Appeal No. UKEAT/0020/16/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 19 May 2016

Before

THE HONOURABLE MR JUSTICE MITTING

(SITTING ALONE)

ROYAL MAIL GROUP LIMITED APPELLANT

MS K JHUTI RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS-APPEAL

APPEARANCES

For the Appellant	MR SIMON GORTON (One of Her Majesty's Counsel) Instructed by: Weightmans LLP 100 Old Hall Street Liverpool L3 9QJ
For the Respondent	MR SIMAO PAXI-CATO (of Counsel) Instructed by: Net Solicitors Pett Lodge Ashford Road Charing Ashford Kent TN27 0DX

SUMMARY

VICTIMISATION DISCRIMINATION

VICTIMISATION DISCRIMINATION - Dismissal

Whether the Employment Tribunal's determination that dismissal was not automatically unfair under section 103A **Employment Rights Act 1996** because the person who decided to dismiss was misled by the Claimant's line manager (to whom she had made a protected disclosure) who engineered her dismissal because she had done so was sustainable. It was not.

THE HONOURABLE MR JUSTICE MITTING

1. The Claimant was employed as a probationary Media Specialist within the MarketReach unit of the Respondents' Sales Division from 17 September 2013 until her dismissal with effect from 21 October 2014. She was an experienced and, prior to the events which gave rise to her dismissal, a self confident media sales person. Her employment was subject to a trial period of six months.

2. She was assigned to a team headed by Mike Widmer and to the Entertainment, Charities and Travel Sector within this team. Two other Media Specialists worked within that sector, Nicola Mann, a long serving employee of the Respondents' who had returned to work in November 2012 after a ten-year sabbatical, and Sarah Oakes, who was three months into her trial period.

3. The Claimant was inducted into the Respondent's marketing practices and the legal constraints on their use. One of their practices was to offer Tailor Made Incentives ("TMIs") to some of their customers to trial new or more expensive mail services. The policy document in which TMIs were explained noted that the Respondents attached "the greatest importance to ensuring that its TMI policy is deployed compliantly" and that its rules and policies were followed. One of them was stated in unequivocal terms "TMIs cannot be used solely for the purpose of reducing the price of a Royal Mail service". To do so would be a serious regulatory breach.

4. In early October 2013 the Claimant began to shadow Ms Mann. On 16 October 2013 she accompanied her to a visit to Leger Holidays, a customer of the Respondents'. Ms Mann

had led her to believe that Leger Holidays was an established client of hers, yet during the presentation which Ms Mann made, it became apparent to the Claimant that she had never met them before. Ms Mann gave a member of Leger's staff an envelope containing a document. The member of staff later returned with it and took the document out of the envelope. It was headed TMI. She asked to whom it should be given and Ms Mann said to her. She checked it and said all was fine.

5. The Claimant suspected that Ms Mann had done something contrary to the Respondents' rules and to the requirements of its regulator Ofcom. Later that day the Claimant checked the Respondents' computerised sales database and discovered that Ms Mann had had no previous dealings with Leger. She also discovered that the clients listed on the database by Ms Mann and Ms Oakes were all long standing customers of the Respondents with substantial business with them. By now the Claimant believed that Ms Mann had offered a discount to Leger via a TMI in breach of the Respondents' rules and regulatory rules. She did not then do anything about it other than to discuss it with a colleague who had joined a different sector of Mr Widmer's team at the same time as her.

6. On 7 November 2013 a sector meeting - attended by the Claimant, Ms Mann and Ms Oakes, chaired by Mr Widmer - took place. Accounts were allocated to each of them. The Claimant was disappointed. Out of 600 actual and potential customers she was allocated 42, all in the travel sector, none of whom were established customers. She expressed her discontent to Mr Widmer in emails on the following days. An email timed at 20.16 on 12 November 2013 contained the following:

> **"I hope you are able to rectify the situation as I have requested to provide an equal opportunity for all. I will write all down and provide you [the] supporting evidence to my emails and issues to be addressed. Including TMIs provided to clients whom already have activity planned yet have been claimed by my team."**

7. At 21.52 on the same day Mr Widmer emailed his line manager, Peter Reed, the Sales Director, expressing concern about the Claimant's behaviour. At 7.56am on the following day, 13 November 2013. Mr Reed responded as follows:

> **"Mike**
>
> **I think you proceed [sic] with your original plan, she is on trial and needs to work as instructed and as a senior manager has a responsibility to work well with others, as we see it this is not a good start! The TMI issue is one we should look at, so she needs to provide evidence of that, and has to be aware that she is making quite strong and serious allegations in this area."**

8. Mr Widmer arranged to meet the Claimant at Oxford Services on the M40 at 9.30am on that day. The meeting lasted over four hours. Evidence was given about it by the Claimant and Mr Widmer. Their accounts differed in the words of the Tribunal "dramatically". The Tribunal believed the Claimant. She said that Mr Widmer had said to her that the allegation made in the email cited was serious. She explained what had happened on 16 October 2013 in detail. He questioned her about her understanding of TMIs rather than about her account of what happened and the potential for fraud on the Respondents, on their investors and on the regulator. She found this uncomfortable.

