Bullch 154

CI/142/2006

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the tribunal is erroneous in point of law. I set aside the tribunal's decision and refer the case for rehearing before a differently constituted tribunal.

2. This is an appeal from the decision of the tribunal dismissing the claimant's appeal against a decision made on 16 September 2005 refusing a declaration of an industrial accident. I held an oral hearing of the appeal on 15 June 2006 at which the claimant was represented by her husband, and the Secretary of State was represented by Ms. Gillian Harris, Solicitor.

3. From 1996 until 2000 the claimant worked as a part-time civilian police clerical officer, carrying out mainly word processing duties. The claimant was a job-sharer and worked two days and three days in alternate weeks, on average for 18.25 hours per week. The other job sharer worked the reverse shift pattern.

4. In August 2000 the claimant volunteered to work in the force's intelligence office and commenced her new duties in October of that year. Although it appears that the claimant no longer had a job-sharer at that time, her work pattern continued as before. The claimant has submitted a grievance to her employers in which she makes a number of complaints about her treatment in the period from 2000 to 2004, but there is no suggestion that her work pattern at that time caused any difficulties.

5. In February 2004 a uniformed officer, whom I shall call Sergeant T, was appointed to the intelligence office and raised with the claimant the issue of her working hours. According to the claimant, in March 2004 Sergeant T asked the claimant to consider working Mondays and Thursdays each week, but the claimant declined to do so and she says that Sergeant T appeared to accept that position. The claimant also says that she confided sensitive personal information to Sergeant T, but the nature of the information has not been revealed.

6. On 12 May 2004 there was a further meeting between the claimant and Sergeant T, and the claimant's case is that as a result of that meeting she suffered "personal injury ...by accident" within the meaning of section 94 of the Social Security (Contributions and Benefits) Act 1992. The tribunal's statement of reasons records the claimant's evidence about the meeting as follows:

> "(The claimant) had no reason, she told the Tribunal, to believe that (Sergeant T) had not accepted her reasons for not wanting to fall in with his suggested new shift pattern until (Sergeant T) called her into his office for a "a chat in private" on 12 May 2004 when she had returned to work in the normal way following her rest days. She had no prior notice of this meeting and did not know what was to be discussed. She and the Sergeant had their discussion in his office. There were only the two of them present. He said he wanted to discuss "roles and responsibilities" and the conversation soon turned to the question of her shift pattern. (The claimant) was dismayed when having previously seemed to accept her reasons for not wanting to change this pattern, (Sergeant T) said he saw no alternative but for her to work the shift pattern he was proposing. (Sergeant T) also let her know he had discussed the matter with the Personnel Office and had informed them of very sensitive she had previously confided

to him in confidence. (The claimant) said that at this point in the conversation she could see where matters where going and became shaky and worried. As she realised the breach of her confidence which had occurred she became extremely distressed. As the conversation, which lasted approximately ten minutes in all, progressed (the claimant) became increasingly distressed and (Sergeant T) said that if she was not prepared to work the shift pattern he wanted, he did not know what would become of her position within the Intelligence Office. (The claimant) felt it must have been obvious to (Sergeant T) that she had become very upset but he carried on talking to her until she had to leave the room because she could not take it any longer. She describes feeling panicky and sick. She told the Tribunal that she stood outside the main building to try to pull herself together because she was having a severe panic attack. She felt she should see the Personnel Officer to describe what had happened and she wanted to go home. The Personnel Officer in fact was not in at that particular time but she saw another civilian worker who could see how upset she was and who took her into the staff kitchen to calm her down, made her coffee etc and informed another member of staff from the Personnel Team that there had been this problem and that (the claimant) needed to see the Personnel Officer. The person...told (the claimant) that she had done the right thing in removing herself from the conversation and she would let the Personnel Officer know when she arrived, and indeed (the claimant) saw the Personnel Officer later that day."

