IN THE EMPLOYMENT APPEAL TRIBUNAL

Case Numbers: EA-2022-001347-NLD and
EA – 2023-000545-NLD

ON APPEAL FROM THE LONDON SOUTH EMPLOYMENT TRIBUNAL

Case Number: 2300819/19

B E T W E E N:

DR. CHRISTOPHER DAY

Appellant

-and-

LEWISHAM AND GREENWICH NHS TRUST

Respondent

APPELLANT'S SKELETON ARGUMENT

For preliminary hearing on 27th February 2024

---

1. This is the Appellant's skeleton argument for the preliminary hearing in respect of the following:

   a. The Claimant's appeal EA-2022-001347-NLD (where relevant, "**the Appeal**") of the substantive liability judgment ("**the Liability Judgment**") dated 15 November 2022 and sent to the parties on 16 November 2022 [3-69];

   b. The Claimant's appeal EA – 2023-000545-NLD (where relevant, "**the Costs Appeal**") of the costs judgment dated 6 March 2023 and sent to the parties on 26 April 2023 ("**the Costs Reasons**") [70-75].

2. In both cases, the decisions under appeal were made by Employment Judge Anne Martin sitting with Ms J Forecast and Ms C Edwards ("**the Tribunal**").

3. Hereafter, the parties are referred to as they were in the court below, with the Claimant being referred to as "C" and the Respondent as "R". No discourtesy is intended by these or any other abbreviations adopted in these submissions.

4. The additional materials included in the bundle are the submissions made by the Claimant before the Tribunal [275-315]; the witness statements concerning the inadequate disclosure [316-321]; and the deletion of documents [322, 323-326]; part of the transcript of the hearing [327-330]; board minutes [331-334]; costs application [335-343]; response to costs application [344-351]; response to response [352-357].

5. The Appellant has taken note of the comments made by HHJ Tayler in the Reasons attached to the order of 31 July 2023 on the liability appeal [271]. The Appellant has consolidated the number of Grounds of Appeal; and re-drafted the existing Grounds of Appeal in a proposed amended form (attached to this skeleton). In summary and cross-referred to the original numbering where relevant, the Proposed Grounds are:

<u>Ground 1: Failure to make reasoned findings on the issues</u>

- The Tribunal erred in law by failing to make findings on whether the protected disclosures tended to show concealment at issues 2.2(b)[1] and 2.2(c)[2]. The Tribunal has therefore failed to properly adjudicate and engage with the Claimant's claims.

<u>Ground 2: Taking into account irrelevant information and failing to take into account relevant information regarding the Claimant's pleaded detriments:</u>

- The Tribunal has taken into account irrelevant information. At paragraphs 154 and 156 the Tribunal has erred by finding that a true statement cannot be a

[1] 1.4(b) according to the LoI attached to the Judgment
[2] 1.4(c) according to the LoI attached to the Judgment

detriment, and has failed to assess the detriment from the viewpoint of the worker (covered by Ground 4);

- The Tribunal has also failed to take into account the following relevant information:

  a. In relation to issue 4.1(a)9i), 4.1(a)(ii) and 4.1(b), at paragraph 155, the timing of the Respondent's decision to definitively not pursue costs against the Claimant;

  b. In relation to issue 4(b), the evidence of both Mr Milsom and Mr Cooper as to who had raised the issue of a potential finding by the tribunal that the Claimant's evidence was untrue;

  c. The agreed statement in the settlement agreement arising from the First and Second Claims and the Respondent's repeated departure from that in its public statements;

  d. The use of potential costs and wasted costs applications to force the wording of an agreed statement.

- Further or alternatively, the Tribunal has failed to engage with the Claimant's case.

<u>Ground 3:</u> <u>Applying an incorrect and inconsistent approach to the drawing of inferences</u>

- The Tribunal erred in the following respects:

  a. Drawing adverse inferences in respect of the Claimant's reliance upon legal advice privilege

  b. Refusing to draw an adverse inference in respect of the following:

     i. The destruction of 90,000 documents by Mr. Cocke during the hearing;

     ii. Mr. Travis' false or inconsistent evidence regarding the number of NHS stakeholders he had written to making statements about the Claimant;

iii. Mr. Travis' false or inconsistent evidence regarding the note of a board meeting prior to the settlement of the First and Second claims;

iv. The false or inconsistent position advanced in Mr. Travis' witness statement that at the time of settlement he advised the Board of the Respondent that he wanted the case to run its course;

- Further or alternatively, the Tribunal's decision in this regard is not Meek compliant.

