Appeal No. UKEAT/0229/18/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 February 2019
Judgment handed down on 22 February 2019

Before

MRS JUSTICE SIMLER DBE

SITTING ALONE

MR S CHUMBER — APPELLANT

HESTIA HEALTHCARE LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	Mr Jeremy Lewis (Of Counsel) Instructed by: Advocate (formerly the Bar Pro Bono Unit)
For the Respondent	Mr Sinclair Cramsie (Of Counsel) Instructed by: Birketts LLP Kingfisher House 1 Gilders Way Off Barrack Street Norwich NR3 1UB

VICTIMISATION DISCRIMINATION - Whistleblowing

Two grounds of appeal were conceded by the Respondent, and in addition, the Employment Tribunal made further significant factual errors in relation to the question of knowledge of protected disclosures made by the Claimant.

In light of the factual errors conceded and those found to have been made, the Employment Appeal Tribunal could not be confident that the errors did not affect or undermine the finding that the dismissal was not by reason of the protected disclosures.

The appeal was therefore allowed on the disputed ground.

MRS JUSTICE SIMLER DBE

Introduction

1. This is an appeal from a judgment of the Bury St Edmunds Employment Tribunal (comprised of Judge Laidler and Members, Mr Wilshin and Mr Bowerman) with reasons sent to the parties on 27 March 2018 ("the Judgment"). I refer to the parties as they were below. They are represented by Mr Jeremy Lewis for the Claimant and Mr Sinclair Cramsie for the Respondent. I am grateful to both counsel for their helpful and realistic submissions.

2. The Employment Tribunal dismissed the Claimant's claims of unlawful disability discrimination and held that his dismissal was not by reason of the protected disclosures he made and nor was it less favourable treatment because of his disability. All claims brought by the Claimant were dismissed.

3. The Claimant appealed the Judgment on 4 May 2018 and at a Rule 3(10) Hearing on 10 October 2018 HH David Richardson allowed the appeal to proceed to a Full Hearing on grounds set out in an Amended Notice of Appeal received on 29 October 2018 and approved by him subsequently. The Amended Notice of Appeal challenges the following findings or omissions in the Judgment:

(i) that the Respondent did not know and could not reasonably have been expected to know that the Claimant was at a substantial disadvantage in being required to use the stairs at the Willow Care Home where he worked;

(ii) the Employment Tribunal's failure to address at all the Claimant's wrongful dismissal claim notwithstanding that this was identified as a head of claim at paragraphs 16 and 17 of the Judgment; and

(iii) the finding that the Claimant's dismissal was not by reason of the protected disclosures he made. In this regard in summary, the Claimant contended that the Respondent's investigating officer, Vivian Vuchemtigah, manipulated the investigation by reason of the protected disclosures she well knew had been made by the Claimant; and her knowledge and motivation could be attributed to the Respondent (see **Royal Mail Group Ltd v Jhuti** [2018] ICR 982). The Claimant contends that the Employment Tribunal wrongly found that Ms Vuchemtigah was not aware of his whistleblowing complaints about the dignity of a resident, RP, (made internally and to the Care Quality Commission ("the CQC")) when the evidence was clear that she was aware of these. Separately, the Claimant contended that both Mr Sales, the dismissing officer, and Mr May, the appeal officer, were also aware of the protected disclosures made by the Claimant but the Employment Tribunal wrongly held otherwise. These errors, all compounded by the earlier errors, mean that the Employment Tribunal's finding cannot stand.

4. By a further application dated 4 January 2019 the Claimant sought permission to amend the Notice of Appeal to introduce a number of additional grounds. The application was considered on the papers by HH David Richardson on 1 February 2019. He refused the application giving reasons in relation to each proposed amendment. The Claimant sought a review by an application dated 7 February 2018, and that too was refused on the basis that HH

David Richardson remained unpersuaded that it was just and fair to grant permission to amend to raise factual issues distinct from the arguments already raised at such a late stage. Although Mr Lewis made a faint attempt to revive the review application, I made clear that I was not prepared to review a decision made so recently by another judge. This appeal is accordingly limited to the matters raised in the Amended Notice of Appeal as set out above.

