC or NOA and HMRC. He wrote this:

> "IPCC are a quango within the control and influence of the ultimate employer which is the Civil Service and its client customer Parliament who are also subject to comply with the law…. My understanding of the status of NAO is that they are part of the Civil Service engaged and working to Parliament. There is a very clear and direct connection between NAO and the 'Employer'."

16. In his letter of 8 December 2017 the claimant responded to an assertion in the ET3 on behalf of NAO that it did not "determine the terms under which the claimant was engaged". In that letter the claimant sets out his argument in relation to the NAO in more detail. The claimant wrote this:

> "It is a matter of public record that NOA were acting for Parliament who are the ultimate employer here in reviewing the current treatment of whistle-blowers across the Civil Service and None [sic] Departmental Government Bodies. This resulting in a report and recommendations to Public Accounts Committee identifying the policy principles that were accepted by PAC and

> the Civil Service and implement it into the terms and conditions of employment. Very clearly NAO have determined the terms and conditions of employment. Further in AO have been tasked to monitor and review the implementation of the policy principles to ensure that the Civil Service and NDPB's to follow the terms and conditions. This is a Governance role that NAO have and with equal clarity failed to execute. Whether the Governance role is to be executed by the direct employer (HMRC) or some other arm of the ultimate employer the effect of the failure remains the same in causing detriment and by the wider definition of employer identified in PIDA is covered by PIDA and it is entirely appropriate that an AO should respond to the complaint of causing detriment by its deliberate intent to mislead and deceive (breach of trust and confidence) the employee's in all the Civil Service and NDPB's."

17. Reading these representations together it appeared to me that the fair way to consider the claimant's argument is on the basis that he is making the same argument in relation to both IPOC and NOA.

Legal framework

18. The relevant statutory provisions are found in material part in sections 203(3), 43K and 47B of the Employment Rights Act 1996.

s. 230

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

s. 47B

(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, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

s.43K

(1) For the purposes of this Part " worker " includes an individual who is not a worker as defined by section 230(3) but who—

(a) works or worked for a person in circumstances in which—

(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

…

(2) For the purposes of this Part "employer" includes—

(a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged…

19. For the reasons set out in their written skeleton arguments NAO and IPOC submit that they do not satisfy the test of being the "employer" of the claimant as a worker having regard to the definition of worker as defined either in section 230 or in the extended definition of section 43K. That submission was supported by HMRC.

Discussion and conclusions in respect of 3rd and 4th respondents

20. In my judgment section 43K is not engaged here. The claimant relies upon the expression "determines or determined the terms on which he is or was engaged". He argues that since these departments or agencies were all answerable to Parliament they are, in effect, all emanations of a common employer. That general proposition of a common employer is unsupported by any legislative provision or other precedent. The IPOC submitted that it had never employed nor received services from the claimant. I do not understand the claimant to argue to the contrary except in the way just set out. Absent cogent argument to the contrary I cannot accept the claimant's argument in relation to the concept of a "common employer". That conclusion disposes of the position of IPOC. In no sense can the argument that the claimant advances in relation to NAO as having oversight of terms and conditions within the civil service generally be advanced in relation to IPOC. The claimant does not attempt to do so.

21. However, on the proper construction of the statute the argument in relation to NAO is also not well-founded. In order to engage the extension of the definition of employer as someone who substantially determines the terms on which the

worker is engaged the worker needs to pass through the "gateway" of subsection (1)(a). In other words he can only invoke that provision if he was introduced or supplied to do the work for HMRC by NAO or, conversely, by NAO for HMRC. The claimant does not even assert that that is the true factual position in his claim form or in any of his communications to the tribunal which I treated as his written representations.

22. Since the claimant cannot overcome the hurdle of being a worker of either NAO or IPOC it must follow that, even taking his case at its highest, he cannot have any reasonable prospect of success of establishing that they are liable for any detriment to which he was subjected by reason of having made a protected disclosure. For that reason I strike out the complaints against those respondents in exercise of my discretion under rule 37 of the Employment Tribunal Rules of Procedure 2013.

The 2nd respondent

23. In respect of HA I am not in a position to make a determination at this stage. HA is alleged to have been an agent of HMRC. That is how I interpret the claimant's statement that HA was "acting on behalf of" HMRC. It is the only logical interpretation.

24. As I understand the position from Mrs Ashfad at two points in time HMRC engaged the services of HA for the purposes of obtaining an assessment of the claimant's medical condition for the purposes of his application under the CSIBS.

25. I understand from Mr Hurd that that scheme operates in HMRC and in other sections of the civil service. For the purposes of this application Mr Hurd accepts that it can be treated as having been operated by HMRC. It appears that it was HMRC who referred the claimant to HA for the purposes of the assessment. It seems at least possible that, in doing acts in connection with providing that medical assessment, HA may properly be described as the agent of HMRC.

26. I was informed, after Mrs Afshad had taken instructions, that on each occasion that the claimant's case was referred to HA, that body was not satisfied that the claimant had given consent for the relevant medical assessment. As a result no assessment took place and no results of any assessment were reported to HMRC. As I understand the position HMRC either adopts or does not dispute that factual case.

27. However, I was not provided with any evidence in either written or oral form from HMRC or HA to support those propositions. The mere assertion by HA that it was not the agent of HMRC for the purposes of conducting the assessment, which is all that the tribunal has at the moment, would not amount to a sufficient basis for striking out the complaint.

28. However, further to this, the apparent basis for the application to strike out by HA was that they were hampered in carrying out the assessment by the failure of the claimant to give consent. That is a factual issue. If HA are correct on those facts then there is a substantial argument that in not carrying out the assessment they

cannot in any proper sense be said to have subjected the claimant to a detriment. If HA are not correct in that then the proceedings against them may properly be permitted to continue.

29. In all the circumstances, and in particular so that the claimant could understand fully the basis upon which the case against HA was sought to be struck out I adjourned the application and gave directions which are set out in a separate case management order. When that matter comes back for determination it will be open to the parties to put forward the arguments and counter arguments as they see fit provided they comply with the orders and directions that I have made.

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Employment Judge Tom Ryan

Date 12 February 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

13 February 2018

FOR THE TRIBUNAL OFFICE