7. The tribunal very properly questioned the claimant further about the way in which the meeting had been conducted and recorded the following additional evidence on that issue:

"(The claimant) told the Tribunal that (Sergeant T's) office was somewhat disorganised at the time in question-there was no desk or table but there were chairs and they were both seated. The office was in the process of moving. Both parties were seated to start with and the Sergeant was softly spoken at the outset, but she felt there was some sarcasm. When she declined to change her rest days, she says that (Sergeant T's) tone of voice became more assertive and the volume increased. She was asked whether there had been any point at which he was shouting. (At this point the statement refers to a correction to the Record of Proceedings to indicate that the claimant in fact said that Sergeant T did not shout.) (The claimant) confirmed that there were no physical threats. However, she said she felt threatened. (Sergeant T) was a large man in uniform. She was a civilian worker. She had no-one else in the room with her. Asked whether there was any instance of physical intimidation that she could identify, she believed that he had leant forward in his chair and he might have got up and wandered around the office but at what point she could not say. In terms of whether there was anything unusual about the conversation, she considered it was a breach of protocol because asking her about her shift pattern was a Human Resources issue and therefore someone from Personnel should have been there. Her previous conversation with him, when she had provided the private information to him, was also in private and at his instigation and this would have been in February or March soon after he had arrived in the Department. She had not felt threatened by that because he had not raised the matter before. The Tribunal noted that (the claimant's) computer diary showed an entry for an unidentified date in march 2004 when she mentioned that (Sergeant T) had discussed the sort of shift patterns and cover that he wanted and the Tribunal was told this was an open office meeting."

8. The claimant continued working until 23 August 2004, but on that date she went on sick leave and has not worked since. She was certified as suffering from depression and chronic anxiety (although the medical certificate is not in the documents). She originally claimed that the relevant accident occurred on the day on which her sick leave commenced, and that her anxiety and depression resulted from work related stress caused by her employer "due to a catalogue of events (work related) over a period of time". However, in her letter requesting a reconsideration of the decision refusing a declaration of an industrial accident, the claimant stated that the specific date on which the accident occurred was 12 May 2004 on the basis that: "on this date an event occurred which caused me psychiatric injury by pushing me over the edge and into a mental breakdown".

9. The tribunal rejected that contention. Having reviewed the case-law and referred to guidance given by the Industrial Injuries Advisory Council in relation to the diagnostic criteria for stress at work as a prescribed disease and post traumatic stress disorder, the statement continues:

> "The Tribunal in this case makes no finding about whether (Sergeant T's) conversation with the claimant was proper or not. The Tribunal is not qualified to make such a statement because it has no access to the data which would enable it to determine this. Further, it is not necessary to the Tribunals' decision that it should decide whether this was a proper conversation for (Sergeant T) to have with (the claimant). The Tribunal's decision is based on there being no evidence of any untoward event. (Sergeant T) said something to (the claimant) which was very unwelcome to her and it precipitated a panic reaction. However, it was the words, in the entirely personal and private context of (the claimant's) reasons for not wanting to change her shift pattern, which caused the injury of which she complains, and not any action on the part of (Sergeant T). There is no evidence that she was at any time put physically under threat. She complains that the situation was of its nature intimidating, that she as a civilian woman in an office alone with (Sergeant T), a man in uniform. However, as a civilian worker in a Police office she must have been used to such situations. Even if she had not been, there was nothing which occurred in the course of the conversation which crosses the threshold which makes it identifiable as an accident which occurred in the course of her employment."

10. The claimant appealed on the ground that the hearing had been conducted unfairly. I did not grant leave to appeal on that ground, but I did so because I considered it arguable that the tribunal erred in law in holding that there was no evidence of an 'untoward event' on 12 May. Since the claimant has apparently made a complaint about the conduct of the hearing and I have decided to allow the appeal for other reasons, I say no more about the conduct of the hearing.