5. Before the appeal hearing, the Respondent conceded that the Employment Tribunal made a number of errors of law, and some factual errors. First, it concedes the error identified at paragraph 3 (i) above. Secondly it concedes that there was a complete failure to address the Claimant's pleaded wrongful dismissal claim (see paragraph 3 (ii) above). Thirdly, although the remaining ground of appeal (advanced by reference to three pleaded challenges) is resisted, the Respondent accepts that the Employment Tribunal's finding that Mr May did not know that the Claimant made a whistleblowing complaint to the CQC was in error in circumstances where Mr May's own evidence was to the opposite effect. Notwithstanding that error however, the Respondent maintains that the Employment Tribunal's conclusion that the Claimant was not unfairly dismissed by reason of the protected disclosures made by him is not affected or undermined. Accordingly, ground three remains in issue.

6. Although the Respondent has made the concessions to which I have just referred, it remains necessary for me to consider whether the Employment Tribunal did err in law in the respects alleged.

The facts

7. It is not necessary to deal in detail with the full factual background to the Claimant's claims. So far as relevant to this appeal, the Employment Tribunal made findings of fact about the Claimant's disability and his employment and its termination, as follows.

8. There was no dispute before the Employment Tribunal that the Claimant was at all material times a disabled person within the meaning of the **Equality Act 2010**, suffering as he did, from severe psoriatic arthritis in both knees, his left wrist and his left foot. He had walked with a limp since 2005. He could not bend his left wrist and was unable to walk on the balls of his feet, flex his ankle joint or bend his knees fully without severe discomfort and he had severe pain in his left ankle joint.

9. In his application for employment with the Respondent, the Claimant referred to his "chronic ill-health" in the section dealing with relevant skills, knowledge and experience and said that he would be happy to discuss this in detail at interview. He made express reference to having detailed knowledge of what is required and expected of a carer as a consequence of his chronic problems and also to understanding mobility issues. At interview on 29 October 2015, it was common ground that he disclosed his severe arthritis and explained that he had once been in a wheelchair for a long time and had had a carer. He was recommended for work as a support worker or a domestic and was duly offered a position by the Respondent.

10. The Claimant commenced employment with the Respondent on 6 November 2015 working at Willows Care Home. It was part of his case that in the first week of work he was told to work on the first and second floor and explained to his Team Leader that he found it difficult to go up and down stairs and ought to be working on the ground floor. He said he was told that he had been allocated to and was required to work on the first and second floor. The Claimant alleged that on his second day of work he heard his Team Leader, Lucia Chungwe, say to another carer, "let's kill him" in relation to making him use the stairs. There was also

evidence about difficulties when he tried to use the lift and that he was expressly instructed to use the stairs. He said in his witness statement that as a consequence his condition deteriorated, and he was breaking down because of the pain. The Employment Tribunal referred to this evidence at paragraphs 40, 41, 42 but no express findings are made either way by the Tribunal in relation to it. The Tribunal did however find at paragraph 42 that having to go up and down stairs would have caused the Claimant substantial disadvantage in comparison to those without his severe psoriatic arthritis.

11. The Claimant gave evidence about a particular incident on 15 June 2016. He said that on entering the lounge he saw that a resident, RP, had soiled himself and was walking around with faeces dropping to the ground. The Claimant said he was asked by Fay Gooch to stop RP walking around, and to take him for a shower. Showering RP took a considerable time as the faeces had dried. The Claimant made notes on the Care Home computer system ("caredoc") at 4.19 pm. It was his case that Ms Chungwe updated the system at 7.34pm by deleting the following words he had included in his entry

> "Maybe if more senior members of staff delivered the same dignity and compassion towards Mr P maybe he would not end up in such distress"

12. The Claimant relied on that entry in caredoc as his first disclosure but for the reasons explained at paragraph 46 of the Judgment (which I confess to finding somewhat convoluted and difficult to follow) it was agreed that disclosure one could be removed from the list of issues as not existing.

