Appeal No. UKEAT/0270/08/MAA

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 14 August 2008

Before

HIS HONOUR JUDGE ANSELL

MR D J JENKINS OBE

MR J MALLENDER

MRS B SHESTAK — APPELLANT

THE ROYAL COLLEGE OF NURSING & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	No appearance or representation by or on behalf of the Appellant
For the Respondents	
The Royal College of Nursing	MR ANDREW SHORT (of Counsel) Instructed by: Messrs Reynolds Porter Chamberlain LLP Solicitors Tower Bridge House St. Katharine's Way London E1W 1AA
East of England Strategic Health Authority	MR JONATHAN DAVIES (of Counsel) Messrs Radcliffes LeBrasseur Solicitors 5 Great College Street London SW1P 3SJ
Anglia Ruskin University	MR MARTYN BARKLEM (of Counsel) Instructed by: Messrs. Berrymans Lace Mawer Solicitors Salisbury House London Wall London EC2M 5QN

SUMMARY

RACE DISCRIMINATION: Aiding and abetting

Issues relating to s11 and s33 **Race Relations Act 1976** correctly dealt with by a Tribunal on a striking-out application.

HIS HONOUR JUDGE ANSELL

1. This has been the final hearing of an appeal against certain aspects of a judgment of an Employment Tribunal presided over by Employment Judge Pearl following a pre-hearing review conducted over five days between May and November 2007 (with three chambers' days) relating to the striking out of claims of racial discrimination against 3 of 16 Respondents that were originally named.

2. The Appellant, Mrs Shestak has not appeared today, neither is she represented.

3. Apart from the Notice of Appeal, which eventually was placed before HHJ Clark on the sift who granted leave for this hearing, very recently a facsimile has been received on behalf of the Appellant purportedly being a Skeleton Argument in relation to today's appeal hearing but in fact seeking an adjournment, postponement and possibly referral to ACAS arising out of what is said to be a number of procedural and other errors in relation to the conduct of this appeal and in particular the conduct of the Employment Appeal Tribunal and its staff in dealing with this appeal.

4. At the commencement of this hearing before dealing with the substantive issues we did raise the various complaints that the Appellant has made in relation to those procedural matters and we will refer to them in a moment.

5. The background facts to this can be stated in fairly short terms. The Appellant commenced a nursing degree with Anglia Ruskin University, that being a three year course, 50 per cent being academic or classroom based, the other 50 per cent being practical and carried out through work placements at hospitals.

6. She commenced her first such placement in October 2005 at a hospital which was under the

control of the Mid Essex Hospital Services NHS Trust. The last day of that placement was in January 2006 and in that four month period there were disagreements at the Broomfield Hospital between the Claimant and others, the facts of which fall to be resolved at a full hearing of her claims against the Trust and certain members of its staff which were claims which the Employment Tribunal ordered could remain to be heard at a full hearing which we are told is fixed for hearing in January.

7. The Trust terminated the Appellant's work placement and declined to have her work at any of its hospitals. It emerged in evidence that this was the first and only time that such a step had been taken by the Trust against a trainee nurse on work placement.

8. The first set of allegations relate to specific behaviour by members of the Trust staff up to 12 January 2006 and then allegations relating to termination of the placement and refusal to take her back.

9. There are other allegations against the university in terms of failing to provide support and there are also claims which are the subject of other proceedings relating to the university's failure to find placements within other hospitals or Trusts.

10. Reverting to the complaints that are made in relation to the procedural aspects of this case, the Appellant has complained that her Notice of Appeal was not in a complete form when it arrived by facsimile at this Tribunal. In particular she has suggested that there was some malpractice on the part of, certainly one member of staff in this building, and has indeed suggested that it amounted to fraud within the meaning of the **Fraud Act**.

11. The document as transmitted certainly when received contained some omissions in the text. There is absolutely no evidence at all that it has been interfered with in any way by a member

of staff within this building. The matter was looked into by the Registrar of the Employment Appeal Tribunal and she is quite satisfied that nothing untoward has happened to that document; and indeed there is no reason whatsoever why that sort of interference should have been perpetrated in this particular case. It looks, certainly to all who have seen it, simply as some form of transmission error in the document.

