B3/2004/2151

Neutral Citation Number: [2005] EWCA Crim 939

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM PLYMOUTH COUNTY COURT

(HIS HONOUR JUDGE OVEREND)

Royal Courts of Justice

Strand

London, WC2A 2LL

Monday, 20 June 2005

B E F O R E:

THE MASTER OF THE ROLLS

(Lord Phillips)

LORD JUSTICE WALLER

LORD JUSTICE LLOYD

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MICHAEL HEYWARD

Appellant

-v-

PLYMOUTH HOSPITAL NHS TRUST

Respondent

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(Computer-Aided Transcript of the Stenograph Notes of

Smith Bernal Wordwave Limited

190 Fleet Street, London EC4A 2AG

Tel No: 020 7404 1400 Fax No: 020 7831 8838

Official Shorthand Writers to the Court)

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MR ANDREW BUCHAN (instructed by Messrs Nash & Co, Devon PL4 9BD) appeared on behalf of the Appellant

MR ANDREW MILLER (instructed by Messrs Veitch Penny, Devon EX1 1UP) appeared on behalf of the Respondent

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J U D G M E N T

1.

LORD PHILLIPS: This an interlocutory appeal in a stress at work case. The claimant, Mr Heyward, alleges that the defendant ("the Trust") caused him psychiatric injury by subjecting him to stress at work in breach of the Trust's duty.

2.
On 15 March 2004 after a case management conference conducted over the telephone, Deputy District Judge Lloyd Davis made an order which restricted the expert evidence that each side could adduce to one consultant psychiatrist. In doing so, he rejected Mr Heyward's application to call both a psychiatrist and an occupational psychologist. Mr Heyward appealed through counsel, again by telephone, on 27 September 2004 to HHJ Overend. His appeal was rejected. He now makes a second appeal to us.

3.
Permission to appeal was granted, as I shall explain, on the ground that the appeal raises an important issue of principle.

The claim

4.
This action was commenced on 26 November 2003 in the Plymouth District Registry of the High Court. The particulars of claim settled by Mr Andrew Buchan, counsel with great experience in this field, were lengthy. I identify the essential features of the claim as follows. Mr Heyward was employed by the Trust at Derriford Hospital in Plymouth as a purchasing officer. It was his job to order stores which the hospital needed. In 1998 he was placed under stress when he formed the conclusion that a store-keeper was colluding with his own superior, the store manager, to defraud the Trust. The stress was such that he was forced to take sick leave in May 1998. While off sick he "blew the whistle" on his colleagues by reporting his suspicions to the Trust's deputy director of facilities. When he returned to work in July 1998 the matter had not been resolved. Disciplinary proceedings were subsequently brought against his two colleagues, which resulted in the store-keeper resigning and the store manager being given a final warning. The latter was removed from the stores department but moved into an office next door to Mr Heyward. From this proximity he behaved towards Mr Heyward in an intimidating manner, placing him under further stress. The Trust was in breach of duty in taking this action and thereby subjecting him to stress.

5.
In June 1999 the ex-store manager was dismissed for unrelated misconduct.

6.
By April 1999 those staffing the stores department had been reduced from five to Mr Heyward and only one other. This meant that he had usually to work from 7.00 am to 5.00 pm with no time to stop for a rest break or a lunch break. In May 2000 he broke down under the stress and has had to cease working for the Trust.

7.
The Trust should have carried out a risk assessment of Mr Heyward's workload and alleviated this by allocating additional staff to the stores. Had they done so the psychiatric injury which the Trust should have appreciated he might suffer would have been averted. The damages claimed were put between £50,000 and £100,000.

What I have been outlining are the essential features of the case as I see them, but it is right to say that the particulars of claim included what Mr Andrew Buchan described as his fall-back situation. These particulars ran to eight pages of detailed allegations of failure to comply with two EEC Directives, failure to comply with the Management of Health and Safety at Work Regulations 1992 and 1999 (these were relied upon not as giving rise to direct claims for breach of statutory duty, but in support of allegations of negligence) and allegations of failure to have regard to various guidances issued by the Health and Safety Executive, all of which it is alleged were material in leading to the claimant's psychiatric injury.