<u>Ground 4: Applying the wrong legal test in respect of detriment</u>

- Contrary to *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, the Tribunal applied a higher standard than the subjective standard of the reasonable worker.
- Further or alternatively, the Tribunal's findings on the above are not Meek compliant.

<u>Ground 5: Application of the wrong legal test in respect of causation</u>

- The Tribunal has erred in law by applying a but-for test in respect of causation, contrary to *Fecitt v NHS Manchester* [2012] IRLR 64.
- The Tribunal further erred by failing to follow the guidance in *Jesudason v Alder Hey Children's NHS Foundation Trust* [2020] ICR 1226.
- Further or alternatively, the tribunal has failed to give adequate reasons for its findings on this issue.
- In a further alternative, the decision reached by the Tribunal is perverse.

<u>Ground 6: Failure to correctly apply the burden of proof</u>

- The Tribunal misapplied the burden of proof in the following respects:

a. Failing to shift the burden of proof to the employer to show that if a detriment was done it was not done on the grounds of the protected disclosure;

b. Requiring the Claimant to show that he had suffered actual harm;

c. Uncritically accepting the Respondent's reasons for detrimental action;

d. Requiring the Claimant to show that detriments suffered by him were considered to be detrimental by others.

Further or alternatively, the Tribunal's decision on this point was perverse.

Ground 7: Incorrect application of the law on the field of employment issue (Majority Decision)

- The Majority erred by applying a test that is derived incorrectly from the Court of Appeal's judgment in *Tiplady v City of Bradford MDC* [2019] EWCA Civ 2180; [2020] ICR 965, in finding that the Claimant was acting as a "crowd-funded litigant" for the purposes of post-employment detriment.
- The Majority further erred by finding that *Tiplady* was authority for a new "field of employment test". *Tiplady* is not authority for a new test. The Court of Appeal in Tiplady agreed with the court of Appeal in *Woodward v Abbey National Plc* (No1) [2006] EWCA 822; [2006] ICR 1436.
- Further or alternatively, the Tribunal's decision on this point is not Meek compliant.

Ground 8 (formerly Ground 9): Procedural unfairness

- The Tribunal adopted a procedure contrary to the principle of procedural fairness by stopping the cross-examination of Mr. Cooper KC and then relying on his untested evidence in respect of pleaded detriments.
- This error renders unsafe the findings at paragraph 137 and 140, and further amounts to irrelevant information being taken into account.

OVERVIEW

6. The background to this matter is complex and is set out in detail in the two Notices of Appeal. In summary:

a. This was C's third whistleblowing claim, brought on 6 March 2019. It dealt with post-employment detriment suffered following the contentious settlement of the previous claims during the final hearing;

b. The alleged detriments turned on adverse comments made by R about C as a former employee of R. These comments had either been published or made to influential stakeholders;

c. During the hearing of C's third claim, there were serious disclosure issues. These ultimately led to the destruction of 90,000 documents by one of R's witnesses, who was then not produced for cross-examination on the basis that his own actions had made him unwell.

7. The parties broadly agreed that there were three legal issues for the Tribunal to approach at the liability stage:

   a. Whether the matters at paragraph 4 of the list of issues are detriments for the purposes of s47B ERA 1996 ("**the Detriment Issue**");

   b. Whether the detriment was caused by the protected disclosure, such that the protected disclosure materially influenced (in the sense of more than trivially) the deliberate doing or failure to do of an act ("**the Causation Issue**");

   c. Whether the detriment was suffered in the field of employment ("**the Field of Employment Issue**").

8. There were numerous other further issues subsidiary to the key legal issues. Key amongst these for the purposes of these were:

   a. The use of privileged material; and,

   b. The conduct of R's witnesses.