12. There was then a complaint raised in relation to the length of time it has taken for this full hearing to have been reached. The procedural steps in this appeal involved initially a stay that was ordered by HHJ McMullen because there was a case management decision pending in the Tribunal. Once that stay was lifted the matter then simply proceeded in the normal way, and as we have indicated already came before Judge Clark who sifted it through to a full hearing.

13. Another complaint related to the failure of one or more the Respondents to serve a copy of the Answer on the Appellant. There was, we believe, an oversight (certainly on the part of one or more of the Respondents) but it was accepted that was an oversight and of course, the Rules require only that there is service within the prescribed period of the Answer to this court.

14. Leave was given to one Respondent to file out of time, again that followed normal procedure in this court and the matter again was put before the Registrar and leave was given. We note there was no appeal against that decision of the Registrar.

15. There was another error involving the Notice of Appeal being served on the wrong solicitors; rather than the solicitors for the East of England Strategic Health Authority it was served on the solicitors for the Hospital Trust. That error was rectified fairly swiftly once it had been brought to the attention of all concerned.

16. The other matter raised by the Appellant was a possible referral to ACAS to resolve this

matter. We have considered that and we do not consider it is an appropriate course to be taken. Our task is to determine whether the striking-out that was ordered by the Tribunal below was correct, and if not, then the claims would be reinstated and would obviously be joined into the proceedings which are fixed to be heard in January.

17. As far as the preliminary matters raised in the so-called Skeleton Argument are concerned we find nothing of substance that requires our further attention or in any way affects our determination of the main appeal.

18. Before considering the position of the three Respondents and the claim that is made against them, the Notice of Appeal also complains that Employment Judge Pearl should have recused himself from carrying on with the case as a result of something that was said during the course of the afternoon of one of the hearing days at the Tribunal.

19. That incident is dealt with very fully by the learned judge in an appendix to his decision and it relates to what his decision indicates was, in his opinion, an innocent comment expressing a hope at the end of the afternoon's hearing that the case would finish the following day. That was taken by the Appellant as a comment to suggest that the Tribunal had already made up their minds.

20. The following morning the issue was ventilated and investigated by the Tribunal and the Tribunal checked with all parties as to what was said and the impression that was thereby created. The Tribunal together, rather than the Judge on his own, considered the matter and came to the view that there was no need for the Judge to recuse himself from acting further in the case which would, of course, have meant effectively a re-hearing.

21. The circumstances and the decision, as we have indicated, were fully set out in the appendix.

We are satisfied that the matter was looked into properly, was considered by the whole Tribunal having heard submissions from the parties and we can find no error in the Tribunal's approach.

22. A complaint was also made in the Notice of Appeal against the Tribunal's decision to permit an amended ET3 to be filed on behalf of one of the Respondents who is not a party to this appeal.

23. It related to the fact that the original answer filed was apparently still in the draft form in which it had been prepared either by counsel or solicitors and included certain matters in brackets that would not have been included in a final version. The District Judge allowed the party concerned to put in a proper version either by way of replacing the original or by way of amendment. Again this seems to us to be an entirely proper course to have taken and we can find no error of law as far as that is concerned.

24. We turn then to the way in which the District Judge dealt with the three Respondents.

25. Firstly turning to the Respondents, namely the Royal College of Nursing and its employee Tony Durcan, although the College is the only one of the two Respondents named in the Notice of Appeal. The section dealing with those two Respondents can be seen from paragraph 76 of the decision onwards.

26. The claims against those two Respondents were made under section 11 of the **Race Relations Act 1976** which is the section that relates to discrimination by trade unions and other workers' organisations. By (2) of that section:

> **"It is unlawful for an organisation to which this section applies, in the case of a person who is not a member of the organisation, to discriminate against him-**
> **(a) in the terms on which it is prepared to admit him to membership; or**
> **(b) by refusing or deliberately omitting to accept, his application for**

membership.