9. He suggested that it would be better if she admitted that she had made a mistake and advised her to send a retracting email. She agreed to do so. All of this took about two hours. He then spent the next two hours giving her a dressing down and gave her a list of tasks to complete. The meeting left her distressed to the point that she was shaking and in tears in her car on her journey home to London. She sent the required email to Mr Widmer at 20.30 on the same day. Its tone, deferential and apologetic, unlike her previous emails, led the Employment Tribunal to conclude that something "of major proportions" had happened at the meeting.

10. Mr Widmer's account, which the Tribunal did not accept, was that he had explained to the Claimant how TMIs worked and that, while she was correct to raise the issue with him, she had been mistaken in her understanding of them. She accepted his explanation and that she had been mistaken. It was common ground that he then required her to attend weekly meetings with him to monitor her progress. The Tribunal found that these took about 1½ days out of her working week, a week in which she was required to prove her mettle as a salesperson: half a day for travelling to and from the meeting, half a day for the meeting and half a day for preparation for it including the preparation of the plans required by Mr Widmer.

11. The Tribunal also found that Mr Widmer set her, thereafter, an ever changing unattainable list of requirements which she took to be an attempt to drive her out of her job. By contrast, while he was away from work between 10 December 2013 and January 2014, Louise Murphy, head of the other MarketReach team, complemented her on her fulfilment of his latest requirements. Meanwhile on 18 December 2013, the Claimant arranged a meeting with the architect of TMIs, Sean Robertson. He told her that as "we all know" "TMIs were being abused by the media specialists …", and she understood the reference to "we" to be a reference to senior management.

12. Following his return to work on 26 January 2014, Mr Widmer emailed James Dabill of Human Resources to tell him that a member of his team - plainly the Claimant - was not up to expectations and "if things don't change, we will need to look at exiting this individual". He remained critical of the Claimant at subsequent meetings and in follow up emails. On 5 February 2014 he set a performance plan for her. It included a requirement that she compile a list of her key clients in the travel market while in previous employment. She believed that she would be in breach of the law if she complied.

13. On 6 February 2014 the Claimant emailed Jane Heath in Human Resources to express her concern about how she was being treated. She said that she believed that Mr Widmer's judgment and actions towards her were clouded "since I raised my issue" and that he was "looking to manage me out of the business for his own gain". Ms Heath passed this email to Rita Rock, the Human Resources person responsible for the Respondents' MarketReach unit, who arranged to meet the Claimant on 10 February 2014. At that meeting the Claimant explained to her what had occurred starting with the incident at Leger Holidays on 16 October 2013. She explained that the TMIs were being used to support inappropriate claims towards individual and team sales targets which defrauded the Respondents of bonuses and led to misleading information being reported to investors. Ms Rock's response was, in essence, to assert that Mr Widmer was a respected manager and to ask her if the Respondents might not be the right company for her.

14. The Claimant had further stressful meetings with Mr Widmer. On 25 and 26 February 2014 she emailed Ms Rock complaining of harassment and bullying because of her disclosures. Ms Rock arranged for the Claimant to be managed directly by Mr Reed. He extended her probationary period by one month and arranged to meet her on 3 March 2014. At that meeting she was obviously distressed. On 7 March 2014 the Claimant's General Practitioner advised her to take time off work. The same day she saw Ms Rock, who offered her three months' pay to leave, which she declined. On 10 March 2014 the Claimant raised a formal grievance, not in fact dealt with until 18 months later on 28 August 2015. On 12 March 2014 the Claimant was signed off sick by her General Practitioner. She did not, thereafter, return to work. Sometime later on an unknown date Ms Rock telephoned the Claimant to tell her that Graham Davis, the Head of Sales, had authorised the offer of one year's salary to her to enable her to get well and to re-enter the jobs market.

15. Pauline Vickers, of the same level of seniority as Peter Reed in the Sales Department, was appointed in April 2014 to review the Claimant's position with the Respondents, excluding the grievance which she had raised. She did not at any stage see any of the emails sent by the Claimant referred to above in which she spoke of the events of 16 October 2013 or of the perceived misuse of TMIs. She received a large number of letters and incoherent emails in return, which she characterised as "irrational". They did, however, include references to cheating the business and the public, to which the Claimant did not wish to be a party.