11. The term "accident" was defined in the leading case of *Fenton v Thorley* [1903] A.C. 413 as "...an unlooked-for mishap or an untoward event which is not expected or designed". It has long been accepted that the term 'personal injury' in what is now section 94 of the 1992 Contributions and Benefits Act may extend to psychological injury unaccompanied by physical injury, and that proposition was accepted by the House of Lords in *CAO v Faulds* (reported as R(I)1/00) Although it was stated in C.I.7/71 that the use of language alone cannot constitute an accident, a different view was taken in CI/4642/97, CI/2414/98 and

CI/47082001. However, in CI/3414/98 Mr Commissioner Rice held that an employer's action in suspending an employee could not constitute an accident:

> "If the suggestion were put to the man in the street that an employee's suspension, pending an investigation of his conduct, was an accident, he would regard it as absurd. Employees are regularly suspended or dismissed, but these actions are never regarded as accidents. In some cases such action may well be unexpected, but that does not make it an accident."

12. In opposing the appeal, Ms. Harris relied principally on the decision of Mr Commissioner Rowland in CI/105/1998. The claimant in that case was a senior member of the academic staff of a college of further education who suffered depression following what the tribunal found to be three aggressive and bullying interviews in a six month period. Although disagreeing with the statement in C.I.7/71 that words alone can never constitute an accident, the Commissioner followed the approach of Mr Commissioner Rice in CI/5249/95 in holding that it was the *consequences* of the relevant conversations, rather than the conversations themselves, which had caused the psychological injuries in that case:

> "I agree with the view expressed in CI/5249/95 that a perfectly proper conversation cannot constitute an accident because it seems to me that it may be an event but not an untoward event. However, I do not agree with the suggestion in C.I. 7/71 that the use of language alone can *never* constitute an accident. In my view, the tribunal in the present case were quite entitled to regard the three material interviews as being sufficient to amount to accidental causes of any injury that flowed from them. On the tribunal's findings, those interviews were quite untoward.
>
> However, I must emphasise that, for a person to be entitled to disablement benefit in consequence of a conversation, it is the conversation itself that must cause the injury rather than the fact of suspension or dismissal or criticism. In other words, it is the *event* that is important. If a person is dismissed and suffers depression due to contemplating the consequent loss of financial security or loss of status, that by itself is not enough to show injury by accident. If, however, psychological harm is caused by the *manner* of dismissal, then the events surrounding the dismissal can amount to an accidental cause of the harm."

13. Ms. Harris submitted that the tribunal in this case found nothing untoward in the way in which the conversation between the claimant and Sergeant T was conducted, and that it was the subject of the conversation-namely the proposal to change the claimant's working hours-which was the cause of the claimant's psychological injury. Since it was the consequences of the conversation, rather than the conversation itself, which caused the claimant's injury, the tribunal were correct in holding, in accordance with CI/105/1998, that the injury in this case was not caused by accident.

14. I do not accept that submission. In CI/2414/1998 Mr Commissioner Williams drew attention to the need to consider the context of a conversation when deciding whether it constituted an accident:

> "Given that "accident" includes deliberate actions, and that words can constitute assault or other crimes to the person, the statement in C.I. 7.71 is too general. For

example, verbal sexual harassment at work might be such in extreme cases as to amount to an accident or series of accidents, as might misinformation designed to shock or causing shock. I note that in the recent decision of CI/4642/97 and linked cases, the Commissioner reaches the same conclusion. Any claim that words cause an accident must also be taken in context. This conversation reopened an issue that had clearly traumatised the claimant. That is relevant in considering its effect on her. It was not just the words by themselves that must be considered, but the context of the words concerned." (para 8).