(3) It is unlawful for an organisation to which this section applies, in the case of a person who is a member of the organisation, to discriminate against him—
(a)in the way it affords him access to any benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them; or
(b)by depriving him of membership, or varying the terms on which he is a member; or
(c) by subjecting him to any other detriment."

27. The claims made against the union are set out in summary form at paragraph 3 of the helpful Skeleton prepared on behalf of the Respondents for this hearing. They were: (1) not providing the Appellant with any legal, semi or specific professional advice concerning her case of harassment and discrimination at Broomfield Hospital; (2) not protecting her from the racial harassment and victimisation; (3) not appointing a solicitor to her case of harassment and discrimination at Broomfield Hospital; (4) not treating her without respect (that refers in particular to emails emanating from Mr Durcan and in particular the fact that they appeared to be typed all in lower case and certainly in the case of two emails, a misspelling of the word, "difficult"). The suggestion being that that misspelling was drawing attention to racial differences as far as the Appellant was concerned. Other allegations were (5) depriving her of the services of RCN stewards and treating her less favourably than other RCN members; (6) damaging her reputation by stating, "difficult student, don't know what she wants"; (7) not providing her with copies of the Health Trust Policy on Bullying and Harassment, and the Equality Policy as requested.

28. Those claims were struck out by the Tribunal as having no reasonable prospect of success. The Tribunal in dealing with the matter reminded themselves of the power to strike out and in particular the guidance given by the Court of Appeal in **North Glamorgan NHS Trust v Ezsias** [2007] IRLR 603. In particular the passages from the judgment of Maurice Kay LJ where at paragraph 26 he accepted the issue was:

"… whether an application was realistic as opposed to the fanciful prospect of success."

At paragraph 27 he went on to say this:

> **"I too accept that there may be cases which embrace disputed facts but which nevertheless may justify striking out on the basis of their having no reasonable prospect of success ... However, what is important is the particular nature and scope of the factual dispute in question.**

At paragraph 29:

> **"It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation."**

29. The Tribunal considered that authority and went on to consider the extent to which the essential facts were in dispute and noted in particular that many were not capable of being in dispute. They considered in detail the contents of the emails, and in particular considered that the suggestion of misspelling of the word 'difficult' was a coded reference to the Claimant's different culture was unsustainable.

30. They went on to consider the suggestion made by the Appellant that Mr Durcan had allowed her claim to become time barred and noted that this was unsustainable in the light of his email to her informing her of the three month time limit.

31. The suggestion that she had been subject to a detriment by being deprived of the services of an RCN steward were again clearly answered by an email from Mr Smith to the Claimant.

32. They concluded that the claims against the Royal College and Mr Durcan were wholly unsustainable, had no prospect of success and went on to say, "no prospect of success whatsoever".

33. The Grounds of Appeal really seek to suggest the Tribunal should have reached a different conclusion on the various matters that we have set out above. In particular it was asserted that the evidence of Mr Durcan was unreliable and that he was not a credible witness.

34. We did raise in the course of argument whether in a discrimination case of this sort it was an appropriate practice to consider striking-out on the basis of the documents as amplified by brief evidence from the main parties involved.

35. We are satisfied in a case of this nature where the substantial allegations were not in dispute in terms of the interpretation of emails from Mr Durcan, that it was permissible for the Tribunal to take the approach that they did. Bearing in mind the costs that can be involved in substantial discrimination cases, it seems to us that it was permissible in considering whether to strike out at this stage for the Tribunal firstly to look at the allegations taking them at their face value and at their highest but, if necessary, to supplement that documentary evidence by brief evidence from the parties involved.

36. We are satisfied that the Tribunal's approach to this particular Respondent was entirely correct having reminded themselves of the approach and the guidance from the Court of Appeal and looking at the Claimant's case at its highest. They were clearly entitled to form the view that they did.

