Neutral Citation Number: [2004] EWHC 2554 (QB)

Case No: HQ03X03464

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2004

Before :

THE HONOURABLE MR JUSTICE EADY

- -

Between :

Denise Lynn Merelie	**Claimant**
- and -	
1. Newcastle Primary Care Trust	**Defendants**
2. Bob Smith	
3. Judith Smith	
4. Jill Prendergast	
5. Paula Whitty	
6. Miles Ferguson	
7. Helen Nagaj	
8. Dianne Tabari	
9. Janice Falkous	
10. Jennifer Smith	
11. Natasha Weisser	
12. Tere Peart	
13. Kerry Fawcett	

Mr Adam Wolanski (instructed by **Eversheds**) for the Defendants
Ms. Merelie appeared in person

Hearing dates: 26th July 2004 and 6th October 2004

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Eady :

1. The Claimant relies on a number of causes of action to seek remedies in connection with the dismissal from her post as a dentist employed by the Newcastle Primary Care Trust (the first Defendant). These tend to overlap not only with one another but also with other proceedings brought, respectively, for unfair dismissal in the Employment Tribunal and for personal injury in the Newcastle County Court.

2. In the proceedings before me there are no less than thirteen Defendants. Apart from the Trust itself, there are twelve individuals. Defendants No. 6, No. 7, and No. 8 are dentists with the Community Dental Service and Defendants Nos. 9 to 13 are dental nurses. The second Defendant is Mr Bob Smith, former Chief Executive of the Primary Care Trust, the third is Judith Smith, the fourth Jill Prendergast, and the fifth Paula Whitty. Those were all involved at various stages in investigating complaints made by or concerning the Claimant. No defence has yet been served.

3. The Claimant was employed from 1975 to 2001 by the Trust (or its predecessors in title) although there was a period of absence through stress between February and August 1999. The problems to which I have referred appear to have had their origin in the troubled relationship between the Claimant and Miles Ferguson (Defendant No. 6), who was at the material times responsible for day to day management of the Community Dental Service and was, in that capacity, also largely responsible for determining the work load among dental nurses. The Claimant says that she had been concerned about the way in which Mr Ferguson carried out his duties, which she claims had often adversely affected patient care. She also claims that he had harassed her in various ways over a number of years, including sexually.

4. The Claimant and Mr Ferguson lodged complaints against one another. His was first in time, and was based upon the proposition that she had taped an interview between them without his consent; her complaint was based on an allegation of bullying, harassment, and unfair treatment. The complaint against Mr Ferguson was resolved by Defendant No. 4 in January 2000. It was acknowledged that the relationship between the two was troubled, and recommendations were made in an attempt to improve matters. Unfortunately, the disposal of the Claimant's complaint does not seem to have cleared the air.

5. Following this outcome, it is the Claimant's case that Mr Ferguson proceeded to launch a campaign of harassment against her. The conduct seems to fall into three categories, according to paragraph 4.3 of the particulars of claim. He is said to have falsified information he was obliged to provide, by way of returns to the Trust, by omitting work carried out by the Claimant over the four-month period between April and July 2000. He is also said to have written to some of her patients to inform them, falsely, that they could no longer receive treatment from her. But the allegation which looms largest in her pleaded case is that "extremely serious allegations about the Claimant's professional and personal conduct were repeatedly made". Mr Ferguson is said to have encouraged, in particular, Defendants Nos. 7 to 13 to "lodge grievances" against her. For them, the Claimant suggests, the incentive to do so was that Mr Ferguson would bring about improvements in their workloads. Although reliance is placed by the Defendants on the absence of any express allegation that Mr Ferguson encouraged the people concerned to lodge *false* grievances, so far as I understand the Claimant's case this would appear to be implicit. Certainly, it seems that a litigant in

person should be given the benefit of any lack of clarity in the pleaded case in that respect.

6. The Claimant places considerable weight on the timing of Mr Ferguson's 'encouragement'. Four of the dental nurses (Defendants Nos. 9 to 12 inclusive) lodged their written complaints in March 2000. It followed, she says, shortly after the outcome of the complaint she had made against him and could thus be accounted for by spite or revenge. Moreover, she states that she had not worked with Defendant No. 9 for three years prior to her raising the allegations, or with Defendant No. 10 for two years, or with Defendant No. 11 for one year. She no doubt wishes to invite inferences as to the concerted nature of these complaints and their apparent lack of spontaneity. Also, in view of the general nature of some of the allegations, she points out that she only worked with Defendant No. 10 for one and a half days in the whole of their employment and with Defendant No. 12 for two days.