9. In the amended liability Grounds of Appeal, C contends that there are eight grounds upon which the decision of the Tribunal may be impugned.[3] This is reflective of the fact that the Liability Judgment is, in C's submission, a severely

[3] There was a numbering error in the original grounds of appeal. The grounds are numbered up to ground 14, but there were in fact twelve grounds. There were no Grounds 10 or 11.

flawed decision. This is perhaps because of the complexity of the underlying facts and law, as well as the extraordinary conduct of R's witnesses.

10. Unsurprisingly, this is not accepted by R; however, R cannot sensibly contend that, among other things, having a witness irretrievably delete an archive of 90,000 potentially relevant emails the morning before he was due to be cross-examined is anything other than conduct of the utmost severity. This is just one of the factual matters in relation to which C contends the Tribunal made a perverse decision.

11. C is mindful of the EAT Practice Direction and accepts that the grounds are lengthy; however, C contends that they are all arguable. This is an exceptional case, where a great deal appears to have gone awry with the Martin Tribunal's application of the law.

12. The submissions in respect of the Liability Judgment appeal are found at paras 13 to 37 below.

13. There are also brief submissions on the costs appeal found at paras 38 to 41 below.

SUBMISSIONS

Failure to make findings on the issues (Ground 1)

14. There are issues in relation to which the Tribunal made no or no adequate findings. On this ground, C may be very brief indeed: this is an arguable error of law and should be allowed to proceed to a full hearing.

The Detriment Issue (Grounds 2 – 4)

15. Grounds 2 – 4 analyse the Tribunal's treatment of the Detriment Issue. C contends that there are three primary errors that are easily identifiable on the face of the Liability Judgment in the Tribunal's consideration of detriment. These grounds have been expanded in the Notice of Appeal with the intention of assisting the Appeal Tribunal, but they could be summarised as follows:

    The Tribunal erred in law in its analysis as to whether the Claimant had been subjected to a detriment in the following ways:

(i) *the Tribunal took into account irrelevant information and failed to take into account relevant information (Ground 2);*

(ii) *the Tribunal impermissibly drew an adverse inference in respect of the Claimant's assertion of Legal Advice Privilege (Ground 3); and,*

(iii) *the Tribunal applied the wrong legal test in respect of detriment by failing to consider detriment from the perspective of the reasonable worker (Ground 4).*

16. In the amended grounds of appeal, C has highlighted the irrelevant information which formed part of the Martin Tribunal's erroneous reasoning on detriment. In a nutshell, a public statement may amount to a detriment even if it is true (*Beatt v Croydon Health Services NHS Trust* [2017] ICR 1240; *Jesudason v Alder Hey Children's NHS Foundation Trust* [2020] ICR 1226).

17. C has also set out the areas in which the tribunal has failed to take into account relevant information – including most importantly the evidence of Mr Milsom[4] and Mr Cooper in relation to issue 4.1(b).

18. C says that as a result it is arguable that the Martin Tribunal has taken a flawed approach to the law on detriment.

19. The legal privilege point could be considered to form part of a limb on irrelevant information above since any consideration of the reasons why C may not have waived privilege are irrelevant considerations; however, C contends that this ground is of particular importance given the strong public interest in the courts upholding the sanctity of legal professional privilege generally. There is no discretion for a Tribunal to go behind legal professional privilege.

20. As set out in the amended Grounds of Appeal, the Tribunal speculated impermissibly as to the content of the legal advice received by C on numerous occasions, and clearly took into account C's refusal to waive privilege. R contends that at no point did the Tribunal state in terms that it was making an inference (see Response at paragraph 20 [113]), but that is, with respect, irrelevant. C says that the relevant matters are these:

---

[4] [330]

a. There are four references to C's refusal to waive legal advice privilege in the part of the Liability Judgment in which the Tribunal is considering its findings and conclusions; and,

b. There are speculative references to the potential content of the legal advice in eight paragraphs of the Liability Judgment.

21. The proper approach would have been for the Tribunal to simply note that privilege was not waived by either party, and that as such, it would not be referred to again. Instead, the Tribunal speculated as to what the position must have been. An example is seen in paragraph 142 of the Liability Judgment where the Tribunal finds as follows:

"*The other question the Tribunal considered is why the Claimant would believe he was at such a risk of costs if, as he says, he considered his case to have good prospects and his evidence to have been honest and good. If this had been his belief, then why would he have believed that there was a significant chance that costs would be awarded?*

The only conclusion is that he had advice from Mr Milsom which made him believe or consider that there was a significant chance that he would not be successful, with a finding of untruthfulness".