The defence

8.
The defence, dated 22 January 2004, admits most of the primary facts alleged in relation to the whistle-blowing incident and what followed it. It joins issue, however, with Mr Heyward's contention that he was overworked after he returned from his sick leave in July 1998. It further contends that the Trust had taken reasonable steps to address any possibility of work overload in the stores department by commissioning a report from consultants, Green and Kassab, on the conduct of the Trust's services including the operation of the stores department. The Trust denies that Mr Heyward's working conditions exposed him to foreseeable risk of psychiatric harm.

The case management conference

9.
We have been provided with a transcript of the case management conference before Deputy District Judge Lloyd Davis. He did not have the pleadings before him so the nature of the issues had to be explained to him orally. I pause to say that I would commend the practice of carrying out case management conferences or other interlocutory matters by telephone where it is appropriate; but where this is done it is important that the judge who is conducting the hearing should have available before him the appropriate documentary material in a form which the parties to the proceedings are able to duplicate so that their submissions are readily intelligible. The shortcomings in this case underline the desirability of introducing electronic case files into our civil procedure, a step which unfortunately the Court Service has yet to be in a position to fund.

10.
It was explained to the deputy district judge that it was common ground that each side should call one expert witness, although it was not initially made clear to the judge that those would be psychiatrists rather than psychologists. For Mr Heyward it was contend that an occupational psychologist should also be called; he would provide a more detailed analysis in relation to causation as well as addressing liability issues. For the Trust it was submitted that a second expert was unnecessary. The deputy district judge agreed. He gave permission for evidence to be adduced from one consultant psychiatrist on each side. He transferred the case to the Plymouth County Court and ordered exchange of statements of witnesses of fact by 28 June 2004.

The appeal to Judge Overend

11.
We have been provided with a transcript of this appeal which was made pursuant to permission granted by the judge. Despite the deputy district judge's order, witness statements had not been exchanged. The judge had the report of Dr Aylard, Mr Heyward's consultant psychiatrist. He did not have the report of Professor Fahy, the Trust's psychiatrist, which had only just been produced. He was

told by counsel for the Trust that the two reports were not "miles apart" and that neither expert suggested that there was need for evidence from an occupational psychologist.

12.
Counsel for Mr Heyward, who was Mr Sullivan standing in for Mr Buchan who had settled the skeleton argument, argued that, while psychiatrists would be able to give evidence as to what had caused Mr Heyward's psychiatric injury, they would not be able to give evidence of the steps that should have been taken by the Trust as reasonable employers to avoid causing such injury. The occupational psychologist would be the person in a position to do this. I should add that the skeleton argument settled by Mr Buchan included this:

"One of the issues the court has to decide will be whether the defendant should have carried out a risk assessment covering the risk of psychological injury, if so, when this assessment should have been conducted, what it would be involved and what preventative measures would have resulted that may have either reduced or avoided the risk of injury for the claimant. The guidance of the Health and Safety Executive on the subject goes back to 1995. How that guidance is put into practice is a matter upon which the court needs expert evidence."

And the expert evidence it needed, it was submitted, was that of the occupational psychologist.

13.
Counsel for the Trust argued that the court already had adequate expert assistance to resolve the issues before it, and that the cost of a second expert would be disproportionate, having regard to the amount at stake. Judge Overend agreed with these submissions. I will quote a few short passages from the judgment that he delivered at the end of the telephone appeal:

"The claim is a stress claim and the issues as summarised by Mr Archer from the pleadings are firstly the issues as to whether or not the defendants dealt appropriately with the claimant when they became aware of issues of theft and whether or not he was what is known as a 'whistle blower'. Secondly, the question as to whether or not the management of the defendants was appropriate. Criticism being that the claimant was asked to work near the person who was the subject of criticism. And thirdly the issue as to whether or not the claimant was grossly overworked in the store in which he worked being said that he had three persons work to do... The questions that need to be addressed by the court are questions which the court is well able to deal with using its usual experience and knowledge of the world. It does not, in my judgment require the assistance of the occupational psychologist to deal with the issues which I have outlined... Of course the experts are going to meet and they are going to produce a joint report and if at the end of that they were to say we would be assisted by an occupational psychologist well that would put a different complexion upon the matter and then of course an application could be made for this matter to be revisited but in the meantime and for those reasons that appeal on that aspect failed."