7. Excerpts from the Defendants' various complaints are set out in the particulars of claim which are said to be defamatory, but since the current proceedings were only commenced on 10th November 2003 it is apparent that they are well outside the one-year limitation period now governing claims in defamation and malicious falsehood.

8. On 20th June 2000 there was a meeting between the Claimant and the fourth Defendant, when according to the particulars of claim she was a told that the March complaints about the dental nurses were *not* going to be investigated. Yet she was warned in a letter from Defendant No. 4 that she would be formally disciplined if any further complaints were made against her. This sounds grossly unfair, but it should be pointed out that the Defendants do not accept that this is an accurate interpretation of what she was told. Lest there be any doubt in the matter, therefore, I set out the terms of the letter, which was dated 21st June 2000:

> "Dear Denise
>
> Further to our meeting today, I am writing to confirm that I shared with you the issues raised by certain dental nurses within the community dental service (you were provided with a personal copy of the information).
>
> We discussed your perception that there were some discrepancies in the detail but acknowledge that in fact what we were focussing on was the over arching issue of working relationships.
>
> I advised you that Newcastle City Health Trust has a very stringent approach to allegations of harassment and bullying and that should any such allegations be made in the future, that there will be no alternative but to use the formalised process.
>
> I am sure we both hope this will never be necessary and that we can recognise this as an opportunity to draw a line between the past and the future.
>
> I explained that I must now meet with the nurses and their union representative and agree the way forward. I will share with you the outcome of that meeting and as you are aware

> dates have been set for the management meetings where we can take forward the work started with yourself and Miles to create/restate agreed departmental processes which will be expected to be adhered to by all.
>
> Yours sincerely
>
> Jill Prendergast
>
> Programme Manager"

9. It is not necessary for me to comment upon the letter save, perhaps, to say that she was being warned that she would be subject to the 'formalised' disciplinary process if any allegations were made in the future (although the outcome was not expressly prejudged).

10. At all events, the Claimant received advice from her trade union (the British Dental Association) to take preparatory steps to protect herself by obtaining statements refuting the allegations about her behaviour from other potential witnesses. Between 21st June and 31st August 2000 the Claimant, in accordance with that advice, approached members of staff with a view to obtaining such statements. Some of them suggested that this constituted bullying or harassment. It is difficult to see how a mere request for information could be so classified; much would turn on evidence as to the nature or number of approaches. She was instructed by Defendant No. 4 in July 2000 to stop making approaches, in any event, but the Defendants complain that she nevertheless continued to do so.

11. On 1st September 2000 the Claimant was suspended with a view to an investigation taking place into the allegations of bullying by members of the staff. Statements were taken in or about October of that year from the Defendants Nos. 7 to 13. On the face of it, whatever they said in those statements would appear to be privileged and, in any event, any compliant of defamation or malicious falsehood in respect of them would be time-barred.

12. Defendant No. 5 was responsible for investigating the complaints made against the Claimant, who had meetings with her on 30th January and 6th February 2001. On 30th January the Claimant also lodged a formal grievance against Defendants Nos. 9 to 12.

13. Matters seem to have dragged on and, in May 2001, further statements were communicated orally to those investigating by Defendants Nos. 9, 10, 11, and 13. On 3rd May of that year a full disciplinary hearing took place and the Claimant was dismissed because she was supposed to have bullied and harassed staff. An appeal panel dismissed her appeal the following September. Further statements were made about her during that month by Defendants Nos. 8, 9, and 13 (also obviously outside the relevant limitation period for defamation and malicious falsehood).

14. The Claimant has sought to overcome her limitation difficulties by relying upon other causes of action (where a longer period of limitation would apply) and also upon later republications of some of the allegedly defamatory allegations.

15. It is now conceded by Mr Wolanski on the Defendants' behalf that there is an arguable claim for defamation based upon a publication in January 2003 by the second Defendant to Mr Flory (Chief Executive of the Northumberland Tyne and

Wear Strategic Health Authority) of a copy of a letter dated 14th January, which had been sent originally to the Claimant herself. In order to understand the nature of her complaint I should set out three paragraphs from that letter which refer back to the earlier investigations:

> "I have carefully considered the information provided to you, and the previous investigations undertaken under the Grievance Procedure, Disciplinary Procedure and the referral of Mr Ferguson to the General Dental Council for your information I enclose a chronology of these events.
>
> Having considered the remit of these investigations and the evidence presented therein, I cannot accept that there was evidence indicating that allegations made against you were false. The issues raised by you have been raised and considered by these previous investigations. Therefore, I do not believe that any further investigation is either necessary or appropriate. Accordingly, I cannot accept that the Trust has failed to consider and investigate the various issues raised.
>
> Whilst you have referred to gross irregularities with the original investigation, you have not stated which investigation you are referring to nor have you advised what gross irregularities you believe to have occurred. Having considered the various processes which have been followed, I am satisfied that the matter was the subject of full and thorough investigations and you were given the opportunity to be involved in these processes and put your views forward for consideration. In particular, you had the opportunity to question witnesses on two occasions in the course of the disciplinary process and these witnesses remained clear about their evidence".