13. The Claimant's case was that he contacted the CQC by phone on 5 July 2016 about this incident. His telephone call was acknowledged by email from the Care Quality Commission in the following terms:

> "On 5 July 2016 you contacted us with your concerns relating to one of the team leaders working at the Willows Residential and Nursing Home, which you had also reported to the Area Manager for service. Our records show that we provided you with contact details for the whistleblower helpline and for ACAS to support you with this issue.
>
> You also told us about a particular incident relating to a service user in which you told us they had been left in distress after being left for over 30 minutes after soiling themselves. Please be assured that based on your information, we immediately made a safeguarding referral to the Safeguarding Team at Bedford Borough Council. CQC is not able to look into individual concerns and complaints (we do not have the legal powers to do that) …".

14. The Claimant also said that he provided a written statement on 15 July 2016 to the Care Home Manager, Ms Rhanhwara, in which he recounted the incident with RP having been left in a soiled state. There was a dispute about whether other specific concerns (about false fluid reports, and the editing of the caredoc entry) were raised by the Claimant in either of these communications, and the Employment Tribunal found against the Claimant on this question, concluding that he made two disclosures (both protected) about dignity issues relating to RP: the first by telephone on 5 July 2016 to the CQC; and the second to Ms Rhanhwara in writing dated 15 July 2016.

15. Although the Employment Tribunal made no express findings about this beyond fairly general references to the fact that the CQC pass complaints of the kind raised by the Claimant to the Safeguarding Team for investigation, it is common ground that Ms Vuchemtigah investigated the concerns raised by the Claimant and responded to them by a letter dated 26 July 2016 addressed to the Bedford Safeguarding Team (which was in the Tribunal bundle and was expressly referred to by Ms Vuchemtigah in her witness statement). It is clear from that letter, in which the Claimant is not identified by name but as "WB", that Ms Vuchemtigah spoke to the Claimant about the RP concerns and discussed them with him and must accordingly have known that he was the whistleblower in question. Moreover, in her witness statement for the Employment Tribunal hearing she said in terms that the incident concerning the resident RP was one of the incidents investigated following "the Claimant's report to the CQC of which I was made aware by the Bedford Safeguarding Team towards the end of July 2016." At paragraph 25 of her witness statement, Ms Vuchemtigah said she was not made aware that the Claimant made a statement on 15 July 2016 and this was not forwarded to her by Ms Rhanhwara. However, she was made aware of concerns regarding the alleged neglect of RP when the matter was investigated by the Bedford Safeguarding Team in July 2016 and she says, at paragraph 24 that she reported her response to this issue in her letter dated 26 July 2016, to which I have just referred.

16. On 21 July 2016 the Claimant was called to a meeting with Ms Vuchemtigah and Fay Gooch to discuss his request to reduce his hours to 18. There was a conflict about what was said at the meeting. The Tribunal accepted that Ms Vuchemtigah wished to try and resolve the issues raised by the Claimant about other members of staff by having all relevant staff meet together, but the Claimant was not in agreement with that suggestion. The Tribunal appears to have accepted her evidence that it was not made clear to her at this meeting that the Claimant was having difficulty at work in using the stairs due to his disability. There was a further meeting on 5 August 2016 (albeit the Claimant denied that meeting took place). The Employment Tribunal noted that the Claimant said, "things had improved".

17. On 13 October 2016, there was a further incident involving the Claimant and other staff, said to have taken place largely in front of a resident in the care home lounge. The facts were disputed to some extent but the investigation concluded that the Claimant came down to the lounge to collect resident B; he noticed four members of staff there including a senior carer, Tamanna Ahmed, apparently doing nothing. He raised his voice with her and other staff in a disrespectful manner, and was angry and shouting in front of residents. The manager came out and asked the Claimant to calm down but he continued behaving loudly and aggressively towards other staff. They moved into the office and there were further exchanges in which the Claimant was pointing his fingers at Ms Chungwe and called her a "nasty, filthy stinking person".

18. There was an investigation into the incident, initially conducted by Fay Gooch, but taken on and completed by Ms Vuchemtigah. All relevant staff were interviewed and the interviews were audio recorded, transcribed and attached to the investigation report. At interview during the investigation, the Claimant gave a different account of the incident to that summarised above. However, he accepted that he raised his voice in the manager's office and pointed his finger at Ms Chungwe. He said that he had experienced mistreatment by staff "so when I see people, senior people doing it… I always say something, I don't care who it is… there was a reason I had to follow the whistleblowing policy…". He said that he had not been allowed to know the result of previous investigations, that it appeared that nothing had been

done about them as the Team Leader was still there "displaying the same bullying, intimidating behaviour" and he complained of a culture of fear.