37. The next Respondent that we consider is the East of England Strategic Health Authority and that part of the decision is set out from paragraph 67 onwards. The allegation against the Health Authority was that it had aided and abetted discrimination of other Respondents. The relevant section is s 33(1) of the Act which provides:

> **"A person who knowingly aids another person to do an act made unlawful by this Act shall be treated for the purposes of this Act as himself doing an unlawful act of the like description.**

38. The decision first of all dealt with the issue as to whether or not the Strategic Health Authority were caught by the provisions of s 13 of the **Race Relations Act 1976** which

provides:

> **"(1) It is unlawful, in the case of an individual seeking or undergoing training which would help fit him for any employment, for any person who provides, or makes arrangements for the provision of, facilities for such training to discriminate against him–**
>
> **(a)in the terms on which that person affords him access to any training course or other facilities concerned with such training; or**
>
> **(b)by refusing or deliberately omitting to afford him such access; or**
>
> **(c)by terminating his training; or**
>
> **(d)by subjecting him to any detriment during the course of his training."**

39. Having considered the position of the Strategic Health Authority the Tribunal came to the view that they did not fall within the scope of that section, and indeed there is no appeal against that finding.

40. The remainder of the claim against the Strategic Health Authority was that firstly, they had aided and abetted other Respondents, in particular that they had failed to help the Trust to put effectively the National Equality Policy into practice; secondly, that they had failed to monitor performance at the hospital in order to maintain standards and report the various violations of the law against the Appellant to the Department of Health; thirdly, discrimination; fourthly, deprivation of opportunity to allow the Appellant to complete her studies and qualify as a nurse including low quality of practice experience; and lastly, victimisation whilst tackling racial harassment in the NHS.

41. The Tribunal found that none of the above allegations amounted to allegations of aiding within the meaning of s33 by the Strategic Health Authority and in particular they took the view that the claim had not identified which other Respondent had committed an act of discrimination which was allegedly aided by the Health Authority. There was no allegation that (i) the Health Authority helped, assisted, co-operated with that other Respondent in doing that act; (ii) the Health Authority knew that act amounted to treating the Appellant less favourably on the grounds of her race or that the other Respondent was thinking about carrying out such an act and (iii) that they had acted consciously in so doing.

42. In other words the key primary facts for the Appellant to prove had not been established against the Strategic Health Authority. In particular the decision referred to the cases of **Anyanwu v Southbank Student Union** [2001] IRLR 305 and **Hallam v Cheltenham Borough Council and Anor** [2001] IRLR 312 and concluded that the claims against the fourteenth Respondent should be struck out on the basis there are no reasonable prospects of success.

43. Again we are satisfied that the Tribunal's approach was correct in this matter. In our view the claim failed to establish the precise act which it is alleged the Health Authority had aided and indeed what acts committed by the Health Authority would amount to aiding within the meaning of s33.

44. The final Respondent is the university.

45. The principal case against the university of discrimination the Tribunal determined would be outside the scope of Tribunal proceedings since it falls within s17 which is part of Part 3 of the **Race Relations Act 1976** providing:

> **"It is unlawful, in relation to an educational establishment falling within column 1 of the following table, for a person indicated in relation to the establishment in column 2 (the "responsible body") to discriminate against a person-**
> **(a)in the terms on which it offers to admit him to the establishment as a pupil; or**
> **(b)by refusing or deliberately omitting to accept an application for his admission to the establishment as a pupil; or**
> **(c)where he is a pupil of the establishment-**
> **(i) in the way it affords him access to any benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them; or**
> **(ii) by excluding him from the establishment or subjecting him to any other detriment."**

46. The section of the decision dealing with the university is headed, "The Academic Respondents" and can be seen from paragraph 58 onwards.