16. Despite his concession, Mr Wolanski submits that it remains necessary, for the plea to be viable, that the Claimant should identify the precise words complained of and set out the defamatory meaning(s) they are said to bear. So much is elementary. No doubt one part of the letter on which she relies is that in which Defendant No. 2 tells her that he cannot accept that there was evidence indicating that the allegations made against her were false. Albeit somewhat circumlocutory, this no doubt is capable of conveying the imputation that the allegations against her were well founded. The republication to Mr Flory would probably be held to be subject to qualified privilege, but the Claimant's case will be that this defence would be defeated by malice. She has gone to considerable efforts to demonstrate that, by reason of information in Defendant No. 2's possession, he must have known that the impression conveyed to Mr Flory by the content of that letter was false; or alternatively, that he was indifferent as to its truth or falsity: see e.g. *Horrocks v Lowe* [1975] AC 135.

17. I am conscious of the fact that, if this matter is permitted to go forward, it is likely to involve enormous inconvenience to those playing a part in the litigation whether as witnesses or parties, and that valuable time and public resources will be diverted from other important activities. That has caused me considerable concern in weighing up the evidence and the discretionary factors I have to bear in mind. Despite this, however, I have come to the conclusion that the Claimant should be allowed to pursue

her case in relation to this particular publication despite the potentially wide ambit of the inquiry and, in particular, with regard to malice. I cannot leap to conclusions on paper when so many events and motives fall to be investigated. It follows that the first Defendant must remain in the action as being potentially liable vicariously in respect of the second Defendant's publication.

18. I have concluded, however, that this is the only defamation claim that should be permitted to survive; the others are too speculative and imprecise. I bear in mind in this context the principles reaffirmed by the Court of Appeal in *Best v Chartered Medical of England Ltd* [2002] EMLR 335. In any event, this surviving claim should enable the Claimant to have a fair determination of the real issues between herself and the first and second Defendants. So too, there is no point in allowing any of the malicious falsehood claims to survive.

19. One argument that needs to be addressed is the extent to which any other Defendant could be held responsible for the communication by Defendant No. 2 to Mr Flory. It occurred some considerable time after the original complaints and allegations against the Claimant were made, and I cannot see that any of the publishers should be held responsible on the basis that this indirect endorsement of the complaint would have been foreseeable at the various times that were relevant: see e.g. *McManus v Beckham* [2002] EWCA Civ 939; [2002] 1 WLR 2982. This would be an artificial approach and would appear to be simply a device for circumventing the limitation problems.

20. I must next address the claim based upon harassment. The provisions in the Protection from Harassment Act 1997 were considered in *Thomas v Newsgroup Newspapers* [2002] EMLR 78. An exhaustive definition is not possible and was not attempted. But guidance was given. The paradigm case, of course, would be stalking, but other forms of conduct may fall within the notion of harassment, provided certain characteristic elements are present. It would seem clear, for example, that the conduct must have been targeted at the claimant, calculated to alarm or distress the claimant and also, objectively judged, oppressive and unreasonable (see e.g. *Thomas* at [30]). It also clear from section 7 of the Act that 'conduct' includes speech.

21. At the stage of an application to strike out such a plea, the claimant must be able to put forward a pleading asserting conduct which the Court can characterise as arguably unreasonable in all the circumstances. If that crucial element is missing, the claim may be struck out: see e.g. *per* Gray J in *Sharma v Jay* [2003] EWHC 1230 (QB). As with malice, no one should be permitted to advance such plea on a formulaic basis by bare assertion only.

22. Another important element is that there must be pleaded, and ultimately proved, a 'course of conduct' which involves conduct on at least two occasions. Whether two or more instances can be classified as a 'course of action' will depend on such factors as how similar they are in character, the extent to which they are linked, how closely in time they may have occurred, and so on. It is necessary to remember that the mischief to which this statute is directed is that of repetitious behaviour. It is not to be assumed that two instances necessarily give rise to a cause of action in harassment: *cf.* in the criminal context, *Pratt v DPP* [2001] EWHC 483 (Admin).