19. The Employment Tribunal found that the investigation report prepared by Ms Vuchemtigah concluded that the Claimant pointed a finger at his colleague and addressed her with unfriendly words. There was a lack of teamwork. The incident could have been avoided if the Claimant assisted his colleague or went to the nurses or manager to explain why he did not wish to do so. The Claimant did not respect the residents' lounge when he confronted his colleagues in the lounge. Ms Vuchemtigah also found however that other staff, Ms Chungwe and Ms Ahmed, could equally have ignored the Claimant's behaviour and gone to the office but instead they reacted. Ms Vuchemtigah decided that they should be given further training while the Claimant was invited to a disciplinary hearing: see paragraph 66.

20. The Claimant was invited to attend a disciplinary hearing by letter dated 5 December 2016. The allegations he faced were "aggressive behaviours towards your colleagues which is against the company's policy" and "insubordination towards senior member of staff". Copies of the statements obtained during the investigation were enclosed with the letter and the Claimant was told he could submit a written statement in advance of the hearing.

21. The hearing took place on 8 December 2016 and was chaired by James Sales. The hearing was minuted and the Tribunal had the minutes. The Claimant accepted he raised his voice but did not accept he had behaved in an aggressive manner. He did accept the proposition put to him by Mr Sales that "this is a care home and what I cannot accept is staff clashing in front of residents". Mr Sales asked the Claimant if he could assure him it would not happen again but could not obtain such an assurance. Before the disciplinary hearing, the Tribunal found that Mr Sales considered that a written warning might have been an appropriate outcome. However, having heard the Claimant's response at the hearing and seen his increased aggression, Mr Sales did not feel he could put the Claimant back into the Home. That was "too risky" and he therefore took the decision to dismiss the Claimant and communicated that to the Claimant at the end of the meeting.

22. There was an appeal chaired by Chris May, Director of Special Services. The Claimant attended the hearing unaccompanied on 24 January 2017. The hearing was minuted and the minutes were available. The decision to dismiss was upheld on appeal.

23. The Claimant's case was that Mr Sales and Mr May both knew about the Claimant's disability and the protected disclosures he made. I shall return to the findings made by the Tribunal in relation to their knowledge of the protected disclosures in particular when I deal with ground three.

24. The Claimant was summarily dismissed by letter dated 8 December 2016. The letter said that the Respondent had been left with no alternative but summary dismissal on the grounds of gross misconduct and in view of the gravity of the misconduct felt that the trust and confidence placed in the Claimant had been completely undermined.

25. In light of those findings of fact, the Employment Tribunal dealt with dismissal at paragraphs 80 to 88 as follows:

"80. The claimant was dismissed by reason of gross misconduct for his behaviour in the home in front of the residents and not because of any protected disclosures and/or disability.

81. Most of the matters raised by the claimant with regard to the investigation would be matters that may have been relevant had the claimant had sufficient service to bring an ordinary unfair dismissal claim under the provisions of the **Employment Rights Act**. The claimant did not have such length of service. He therefore has to establish that within the meaning of section 103A the reason, or if more than one principal reason for the dismissal was that he had made a protected disclosure.

82. There were three disclosures relied upon. The first fell away as has been explained in the tribunal's findings of fact. In neither of the other two was there any allegation that Lucy created false fluid charts or that she edited a document on the Caredoc system. That left only an allegation to the Care Quality Commission and in the written statement of 15 July that the dignity of a resident RP had been neglected. The tribunal accepts that that had the potential of being a protected disclosure within the provisions of section 43B. Namely that a person had failed to comply with a legal obligation and/or that the health or safety of an individual had been or was likely to be endangered.

83. Neither the dismissing officer nor the appeals officer knew that the claimant had made these protected disclosures. There is no substance whatsoever in the claimant's suggestion that Vivian Vuchemtigah had manipulated the investigation or had any influence on the decision. She was not a decision maker. Mr Sales came new to the matter and it was his decision alone.

