Neutral Citation Number: [2020] EWCA Civ 73

IN THE COURT OF APPEAL (Civil Division)

Appeal Court Ref No: A2/2018/1773

BETWEEN

Mr Edwin Jesudason

Appellant (Claimant below)

-and-

Alder Hey Children's NHS Foundation Trust

Respondent

Application to the Court of Appeal for Permission to Appeal to the Supreme Court

1. This application follows the handing down of the reserved judgment in this appeal on 31 January 2020.

2. The Appellant seeks leave to appeal to the Supreme Court on the basis that a further appeal raises arguable points of law of general public importance which ought to be considered by the Supreme Court at this time.

Ground 1 – scope of s43G Employment Rights Act 1996 ' –disclosure in other cases'

3. In this case, this point turned on whether in relation to the disclosures made by the Appellant to Members of Parliament and the press, in all the circumstances of the case, it was reasonable for the Appellant to make those disclosures.

4. In paragraph 49 of his Judgment, Sir Patrick Elias held that "A worker cannot expect to have protection for a host of complaints unjustifiably brought to the attention of the media or other influential third parties on the basis that amongst them there is one issue which it might have been reasonable to

disclose" and "Had the disclosure related only to the Ahmed issue, then perhaps it would in the circumstances have satisfied the reasonableness test." With respect, this adds an additional hurdle to the test in section 43G ERA 1996, namely that a disclosure that could be reasonable is rendered unreasonable because of other accompanying statements. There is no authority at Supreme Court / House of Lords level to that effect. If that principle is to be established (or not), it is worthy of discussion and determination at Supreme Court level.

Ground 2 - Causation

5. In paragraphs 68 to 74 of Sir Patrick Elias's Judgment, there is a consideration of the argument that the ET had not engaged with the possibility that the Trust might in its responses have chosen to take the opportunity to retaliate against the appellant at least in part because of earlier protected disclosures he has made. With respect in paragraphs 69 to 74 there is an impermissible attempt by the Court of Appeal to 'fill in the gaps' in the reasoning of the ET. In paragraph 69 it is stated that "it is fair to assume that this matter would have been explored in detail with the Trust's witnesses at the hearing". In paragraph 71 it is stated that "I think it is reasonable to infer that the ET will have had the false statements very much in mind since this was the basis of the alleged detriments". In paragraph 72 it states "it is intrinsically unlikely that the authors of these letters would have been reacting to the protected disclosures". These assumptions and inferences should not be used to support a decision to uphold a first instance decision.

6. The extent to which an appellate court can 'fill in the gaps' in this manner is worthy of consideration at Supreme Court level.

Ground 3 - Causation

7. The effect of the Court of Appeal's Judgment is that a false and / or detrimental statement about someone who is making a protected disclosure can be used to protect the reputation of the employer and that this effort to protect the employer's reputation can somehow be isolated from the protected disclosures being made. This could create a loophole in the protection of those who are making protected disclosures and the limits of this principle are worthy of discussion and decision at Supreme Court level.

Ground 4 – Matthew Jones letter

8. In paragraph 63, in relation to the Matthew Jones letter, the Court of Appeal falls into the same error as outlined at ground 2 above stating that: "this would justify the inference that Mr Jones genuinely believed the statement to be true." However there is an acceptance that the letter could have been detrimental to the Appellant.

9. In paragraph 75 of Sir Patrick Elias's Judgment it is stated that: "The ET made an unambiguous finding that the statement was made to defend the reputation of Mr Jones and his colleagues. Since Mr Jones had believed it to be true in all respects, there can be no basis, as there was with the other letters, for differentiating between the reason for sending the statement and the reason for including false information." In doing so the Court of Appeal contradicts its own reasoning at paragraphs 64 and 65 that the relevant question is not the reason why a communication was written but the reason why a detrimental part of that communication was included (particularly if false). There was no engagement with the argument based on the various iterations of Mr Jones's letter which pointed towards the protected disclosures being the reason for his submission of the altered letter as if the original – as did Mr Jones's own evidence that he had revised his letter because he wanted "redress" and to "up the ante" against the Appellant, strongly suggesting that it was connected with the Appellant's protected disclosures - as did Mr Jones' statement submitted

with the altered letter, in which he states it is a response to the Appellant's March 2009 letter, held by all to be a protected disclosure.

Ground 5 – Race discrimination

10. In paragraph 82 of Sir Patrick Elias's Judgment it states "It can never be legitimate to infer that a claimant's race was a significant influence in the treatment meted out to him solely because of other incidents, unrelated to the claimant, where race was a significant influence". This lays down a principle that is too absolute in its nature. If such principle is to be established, it is worthy of consideration at Supreme Court level.

Ground 6 – Race discrimination

11. It is acknowledged at paragraphs 84 and 85 of Sir Patrick Elias's Judgment that the ET treated a list of inferences as a list of alleged discriminatory acts. The manner in which such a list of inferences would be regarded is by its nature different to the manner in which a list of potential discriminatory acts is regarded. There was therefore no item by item consideration of the actual list of discriminatory acts as potential race discrimination. The conclusion that the ET had sufficiently dealt with this issue on the basis of a catch all reference at paragraph 236 of the ET's Reasons as set out at paragraph 88 and 89 of Sir Patrick Elias's Judgment is a departure from the established manner in which a tribunal should look at individual allegations of discrimination and then take a step back and look at the allegations of discrimination taken as a whole. Such a re-framing of an ET's task in this regard is worthy of consideration at Supreme Court level.

Ground 7 – Not putting questions to witnesses

12. The contention that a failure to put an allegation of race discrimination to a witness would be a relevant – even weighty – consideration for an ET is uncontroversial. However in stating at the end of paragraph 93, in relation to an appeal court substituting its judgment for that of the ET in such

circumstances, that: “Indeed, it is difficult to envisage how that could ever be fair, even allowing for the more informal procedure adopted in employment tribunals”, the Court of Appeal goes too far. The ET is used to a great degree by unrepresented Claimant employees, who are frequently unfamiliar with and even on occasion incapable of putting their case or cross examining witnesses and the establishment of such a principle is worthy of consideration at Supreme Court level.

Andrew Allen
Outer Temple Chambers
17 February 2020