23. Moreover, the Court will no doubt generally be wary of any attempt to present as harassment conduct which would more aptly fit within the scheme of some other tort,

such as defamation, but which is not available in itself as a cause of action for some reason (e.g. the statutory limitation period).

24. Bearing these general considerations in mind, I turn to the pleaded case before me. It would appear from para. 20.1 of the particulars of claim that, save in one instance, what is relied upon against the Defendants is that they repeatedly alleged gross professional misconduct on the Claimant's part despite having evidence to the contrary. Additionally, in the case of Defendant No. 6, it is said that he accused the Claimant of not working and that he omitted her figures from returns; furthermore, that he wrote to patients informing them falsely that they could not be treated by her.

25. Mr Wolanski invited me to sub-divide the harassment allegations and to consider the cases made against three classes of defendants. The first class consisted of Defendants Nos. 2 to 5. So far as the allegations of misconduct are concerned, these Defendants did not make the initial claims. They were responsible for addressing the complaints of others. What seems to be relied upon, in their case, is that they had to notify the Claimant of the allegations. It may well have contributed to her distress, but any fair process of inquiry would surely require that they do so. The elements of oppressiveness and unreasonableness are therefore not to be found merely in a rehearsal of those functions.

26. As to the conclusions, it said that they were unfair in preferring the evidence of some people rather than of others. Not only is that not harassment in any ordinary sense of the term, but such an approach would no doubt lead to a host of harassment claims and satellite litigation against those whose employment responsibilities require them to investigate and resolve complaints. It is, in any event, to be remembered that there are current proceedings before an employment tribunal, the purpose of which is to determine how the Claimant was treated in the context of that employment (although they may well not address or resolve, except perhaps obliquely, the underlying allegations against the Claimant of professional misconduct).

27. As to the sixth Defendant, Mr Ferguson, it is submitted that while the allegations against him may be arguably unreasonable they would not constitute oppressiveness. Much depends on disputed facts or the interpretation of facts. It is clear that the Claimant is suggesting that he oppressed her by engineering the whole process that led to her dismissal – from orchestrating the initial complaints by Defendants Nos. 7 to 13 in March 2000 through to the repetitions during the disciplinary hearings of May and September 2001. *If* this was a concerted course of action directed against her, I cannot see how I could rule out harassment on paper alone, whether against the sixth Defendant or against Mr Wolanski's third category (i.e. Defendants Nos. 7 to 13).

28. Moreover, it is still true to say that the statutory notion of 'harassment' is at a relatively early stage of development. In a case where it is possible to see from the pleaded case, or from any witness statements placed before the Court, that a crucial element of the wrong is simply missing, or incapable of substantiation, then the Court can and no doubt should prevent the matter from going further. But where there are genuine doubts about the limits imposed upon the scope of this new form of civil wrong, for reasons of public policy, the Court should guard against summary disposal.

29. As I have already noted, Mr Wolanski attaches importance to the fact that the Claimant does not expressly plead that Defendant No. 6 asked the nurses to lodge *false* grievances. I rather take the view that this is implicit in what the Claimant is

saying. In any case, there is something rather unusual about a professional person with managerial responsibilities egging on less senior staff to lodge grievances against a fellow professional. It is especially striking in the light of a personal clash between the two of them – apparently only resolved in January 2000 some two months earlier.

30. Much of what Mr Wolanski submits about harassment has force. His submissions may prevail at trial, after the facts have been fully investigated, but I think I should be exceeding my function to shut the Claimant out from a hearing.

31. Naturally, I recognise that there is a certain implausibility about the scenario put forward by the Claimant, involving as it does so many people combining (almost conspiring) to do down a professional person. As was observed, however, by Simon Brown LJ in *Spencer v Sillitoe* [2003] EMLR 10 at [31], a litigant should not be deprived of a hearing merely because the case seems to a judge implausible on paper. In any event, the implausibility is not all on one side. The Defendants' case involves the hypothesis that the Claimant was behaving rudely, unprofessionally, and irrationally on an apparently habitual basis despite the fact that no one appears ever to have raised a complaint against her over the previous quarter of a century. It would also appear from the material gathered together by the Claimant that this contention is contradicted by a number of other persons who had worked closely with her, and indeed more closely, and over a longer period, than some of those raising complaints. It is dangerous for judges to shut out claimants from having their grievances properly explored in such controversial circumstances.