84. Even the claimant acknowledges that he did not raise the issue of disability until after Mr Sales had announced his decision to dismiss. The decision was not made because of disability or protected disclosures, but because the claimant would not re-assure Mr Sales that his behaviour before the residents would not occur again.

85. It follows from those conclusions that the claimant was not unfairly dismissed for having raised protected disclosures.

As an act of direct disability discrimination

86. The reason for the claimant's dismissal was his behaviour in front of residents and his unwillingness to reassure Mr Sales that it would not occur again. That had nothing to do with disability. Any other employee who had behaved in the same manner as the claimant would have been subjected to the same sanction. The dismissal was not less favourable treatment 'because' of the claimant's disability.

> 87. Further the dismissing officer Mr Sales did not know the claimant was disabled at the time he made his decision. It was only once the decision was given that the claimant raised the issue of disability.
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> 88. The tribunal repeats its conclusions with regard to the influence of Vivian in the decision as with regard to the protected disclosure allegation. It does not accept and there is no evidence that she had any role in the decision to dismiss due to the claimant's disability or manipulated her investigation in anyway because of his disability to ensure his dismissal".

26. In relation to the claim based on failure to make reasonable adjustments (addressed at paragraphs 89 to 92) the Employment Tribunal accepted that the Respondent knew or ought reasonably to have known that the Claimant had a disability from the outset of his employment by virtue of the information given by him at his interview: see paragraph 89. However, the Employment Tribunal found that "the respondent had no evidence and neither ought it reasonably to have known of any substantial disadvantage that the claimant would then suffer on taking up employment". The Employment Tribunal found that he presented up to his dismissal as well satisfied with his role and there was no evidence that he raised concerns about the effect of his condition on his ability to perform the role. As to the requirement to use the stairs, at paragraphs 91 and 92, the Tribunal held there was:

> "91. …no evidence as to how the stairs put the claimant at a substantial disadvantage compared with those who are not disabled. The tribunal does not know what the disadvantage was. Although the claimant submitted his impact statement and copies of some letters from his podiatrists, even they do not give the tribunal any evidence as to the substantial disadvantage.
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> 92. It follows that the respondent did not know and could not reasonably have been expected to know that the claimant's disability subjected him to a disadvantage such as to lead to the duty to make reasonable adjustments arising. It did not arise and the respondent therefore cannot be said to have failed in its duty."

27. The wrongful dismissal claim was not addressed at all.

The appeal

28. I can deal shortly with the grounds of appeal conceded by the Respondent. It seems to me that the concessions made by Mr Cramsie on the Respondent's behalf are correctly made. So far as the reasonable adjustment claim is concerned, the duty to make adjustments is on an employer who knows or who can reasonably be expected to know (i) that a worker has a disability and (ii) is or is likely to be placed at a substantial disadvantage. The employer must however do all that can reasonably be expected of it to find out whether this is the case, with reasonableness being dependent on the circumstances and involving an objective assessment. The burden is on the Respondent to show that it was not reasonable for it to be expected to know of the substantial disadvantage arising from any PCP imposed by it.

29. On the Employment Tribunal's findings, it is clear that the Respondent had actual knowledge of the Claimant's disability in this case. Moreover at paragraph 42, the Employment Tribunal found in terms that the Claimant's condition would have caused him

substantial disadvantage in having to go up and down stairs in comparison with those without that condition.

30. The assessment of what the Respondent knew or ought to have known in relation to whether the Claimant was likely to be placed at a substantial disadvantage could only properly be made by reference to the nature of the disadvantage and by taking into account what was known or ought to have been known by the Respondent as to the Claimant's condition and its effect upon him. To that end it was important for the Tribunal to make clear findings about both of those aspects. The Tribunal had to address the nature of the condition and whether it was such that the disadvantage should have been apparent on making reasonable enquiries. For example, the Claimant gave evidence that he walked with a limp and this would have been a matter, if observed and known about that would put the Respondent on notice of his difficulties. Moreover, there was evidence from the Claimant that he explained his condition, the pain he was in and that it was caused or aggravated by having to use the stairs. He maintained that he had conversations along these lines with various managers and with Ms Ahmed.