14.
Unknown to Mr Buchan, those acting for Mr Heyward then applied to the court for an order, in effect staying all further process, while enquiries were made of the two experts who should be directed to have a joint discussion on the issue of whether the court would be assisted by evidence from an occupational psychologist or occupational physician with a view to preparing a joint memorandum of agreed issues; or, if disputed issues, the reasons for such dispute, such memorandum to be filed with the court. That application was agreed to by those acting for the Trust. Mr Buchan has been unable to explain why this application was made, and made it plain, understandably, that it was not one which he would have advised. It seems to us that to put a stay on the exchange of evidence at this point was

extremely unfortunate. The deputy district judge had directed that evidence should be exchanged by June 2004. Had that been done the evidence would have been to hand before the appeal to Judge Overend and there would have been no need for this matter to proceed, to quite a large extent, on the basis of conjecture as to the issues that might be raised, as indeed it has.

15.
The inquiries made of the experts by Mr Heyward's solicitor produced the following responses. First of all, Dr Aylard wrote on 23 November 2004:

"I did discuss the issue of using an occupational physician to advise the Court. Professor Fahy and I are agreed that we are both capable of advising the Court as to the appropriate measures which an employer should take when returning an individual back to work after suffering an episode of anxiety and/or depression."

I pause there to say that Dr Aylard in his expert's report had indeed expressed some views in relation to that matter, for he advised as follows:

"From the medical records from Mr Heyward's history, it is clear that following his episode of anxiety and depression during 1998, his employers were aware that Mr Heyward had suffered from anxiety and depression and that this anxiety and depression had been closely related to problems in the workplace. In my opinion, his employers had a duty to ensure that his working environment did not place him under undue pressure, because of his past vulnerability to develop psychiatric problems. If Mr Heyward's description of his working environment from the end of 1998 onwards is correct, then I am of the opinion that his second depressive episode of depression could have been prevented by more appropriate management, both of his workload and of his contact with his colleagues about whom he had quite appropriately sought help from management because of their behaviour."

16.
Mr Buchan said that he did not accept that Dr Aylard was competent to advise on the appropriate measures which an employer should take when returning an individual back to work after suffering on episode of anxiety and/or depression. In the context of this case I do not agree. It seems to me on the facts of this case that the expert psychiatrists were fully competent to express opinions on that matter.

17.
Dr Aylard continued his letter:

"If however, the Court requires advice on the organisational issues relating to stress at work and in particular to specific risk assessment procedures then we would recommend consulting an occupational physician with expertise in this area. I can recommend Dr Doreen Miller, Consultant OccupationAl physician."

Professor Fahy wrote on 14 December:

"I believe that Dr Aylard and I are qualified to deal with the clinical issues which have arisen in Mr Heyward's case, and I think that we have addressed these issues in a comprehensive manner in our reports. I doubt if an occupational physician will be able to add any useful information to the reports which you have already obtained. Perhaps you could clarify if there are any issues which were not dealt with in our reports. If there are specific questions pertaining to the clinical issues, I would be very willing to tackle these points in a supplementary report. I assume that Dr Aylard would also be prepared to deal with any outstanding issues that fall within our areas of expertise."

Finally on 12 January Dr Aylard wrote:

"I have read Professor Fahy's letter dated 14 December 2004. I am in agreement with Professor Fahy that the most appropriate way forward would be for any issues that have not yet been clarified to be put to myself and Professor Fahy, who would then be able to tackle these issues in a supplementary report and, if appropriate, recommend the involvement of an occupational physician if we felt that certain issues fell outside our area of expertise but within that of an occupational physician."

So far as we are aware there was no further correspondence with those experts.

18.
What there was was an application to this court for permission to appeal against Judge Overend's decision. I think it is regrettable that, when that application which was refused on paper was renewed orally, the fact that there had been a stay ordered and the subsequent correspondence with the experts was not put before the court.