15. One relevant aspect of the context was highlighted by Mr Commissioner Angus in CI/6637/1999, a case concerning a school teacher who suffered depressive illness following interviews with a school inspector and head teacher in the course of which he had been criticised. After expressing reservations about CI/5249/1995, which he considered was decided on its own facts, the Commissioner continued:

> "The sole employee in a small business, such as a corner shop, might be shocked if the employer suddenly announced that he is investigating the possibility that the employee has been pilfering stock or taking money from the till. In other employments, there are regular spot stock and cash checks because there are large amounts of "attractive" stock and numerous employees. Employees will normally be unconcerned by such procedures: but a vulnerable employee might well be badly shocked by a conversation following a stock check in which he is told, correctly or incorrectly, that his stock his short." (para. 33)

16. Those cases make it clear that the matters which must be taken into account when deciding whether an interview amounts to an "accident" are not confined to the way in which the interview was conducted. Mr Commissioner Williams cited sexual harassment and deliberate misinformation as the kind of treatment in the workplace which might give rise to depressive illness. Other examples of workplace bullying are deliberately setting an employee unachievable targets, or instituting disciplinary proceedings in bad faith, and in such cases psychological injury may be caused without any overt signs of aggressive or overbearing behaviour. As Miss Commissioner Fellner pointed out in CI/3511/2002, stress illnesses are more likely to result from a process rather than from a single event or series of events, but in those exceptional cases where depressive illness can be attributed to one or more specific incidents, it may be necessary to carry out a careful investigation of the context of the incidents in order to decide whether injury has been caused by accident.

17. The tribunal in this case expressly declined to make any findings on whether Sergeant T's conversation with the claimant was a proper conversation. However, large employers, such as police forces, have detailed procedures precisely in order to give employees a measure of protection in relation to matters such as changes in their working hours. Employees in such organisations are entitled to expect that those procedures will be followed and may feel vulnerable if they are disregarded. The issue of whether the meeting on 12 May should have been conducted in the presence of a personnel officer needed to be determined in order to decide whether it was an unexpected event, so that even in terms of the basic definition of "accident" in *Fenton v Thorley* the tribunal's failure to investigate that matter and its self-direction that there was no evidence of any untoward event were in error of law. The claimant contended that she did not expect to have the question of her working hours re-opened, or to discover that Sergeant T had passed on information given to him into confidence, and findings

on those matters were also necessary in order to decide whether the interview could be regarded as untoward. Those matters may at first sight appear relatively trivial, but it has not been disputed that the claimant was extremely distressed by the interview, and the tribunal itself appears to have accepted that the claimant's illness stemmed entirely from that event. Although the tribunal found that what was said at the interview caused depression "in the entirely personal and private context of (the claimant's) reasons for not wanting to change her shift pattern" I can find no evidential basis for that conclusion and, in any case, without investigating the claimant's complaints about the interview, the tribunal was not in a position to decide whether it was the change in the claimant's working hours or the interview which caused her depression. The tribunal's finding that the depression resulted from the change in the claimant's working hours, which was the foundation of the Secretary of State's case, therefore cannot be sustained.

18. I therefore uphold the argument, ably advanced by the claimant's husband at the hearing before me, that the tribunal erred in law in failing to consider matters relevant to the issues which they had to decide. Accordingly, I allow the appeal and set aside the tribunal's decision. I have come to the conclusion that I cannot decide the claimant's entitlement to a declaration of an industrial accident on the papers, and that the case must therefore be referred for rehearing to a differently constituted tribunal.

19. The new tribunal will need to decide whether the interview on 12 May constituted an accident in accordance with the principles which I have set out and, if so, whether the claimant's depressive illness resulted from that interview or, as she originally asserted, was the result of a process. Although I have not had to comment on the claimant's complaints about the physical conditions in which the interview on 12 May took place, those matters may have relevance to the question of whether the interview was the cause of the claimant's depression, and may therefore need to be considered in detail by the new tribunal.

20. One unsatisfactory feature of this case is the lack of medical evidence, and I urge the claimant to consider obtaining evidence from her doctor dealing with the link between her condition and the incident on 12 May.

(signed on the original) **E A L Bano**
Commissioner

23 August 2006