31. The Employment Tribunal however, failed to address this evidence or to examine these issues. Moreover, its conclusion at paragraph 91 is wholly inconsistent with and ignored its earlier findings, especially at paragraph 42. The Employment Tribunal stated at paragraph 91 that it had no evidence as to how the stairs put the Claimant at a substantial disadvantage and that the Claimant's impact statement provided no evidence about this. Not only was there evidence given by the Claimant about these matters which ought to have been addressed, the finding at paragraph 42 was to the opposite effect. For all these reasons I am satisfied that the holding at paragraph 91 is in error and cannot stand. The question of the Respondent's knowledge of the disadvantage together with an investigation of what steps it was or would have been reasonable for it to take to avoid the disadvantage will have to be remitted for further consideration (in other words issue 14 and that part of issue 15 relating to knowledge that the Claimant was likely to be placed at the relevant disadvantage). It is common ground that it may be necessary for the Employment Tribunal to make further findings about the nature of the substantial disadvantage experienced by the Claimant, the impact on him and how it manifested itself.

32. So far as the claim of wrongful dismissal is concerned, here too the Employment Tribunal plainly erred in law. The claim was listed as one of the issues for determination and referred to expressly by the Employment Tribunal at paragraphs 16 and 17 of the judgment but was simply omitted. This question will also have to be determined on remission.

33. That leaves ground three and the question whether the Employment Tribunal erred in law in relation to its finding that the Claimant's dismissal was not by reason of the protected disclosures he made.

34. Mr Lewis makes the preliminary point that the context in which ground three is to be considered is against the background of a judgment containing significant errors. He advances three interlinking errors under this heading. First, he contends that the Employment Tribunal proceeded on the false and erroneous basis that Ms Vuchemtigah did not know that the Claimant made whistleblowing complaints about RP and the soiling incident. It was a critical feature of the Claimant's case that Ms Vuchemtigah manipulated the investigation against him because of the protected disclosures he made and that her reasons could be attributed to the Respondent. He submits that there was clear evidence that Ms Vuchemtigah was aware that the Claimant blew the whistle and referred to him as the whistleblower. This was an important

consideration and should have featured in the factual assessment made by the Employment Tribunal of what Mr Sales knew, and indeed what was known to Mr May. Secondly, part of the Claimant's case based on manipulation relied on flaws he identified in the investigation process. It was his case that the investigation was biased and the report imbalanced because Ms Vuchemtigah viewed him as a whistleblower. That was material to the Employment Tribunal's consideration of his protected disclosure dismissal claim: if Ms Vuchemtigah produced an imbalanced report it would be important to consider why she did so and what she communicated to Mr Sales. However, the Employment Tribunal did not engage with or address the flaws relied on, holding instead that they were matters that might have been relevant to a claim of ordinary unfair dismissal if the Claimant had had sufficient service to bring such a claim. Thirdly, Mr Lewis argues that the Employment Tribunal made a material factual error in concluding that Mr May did not know about the protected disclosures. That too undermines the finding that the reason for dismissal was not the protected disclosures and the Employment Tribunal's finding cannot therefore stand.

35. Those arguments are resisted by Mr Cramsie. He submits that the Tribunal did not proceed on a false basis in relation to Ms Vuchemtigah's knowledge. To the contrary a fair reading of the judgment shows that the Employment Tribunal did not make that finding and furthermore, did not find that the reason why neither Mr Sales nor Mr May relied on the fact that the Claimant made protected disclosures was because Ms Vuchemtigah did not know that the Claimant was a whistleblower herself. Instead, the critical finding made by the Employment Tribunal was that Ms Vuchemtigah did not raise this with Mr Sales (see paragraph 71 of the Judgment). Accordingly, in Mr Cramsie's submission, the error, even if made, is immaterial.

36. I agree with Mr Lewis that the fact that the Tribunal made a number of errors is important context for the arguments he advanced and in seeking to understand some of the less clear findings made in this Judgment, those errors cannot be ignored.