19.
On the oral hearing Mr Buchan obtained permission to appeal to this court by advancing an argument that is best demonstrated by quoting the following paragraph from his skeleton argument:

"If the claimant is denied the opportunity to rely upon expert evidence dealing with breach and causation it will severely prejudice his prospect of success. The defendants under the framework Health and Safety Directive and Management of Health and Safety at Work Regulations 1992/99 are under a duty to appoint a competent person who has knowledge of health and safety to ensure that they comply with their statutory duties. This involves health surveillance, monitoring, assessment of risk and implementation of preventive measures based upon a hierarchical approach starting with avoiding the risks, adapting the work to the individual and ensuring that the individual is capable of doing the work required of them. In terms of expertise they hold all the cards. They were responsible for the system of work. The claimant, as an employee can hardly be expected to have the same level of expertise as the defendant. If the claimant is prevented from obtaining expert evidence and relying upon it there will be an inequality of arms and his right to a fair trial will be severely prejudiced."

That this argument found favour is apparent from the short reasons given by Smith LJ for giving permission to appeal.

"This is a stress case in which the issues are mainly factual. The claimant contends that the circumstances of his work created a foreseeable risk of psychiatric harm. The defence expressly puts that in issue. It appears to us that it is clearly arguable that the claimant needs expert evidence to support his contention on that issue. It may well be that the defendants, being quite a large organisation, will have an employee who is able to provide their evidence on that issue without resort to an outside expert. If so, the claimant would be at an unacceptable disadvantage; there would be inequality of arms.

3.
The claimant's application to instruct and call a second expert was made before disclosure of evidence. If the claimant waits until disclosure of evidence within this action and then seeks an expert report, the trial would be delayed and the claimant criticised. Accordingly, although this is a second appeal from a case-management decision, we think it right to grant leave. We are of the view that there is an important principle at stake - that of potential inequality of arms. If the point is not an

important point of principle we do consider that there are compelling reasons for the appeal to be considered because the matter is of significant importance in the context of this individual case."

Mummery LJ agreed.

20.
In making submissions before us in support of this appeal, Mr Buchan put at the forefront of his argument the need for an occupational psychologist to deal with the issues raised in what he described as his fall-back case of breach of the Directives and breach of statutory duty. He submitted "once the court has considered the position and given guidance it will save a lot of money"; as I understood it, this was to those involved in other cases. "When should an employer have carried out risk assessment? Does the obligation to do so apply to employees as a whole or to the individual employee? What should the employer realise when someone says he cannot cope?" He went on to say: "The defendants usually call someone from human resources and the claimant cannot deal with this. We do not know whether the defendants will call anyone, because no witness statements have been exchanged. But it is usually dealt with in a statement of someone from human resources."

21.
So far as equality of arms is concerned, this appeal has some similar features to one that was before this court a few years ago in Chesterfield v North Derbyshire Royal Hospital NHS Trust [2004] Lloyds Rep Med 90. That was a very serious claim brought on behalf of a child with cerebral palsy, alleged to have resulted from clinical negligence at the time of the child's birth. Each side had permission to call one expert consultant obstetrician but the claimant had sought permission to call a second such expert. In doing so, it was submitted on behalf of the claimant that this was necessary to avoid inequality of arms in the circumstances of the particular case. Those circumstances were that the two medical witnesses who would be giving evidence of fact in relation to the birth of the claimant were now consultant obstetricians of some note. The application to call an additional expert was initially refused but on appeal to this court that decision was reversed. Brooke LJ explained why in these passages:

"23.
Above all, however, for a case of this importance, high monetary value and complexity the parties will not be on an equal footing if Master Ungley's order is to stand. The master appreciated that it was inevitable that a witness who happened to be a professional will give evidence of his actions based upon his or her professional expertise, but he thought that it was possible to isolate this evidence from the evidence on the 'vital question of whether those decisions fell short of the required standard', on which he was permitting only one expert on each side. In my judgment he was clearly wrong to do this on the facts of this case.

24.
Anybody watching the trial would be bound to be impressed by the fact that there was only one consultant obstetrician giving evidence for the claimant, while there would be three giving evidence for the defendant hospital trust, and those three would cover a much wider spectrum of personal experience than the single expert permitted to the claimant. It is not as if the medical witness of fact for the defendants is a junior hospital doctor."