32. There is much to be said for the view that the adoption of statutory or domestic disciplinary procedures should not be characterised as harassment because of the scope for duplication of issues and costly satellite litigation. Yet I must bear in mind the decision of the Divisional Court in *Baron v CPS*, 13 June 2000 (unreported). There, harassment had been found proved in respect of the appellant's conduct which consisted partly of abusing officers of the Benefits Agency in letters and partly, more specifically, in threatening to abuse his rights as a cross-examiner and to serve witness orders on people in person. The harassment took place therefore, in part, within the framework of legal procedures. Yet it is important to note that it was the *abuse* of those procedures which constituted harassment. That is essentially the Claimant's case here with regard to the grievance and disciplinary procedures instituted against her. Morison J made the following general observation:

> "Equally, citizens have an unfettered access to the Courts to resolve disputes and to conduct those proceedings forcefully, causing legitimate aggravation to the other party within the procedural rules. Persons will or may feel harassed as a result of the lawful conduct of forcefully conducted litigation. On the other hand, if proceedings are being used for an ulterior purpose, namely not to air legitimate grievances but to cause distress to those involved in the process, then the line may be crossed and the acts may become unlawful under the Protection from Harassment Act 1997".

33. Thus, here the central issue would appear to be whether Mr Ferguson stirred up the grievances and encouraged their continuance 'for an ulterior purpose'. That is exactly what the Claimant alleges, on the basis that he wanted revenge, whether because she had shunned or complained about him in the past, or simply in order to be shot of her.

34. I am only too conscious of the unusual facts before the Divisional Court in the *Baron* case; I have little doubt that it would only be in exceptional cases that the Court would feel able to hold that the 'forceful conduct' of litigation had crossed the line, so as to constitute abuse and actionable harassment. What I am unable to do, on the other hand, is to rule simply on the papers that no reasonable Court could uphold the harassment claims, on the basis of the facts pleaded, without perversity.

35. What I have in mind is the possibility, startling though it may seem, that the original complaints made in 2000 and 2001 were prompted and orchestrated by Defendant No. 6. That scenario, although no doubt counter-intuitive, could possibly come within the extended definition of 'harassment' as it is beginning to emerge in the developing case law. On the other hand, although I am cautious about adopting too robust an approach towards those allegations (especially for the reasons canvassed in *Spencer v Sillitoe*, cited above), I believe that I should be unduly timorous not to apply the guillotine in the case of the harassment allegations made against Defendants No. 3, 4 and 5. Their roles, as Mr Wolanski points out, were essentially concerned with the conduct of the investigatory process in accordance with their responsibilities. Of course it may be that they are open to criticism as to the way they discharged their responsibilities, but I am not persuaded that there is anything which would amount, in the case of any of them, to such an abuse of power as to fall even arguably within the notion of harassment.

36. So far as defendant No. 2 is concerned, I believe it would be illogical for me to leave outstanding the claim for defamation against him, along the lines I have already described, without also admitting the possibility that his *ex hypothesi* malicious conduct could also amount to harassment. It is said that his conduct cannot be considered as "calculated to cause alarm or distress, let alone conduct that is oppressive or unreasonable". That may ultimately prove correct but I do not, for the reasons I have given, feel able to rule it out on paper.

37. I have not lost sight of Mr Wolanski's other submissions about harassment in the context of the particular facts. First, he argues that none of the conduct relied upon "directly" affects the Claimant because allegations were not made to her face. Moreover, even if the allegations against her were false, that would only go to their being unreasonable; it would not be oppressive. So too, if the various dental nurses and Defendant No. 6 were trying to avoid having to work with her, that would be "the very opposite of harassment". These facts are unusual and I do not believe it would be right, while the boundaries of the concept are still being tested, to conclude that on the Claimant's case harassment is bound to fail.

38. Again, the first Defendant will remain in the action also as being potentially liable on a vicarious basis of any finding of harassment in respect of the relevant Defendants.

39. There are separate, and apparently free standing, claims based upon alleged infringements of the Human Rights Act 1998. It is suggested by the Claimant that there has been infringement of her rights, in particular, under Articles 3 and 8 of the European Convention on Human Rights. This seems to me to add nothing to the other claims. There is nothing pleaded to indicate conduct anywhere near the severity that would justify finding that Article 3 had been engaged. Furthermore, this dispute concerns the Claimant in relation to her professional life, albeit in relation to her personal behaviour rather than lapses of professional skill. There is no allegation of breach of confidence, or of any comparable cause of action, which impinges upon

private or family life, the home, or personal correspondence. Of course there has, according to her case, been a degree of distress and humiliation, but that must be taken into account in the course of resolving the domestic causes of action relied upon and compensated for, if at all, in accordance with those well established principles (especially those governing causation). There is nothing to justify leaving in the statement of case the specific claims formulated in terms of the Human Rights legislation.