37. The first question that must be addressed is what the Tribunal found in relation to Ms Vuchemtigah's knowledge. It is common ground that the only place this was addressed in the Judgment is at paragraphs 52 and 53 as follows:

> "52. At paragraph 31 of the claimant's witness statement he stated that Vivian was aware of the whistle blowing issues he had raised. In cross-examination he acknowledged he did not make those disclosures in writing to Vivian. He also acknowledged that he had not personally shared with her the Caredoc log, the contents of the call to the CQC or 15 July statement. He had thought that statement would be forwarded to her, but he had not forwarded anything to her. He had however given up his anonymity in the telephone call to the CQC and "would have thought CQC would have written to the management."
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> 53. The tribunal heard from Vivian Vuchemtigah and accept that the CQC pass the matter direct to the safeguarding team who investigate. That is who the home would have heard from. Even if the claimant had waived anonymity the name of the whistleblower would not be revealed to the respondent".

38. It seems to me that there is force in the point made by Mr Lewis that the fact that the findings at paragraph 53 follow immediately upon the Tribunal's account at paragraph 52 of the Claimant's case is significant and the two paragraphs must be read together. At paragraph 52 the Employment Tribunal record the case advanced that Ms Vuchemtigah was aware of the whistleblowing issues raised; and although he did not make the disclosures to her, he thought the 15 July statement would have been forwarded to her and that the CQC would have written to management about the concern he raised. In that immediate context, the findings at paragraph 53 read fairly, seem to me to be a rejection of that case.

39. It might have been possible to reach a different conclusion if paragraph 53 stood alone; and if the Tribunal had not made the self-same error in relation to Mr May's own knowledge, finding that he had no knowledge of the protected disclosures made when his own witness statement was to the directly contrary effect. However, reading the two paragraphs together and in light of the other significant errors made by this Employment Tribunal, I cannot be confident that the Tribunal was here simply making findings about what in practice happened when a complaint is passed by the CQC to the Safeguarding Team as Mr Cramsie suggested. Nor do I accept the argument advanced by Mr Cramsie that paragraph 71 necessarily proceeds on the basis that Ms Vuchemtigah knew about the whistleblowing complaints. A finding that she did not raise them with Mr Sales would have been inevitable if she did not know about them. It seems to me that it would have been straightforward for the Tribunal to deal with the question of her knowledge and to do so shortly, particularly in response to what is set out at paragraph 52; and by making clear that the Claimant was right and Ms Vuchemtigah was fully aware of the whistleblowing issues he had raised in relation to RP, and that he was the whistleblower.

40. There is no dispute that the Employment Tribunal made a significant factual error in relation to the knowledge of Mr May. At paragraph 75 the Tribunal referred to the fact that the Claimant was only able to say that it was "just a feeling" that Mr May knew of his protected disclosures. The Tribunal continued stating that it accepted:

> "…Mr May's evidence that he would not be told about protected disclosures even if the whistleblower had waived anonymity. He felt very clear having heard the appeal that the reasons for dismissal were not connected to protected disclosures and/or disability."

Later in its conclusions, the Employment Tribunal held that Mr May did not know that the Claimant had made the two protected disclosures. In fact, that was simply wrong. There was no dispute that Mr May did know about the protected disclosures because they were expressly referred to and relied on by the Claimant in his written appeal document sent to Mr May.

41. Mr Cramsie submits that neither the error in relation to Ms Vuchemtigah, if it was made, nor the error in relation to Mr May is material or undermines the clear findings made by the Employment Tribunal. He relies on clear findings about what Mr Sales knew himself and about what he was told by Ms Vuchemtigah.

42. I recognise that at paragraphs 70 and 71 the Tribunal held as follows:

> "70. Mr Sales was adamant in his evidence, which the tribunal accepts that his decision was his alone and he did not consider it to have been manipulated by Vivian in any way.

> 71. Further Mr Sales did not know of the claimant's complaints to the CQC, Vivian did not raise these with him and he would not have expected her to do so".

43. On the basis of those findings, at paragraph 83 the Tribunal held:

> "83. Neither the dismissing officer nor the appeals officer knew that the Claimant had made these protected disclosures. There is no substance whatsoever in the Claimant's suggestion that Vivian Vuchemtigah had manipulated the investigation or had any influence on the decision. She was not a decision maker. Mr Sales came new to the matter and it was his decision along."