47. The Tribunal's decision was that certainly in the main the allegations against the university were for direct discrimination and victimisation and therefore it would be caught by the

provisions of s17 requiring that the claim would be instituted in the designated County Court rather than this Tribunal. That position was confirmed by a decision of this court in **Moyhing v Homerton University Hospitals NHS Trust and Anor** UKEAT/0851/04/MAA heard on 3 May 2005 a decision of Burton P. The requirement for a claim under Part 3 to be commenced in the County Court rather than this Tribunal can be seen from the provisions of s57 of the **Race Relations Act** which provide that claims under Part 3 must be brought only in a designated County Court.

48. The only issue therefore remaining was whether the university could be caught by the provisions of s33 and whether they had knowingly aided another person and that other person (for the purposes of this claim) could only be the Hospital Trust.

49. The helpful submissions in this case filed by Mr Barklem have referred us to the case of **Hallam** and in particular the speech of Millett LJ and specifically the passage in paragraph 18 of that speech where the Judge said as follows:

> **"The man who helps another to make up his mind does not thereby and without more help the other to do that which he decides to do. He may advise, encourage, incite or induce him to do the act; but he does not aid him to do it. As I said in *Anyanwu v South Bank Student Union* [2001] ICR 391, 407A, aiding requires a much closer involvement in the actual act of the principal than do either encouraging or inducing on the one hand or causing or procuring on the other."**

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50. The ET1 had identified certain acts prior to the termination of placement and at paragraph 1, the Grounds of Appeal:

> **"… no positive act on the part of the University or any members of its staff is identified as to how there was knowing assistance, in the *Hallam* sense."**

51. The second paragraph of the Grounds of Appeal asserts an act of influencing of the Trust decision. The Tribunal below held this to be fanciful but again the Tribunal (and we agree with this course) were of the view that this would not withstand the **Hallam** test. The

decision to terminate was one solely for the Trust. As the Tribunal put it in paragraph 64:

> **"There is no evidence anywhere that the University was involved in the decision of the Trust to terminate the placement and the Trust had absolute discretion in that regard."**

52. The Tribunal agreed with Mr Barklem that the Appellant had need to identify a positive act of discrimination or victimisation which was alleged on the part of another party and then specify a further allegation of the university having knowingly aided.

53. The Tribunal highlighted general passages such as:

> **"The University 'failed to protect the Claimant from victimisation'. It 'assisted the Trust to do this victimisation'."**

But formed the view that nowhere were there specific allegations of how the university had aided in the sense of **Hallam** the decision that led to the termination of the Appellant's placement.

54. We look back to the ET1 ourselves under the heading, "Other Complaints". There is a complaint against the university for failure to provide a work placement. We understand that is the subject of other proceedings and is not pleaded as an act which aided the discrimination of the hospital Trust.

55. Under the more specific allegations against the university. At paragraph 15 the following is set out in the ET1:

> **"Furthermore the university accepted by victimisation from MEHT and did not defend my interests as ARU is supposed to do."**

56. The Tribunal considered this allegation and all the others and came to the conclusion that nowhere was there to be found an allegation that the university was thereby assisting the discrimination or victimisation of another party.

57. The Notice of Appeal really only seeks to re-litigate, re-argue the matters but the Tribunal it seems to us adopted the correct course of considering her case at its highest as set out in the extensive ET1 and took the view that the **Hallam** test (even taking the allegations at its highest) was not satisfied as far as those allegations are concerned.

58. It follows therefore that we can find no complaint in the manner in which the Tribunal dealt with this matter. In allowing the claims against the Trust to continue they took what some might regard as quite a generous approach towards the Claimant's case and took the view that, particularly bearing in mind she was a litigant in person, an s13 claim had potentially been made out and as we have indicated already that is to be the subject of proceedings in January.

59. They were therefore very careful in looking into the potential claims and not striking out any claims of discrimination that appeared to them to have any potential for success. This careful approach by them, in a lengthy decision, was argued correctly.

60. This appeal is therefore dismissed.

61. We are reminded that there is a general allegation of a systematic violation of Article 6 rights. The only Article 6 issue related to the manner in which the Tribunal dealt with the hearing and heard some very brief oral evidence, where it could be argued that is depriving somebody of a right of a full hearing before the Tribunal. We have dealt with that issue above.