22.
Drawing an analogy with that case, the anxiety as I understand it of those representing Mr Heyward is that the Trust may call as a witness of fact a witness in position to give expert evidence such as that which could be given by an occupational psychologist, and that that witness will state that he could

not reasonably have foreseen or been expected to foresee that the working conditions to which Mr Heyward was subjected would result in his suffering psychiatric injury. An importance difference between Chesterfield and this case is that in Chesterfield the court knew what evidence of fact the defendants were going to adduce; we do not. This is because the directions as to the exchange of evidence of fact were not complied with and a stay was subsequently ordered, a fact of which Smith LJ was unaware.

23.
The issues as they appear to me are relatively simple. It is common ground that the claimant was vulnerable to stress, that the Trust knew of this, and in these circumstances the experts have identified that there are two possibilities in relation to causation of Mr Heyward's psychiatric injury. One is that he suffered a breakdown caused by stress imposed by the work overload in circumstances where he had already had one spell of psychiatric illness and against the background of which complaint is made in relation to the whistle-blowing incident. The alternative is that he was not subjected to work overload, but that he was unable to cope with what was no more than a normal full-time job and had to retire essentially as a result of his own mental fragility and not because of the work burden that was imposed upon him. Those issues are essentially issues of fact. There is nothing to indicate that if the Trust loses on those issues it will argue that the consequences of work overload could not reasonably have been foreseen, or that nothing could reasonably have been done to avoid the work overload.

24.
There is a possibility, it seems to me - a remote possibility - that the Trust will rely on quasi-expert evidence of a type that needs to be rebutted by an occupational psychologist or physician. Should that happen, it will be, and always would have been, open to Mr Heyward to seek permission to call that additional evidence.

25.
As to the fall-back case, it seems to me that Mr Buchan is trying to use this action as a vehicle for the exploration of the applicability of the Directives and Regulations in question when considering liability for stress at work. There may well be cases in which such an exploration will be appropriate. But it does not seem to me on the facts that I have seen that this is such a case. This is a comparatively small stress at work claim where the issues are clear.

26.
On the facts before the deputy district judge and Judge Overend, I can see no criticism that can be made of the case management decision that they reached to limit the expert evidence to one psychiatrist on each side. It seems to me that that was a sensible and proportionate response and one which will cater adequately for the need for expert evidence in the light of any unexpected contingency. Nothing that has been raised before this court causes me to form a different view and for that reason I would dismiss this appeal.

27.
LORD JUSTICE WALLER: I agree, and just will add a few words of my own.

28.
As my Lord has said, this case is a relatively straightforward one so far as liability at common law is concerned. The claimant will allege that he was vulnerable, that the Trust were aware that he was vulnerable, that it was foreseeable that if they acted in particular ways that he would suffer psychiatric injury.

29.
There is also pleaded what Mr Buchan called his fall-back case, which alleges breaches of certain EEC Directives Regulations, and matters of that sort, including breaches of certain guidelines. Mr Buchan wishes on behalf of the claimant to call an occupational psychologist, and he puts that on two bases. The first is, as my Lord has indicated, an attempt to use the case as a vehicle in effect for challenging certain of the Court of Appeal decision like Hatton, and the second is on the basis that the defendants may call a witness relating to the regulations and guidance and it would be lack of equality of arms if an expert could not be called by the claimant.

30.
As to the first point I agree with my Lord. There may be cases in which there will be a need to tackle the wider issues, but this case is not one of them. As regards equality of arms - and it was that that troubled Smith and Mummery LJJ when giving permission to appeal - the real difficulty is we do not know with any clarity what evidence may be called by the defendants. During argument, Mr Miller was pressed as to the evidence likely to be called by the defendants and he could not with precision say what was likely to happen. He reiterated what has always been the defence position, that this case was likely to turn on its own particular facts. If - and it is a big if - that turned out not to be accurate then, as my Lord has said, there would be an opportunity for a further application to call evidence to deal with it. But again in agreement with my Lord there can be no criticism as it seems to me of the decision either of the district judge or that of the circuit judge and I, too, would dismiss the appeal.

31.
LORD JUSTICE LLOYD: I agree.

(Appeal dismissed; Appellant do pay Respondent's costs in the sum of £5,500, to be paid within 28 days).