44. Despite the forceful submissions of Mr Cramsie, I do not have the confidence he invites me to have, that the errors made by the Tribunal in relation to what was actually known to Ms Vuchemtigah and to Mr May did not affect the findings about what was known to Mr Sales and what Ms Vuchemtigah did or did not tell him. If the Employment Tribunal proceeded on the false basis that Ms Vuchemtigah did not know about the identity of the Claimant as the RP whistleblower, as I judge it to have done, it would follow inevitably that she could not have communicated this to Mr Sales. I cannot be sure that the Tribunal would inevitably have made the same finding had it proceeded on the correct basis.

45. Moreover, it seems to me there is force in the argument advanced by Mr Lewis that to assess the Claimant's case based on manipulation by Ms Vuchemtigah it was essential for the Employment Tribunal to recognise the extent of Ms Vuchemtigah's knowledge and to assess what she did or did not do by reference to it (including her approach to the investigation and whether it was a fair or an imbalanced approach). Similarly, to determine the extent to which, if at all, Mr Sales was influenced or affected by her view of the Claimant as a whistleblower, it was essential for the Employment Tribunal to recognise the extent of her knowledge and what view she actually took of the fact that he raised complaints as a whistleblower, including to the CQC.

46. For these reasons, I have concluded that the appeal must be allowed on ground three as well as the conceded grounds. Accordingly, the finding that the dismissal was not automatically unfair because done by reason of the Claimant's protected disclosures cannot stand and will have to be reconsidered at a remitted hearing.

Disposal

47. Mr Lewis contended that if ground three is remitted for reconsideration, the Claimant should have the opportunity to amend his claims to raise a detriment claim. The factual basis for such a claim is already pleaded and this would simply be a matter of re-labelling. He submitted that it would be open to the Employment Appeal Tribunal to confer jurisdiction on the Tribunal by allowing the appeal and remitting the case to the Employment Tribunal in terms that are not so confined as to limit the Employment Tribunal simply to the claims that have already been made.

48. I do not accept that the Employment Appeal Tribunal has jurisdiction to do what Mr Lewis invites me to do. The Employment Appeal Tribunal can only deal with grounds of appeal relating to claims brought by an appellant. While under section 35(1)(b) **Employment Tribunals Act 1996**, the Employment Appeal Tribunal has power for the purposes of disposing

of an appeal to remit a case to the Employment Tribunal for further consideration, it seems to me that power can only be exercised in relation to the grounds of appeal that are raised. The power does not extend to remitting for further consideration new claims that have not yet been made; nor can the Employment Appeal Tribunal confer jurisdiction on the Employment Tribunal to consider new claims yet to be pursued.

49. In the light of my conclusion that the appeal is allowed on all three grounds, it is common ground between the parties that the most appropriate course is to remit to a fresh tribunal. I agree with that approach. This was a substantially flawed decision. Both sides consider it likely that evidence will have to be reheard and without doubting the professionalism of the Tribunal, it might be difficult for the same Employment Tribunal to reach a different decision having made such firm but flawed factual findings. The risk of confirmation bias cannot be excluded.

50. Accordingly, the appeal is allowed on all three grounds. The following issues are remitted to a fresh Employment Tribunal for rehearing:

(i) Did the Respondent take such steps as were reasonable to avoid the disadvantage? For example, allowing the Claimant to work on the ground floor, allowing the Claimant to carry out the role of activities co-ordinator and/or allowing the Claimant to carry out the laundry.

(ii) Did the Respondent not know, or could the Respondent not be reasonably expected to know that the Claimant was likely to be placed at the disadvantage set out above.

(iii) Was the Respondent entitled to terminate the Claimant's employment summarily?
If not, to what compensation, if any, is the Claimant entitled?

(iv) Was the making of the protected disclosures, namely (a) the telephone call made to the CQC on 5 July 2016 and (b) the written statement dated 15 July 2016 and given to Ms Rhanhwara, the principal reason for the dismissal?

(v) As the Claimant has less than 2 years continuous employment, the burden is on the Claimant to show jurisdiction and therefore to prove that the reason or if more than one, the principal reason for dismissal was the making of either of the two proven protected disclosures the principal reason for the dismissal.