22. Contrary to its statement at para 135, the Tribunal do draw inferences from the Claimant not waiving privilege. This prejudiced C's case on detriment and C therefore maintains that this is a reasonable ground for appeal.

23. Finally, as regards detriment, the starting point for the Tribunal should have been that detriment is to be assessed from the viewpoint of the worker (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL, paras 33 to 35). Despite this, even a cursory reading of the Liability Judgment shows that the Tribunal approached this question from the perspective of others, finding that the public statements made by R were not perceived to be detrimental by others (see para 161). That demonstrates that detriment was not considered from the viewpoint of C. Again, as a matter of law it is arguable, that the Martin Tribunal fell into error in its assessment of detriment.

24. In the alternative, C submits that the Martin Tribunal's decision on these points is inadequately reasoned and not **Meek** compliant.

The Causation Issue (Grounds 5 and 6)

25. If the Claimant's submissions as to protected disclosures or detriment are accepted, this renders the causation findings unsafe, because the Tribunal's decision on causation follows a determination based on only the agreed disclosures (and not those on concealment), that there was only a single detriment (issue 4.1(a)(iii)[5]), which is, in essence, R publishing a statement which implied that C knew R was not going to pursue him for costs prior to settling his claim - which was untrue). The reasoning errs in two key respects:

    a. The Tribunal failed to apply a 'material factor' test in respect of causation (Ground 5); and,

    b. The Tribunal applied the burden of proof incorrectly (Ground 6).

26. At paragraph 155, the Tribunal found that the statement by R in relation to costs would have been significant in the eyes of C's crowd funders and therefore constituted a detriment, but went on the find at para 179 that the detriment was not caused by any of the agreed protected disclosures. This suggests that the Tribunal did in fact consider that at least in part, R made the statement to diminish C's status as a whistleblower in the eyes of his supporters which included Journalists, MPs and large numbers of both senior and junior doctors as the case was so high profile.

27. The key finding on causation at paragraph 179, was that the statements were not made "*because the Claimant made protected disclosures*" but in response to media interest in the case as part of a "*PR battle*". The immediate difficulties with this finding can be summarised follows:

    a. The Tribunal appears to have misdirected itself and applied a single cause test rather than address whether the protected disclosures had a material

[5] 3.1(a)(iii) according to the LoI attached to the Judgment

influence on the detriment in the sense of being more than trivial (which is a low threshold);

b. Mr. Travis, who signed off the statement, was in communication with the doctors to whom the protected disclosures had been made (see paragraph 176);

c. The burden of proof is on R to show that the reason for the detriment was solely the PR battle and C further contends that where an employer fails to meet the burden of proof, that issue must be determined in favour of the worker (see *Fecitt and others v NHS Manchester* [2011] EWCA Civ 1190 ; see also *Edinburgh Mela Ltd v Purnell* [2021] IRLR 874 at ¶67);

d. R could not discharge the burden of proof since their witness, Mr. Cocke, who was R's Associate Director for Communications and who was responsible for the drafting of the statements, did not attend for cross examination and moreover deleted a huge archive of documents prior to his scheduled evidence.

e. The Martin Tribunal makes a simple, binary finding, which does not reflect the nuance of the case-law in this area, and conducts no or no adequate enquiry into the conscious and unconscious mental processes of the employer (contrary to *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337). In a case where a witness admitted to the destruction of evidence prior to cross-examination, that is a significant failing in the reasoning of the Tribunal.

28. What the above demonstrates is that the Tribunal's findings in respect of causation are at best a departure from the correct legal test and at worst, perverse. Both grounds are arguable.

29. Alternatively, the findings in respect of causation are not *Meek* compliant, and further reasons would have been necessary for C to understand why the Tribunal reached the decision that it did.

Field of Employment Issue (Ground 7)

30. C contends that the “field of employment” question was misunderstood by the Tribunal, which applied the Court of Appeal’s recent decision in *Tiplady v City of Bradford MDC* [2019] EWCA Civ 2180; [2020] ICR 965**.** *Tiplady* does not make new law nor is it a case about post-employment detriment; it simply reiterates that a detriment must be suffered by an individual in their capacity as a worker. It is an obvious point.

31. The leading case on post-employment detriments is *Woodward v Abbey National Plc* (No1) [2006] EWCA 822; [2006] ICR 1436. It is not contradicted by *Tiplady*. In that case, Ward LJ in the Court of Appeal explained the rationale behind whistleblowing detriment extending beyond the contract of employment:

> “*68 . . . The public interest, which led to the demand for this Act to protect individuals who make certain disclosures of information in the public interest and to give them an action in respective of that victimisation, would surely be sold short by allowing the former employer to victimise his former employee with impunity. It simply makes no sense at all to protect the current employee but not the former employee, especially since the frequent response of the embittered exposed employer may well be dismissal and a determination to make life impossible for the nasty little sneak for as long thereafter as he can. If it is in the public interest to blow the whistle, and the Act shows that it is, then he who blows the whistle should be protected when he becomes victimised for doing so, whenever the retribution is exacted*”.

32. The Tribunal dealt with this issue at paragraphs 182 -191. The majority decision of the Tribunal is found at paragraph 191, though on the Tribunal’s own finding, full details are not provided because in their view, the case did not turn on this point. Therefore, in the alternative, C will argue that this point is obiter (a notion with which R appears to agree at paragraph 38 of its Response [xx]) and that C does not need to succeed on it in order to succeed on his appeal.

33. As regards the substantive ground, the decision of the majority disregards the test in *Woodward*, and the notion that a whistleblower is protected whenever the retribution is exacted, even if that is after his employment has ended. It cannot be

right that simply because a whistleblower has litigated previous detriments, he is debarred from bringing a further claim because once he has, the detriment is somehow suffered in his capacity as a litigant rather than as a worker.

34. This is, however, the effect of paragraph 186 of the Liability Judgment, and it is plainly a misapplication of the law. C therefore contends that there are reasonable grounds for making this argument.

Procedural unfairness (Ground 8 in the amended Grounds – formerly Ground 9)

35. The Claimant considers that Ground 9 is an important point of principle. The Tribunal's decision to abruptly stop cross-examination of a key witness, Mr. Cooper KC, and then to rely on his untested evidence in respect of specifically pleaded detriments runs contrary to the principles of natural justice and procedural fairness.

36. The Tribunal's decision in this respect is of particular concern, given that despite the transcript showing that the Tribunal stopped the evidence on the basis that it would not make findings about the Claimant's truthfulness, the Tribunal in fact proceeded to make findings and allusions as to the same. It is plainly arguable that the Claimant's right to a fair hearing in adversarial proceedings has been violated.

37. The procedural unfairness in respect of the halting of the cross examination of Mr Cooper KC is amplified by the matter already referred to in relation to Ground 2 above concerning whether the Respondent's statement in detriment 4(b) was untrue given the evidence of Mr Milsom and Mr Cooper.

THE COSTS APPEAL

38. C understands that this Preliminary Hearing has also been listed to deal with the appeal on costs. There are only two grounds relied upon, and both relate to the very serious conduct of R. HHJ Shanks, having considered the grounds on the sift, considered that there may be an arguable appeal.

39. The Costs Reasons show that, whilst the Tribunal found that R had acted unreasonably at Stage 1, the Tribunal's Stage 3 analysis was flawed. There is little

to no consideration of: (a) the detailed arguments put forward in the Claimant's costs application; and (b) of the factors relevant to making a costs award in respect of R's conduct; but there is considerable emphasis on C's social media activity and a further claim, all of which arose after the case had concluded. These are plainly irrelevant factors and in any event are not weighted against the Respondent's serious conduct in the course of the litigation.

40. The Tribunal further based the Costs Reasons on matters which were not considered in the Liability Judgment. As such, C submits that the Costs Reasons are reflective of the Tribunal's flawed approach to C's case more generally.

41. C invites the Appeal Tribunal to set the Costs Appeal down for hearing with the substantive Appeal.

Andrew Allen KC

Elizabeth Grace

Outer Temple Chambers

9 February 2024