16. Ms Vickers raised the issue with Mr Widmer. He emailed her stating that the Claimant did raise the issue of the inappropriate use of TMIs with him and that he had explained to her that she had misunderstood the situation which she accepted. He enclosed a copy of her email to him of 13 October 2013. Ms Vickers accepted what he had said. The Claimant never met Ms Vickers because she was unwell. On 21 July 2014 Ms Vickers gave the Claimant three months notice of dismissal. Her reason was that the Claimant had not met the standards required in the role of a Media Specialist and was unlikely to do so. The Claimant retained solicitors, who signified her intention to appeal. On 13 September 2014 they submitted a combined grievance and appeal against dismissal. It enclosed a 14-page document which set out the Claimant's case clearly including her description of the events of 16 October 2013 and her allegations about the abuse of TMIs.

17. Anita Madden, an appeals case work manager was appointed to hear the Claimant's appeal and grievance. She interviewed Mr Reed, Ms Murphy and Mr Widmer in November and December 2014. She sent a copy of the interview notes to the Claimant's solicitors. Matters then stalled. In May 2014 Ms Madden was advised by her manager to put the investigation on hold while the Respondents considered an issue relating to TMIs. What the

issue was was not further elaborated either to her or to the Tribunal. On 5 August 2014 Ms Madden was told that she could resume her investigation. She did and on 28 August 2014 notified the Claimant's solicitors that she had dismissed both her appeal and her grievance. She had accepted the truth of what Mr Widmer had said to her, corroborated, as it was, by the Claimant's email to him of 13 October 2013.

18. The Respondent has since discontinued the use of TMIs for reasons, which to the surprise of the Tribunal, were not explained to it. The Tribunal found the Claimant to be "a very credible witness". It did not find Mr Widmer to be a credible witness and characterised parts of his evidence as "evasive and disingenuous". It described his failure to investigate the Claimant's allegations about the events of 16 October 2013 and the abuse of TMIs as "highly surprising". It found that Mr Reed's email to Mr Widmer at 7.56 on the morning of the Claimant's meeting with him was "quite sinister" and noted that his approach to managing the Claimant during Mr Widmer's absence in December 2013 was consistent with the approach of Mr Widmer.

19. At paragraphs 253 to 254 the Tribunal made a finding on the balance of probabilities about the significance of the offer of a substantial payment to terminate the Claimant's contract:

> **"253. Sixthly, the offers of firstly three months and then one year's pay to leave the respondent which are given to the claimant, the latter of which was sanctioned by Mr Davies, are also extremely strange in the context of an employee who had very limited service and therefore no unfair dismissal right, is said to be an extremely poor performer and who has not yet passed her probationary period.**
>
> **254. It is far more likely that, given her lack of service, given the fact that Mr Roberts, who was the architect of TMIs, had indicated that management knew that TMIs were being abused, and that the authorisation for a year's pay came from as high up as Mr Davies, that management were more concerned about this issue. That in turn places much more significance on the issue and makes it more likely that the claimant's account of the 13 November 2013 meeting was the correct one. Similarly, the unexplained hiatus in the grievance process, which is said to be due to the respondent considering "an issue related to TMIs" and the fact that TMIs have now been discontinued, for reasons for which were never explained to us, is further evidence that TMIs were an issue of considerable significance to the respondent, that Mr Widmer also knew this full well and that his account of the meeting is the less credible of the two."**

20. The Tribunal gave itself a careful self direction of law as to: (1) protected disclosures under section 47B of the **Employment Rights Act 1996**; (2) automatically unfair dismissal under section 107A; and (3) the time limit for bringing claims under the first head set out in section 48(3). There is no criticism of the first of those self directions and no attempt to upset its factual findings on any issue relevant to them. The appeal and cross-appeal turn on the second and third issues.

21. The Tribunal found that the disclosures on 8 and 12 November 2013 reiterated on 13 September 2014 (misstated as "October 2014" in the list of issues) individually and together amounted to a protected disclosure under section 47B and that she was in consequence subject to the following detriments.

> (1) Bullying and harassment by Mr Widmer at and following the meeting of 13 November 2013. This included the ever changing and unobtainable requirements of her, which amounted to "setting up a paper trail which set her to fail". The "overriding reason" for his treatment was her protected disclosures of 8 and 12 November 2013.
>
> (2) A facet of the first issue, issuing her with the performance plan, which included a requirement for her to provide key contacts in previous employments.

22. The Tribunal also found that the disclosures of 10 February 2014 to Ms Rock amounted to a protected disclosure and that, in consequence, Ms Rock made an offer to terminate the Claimant's employment on payment of three months' and then on payment of 12 months' salary, detriments because she did not wish to leave employment. It is also common ground that as the Tribunal found the last date for presentation of the claim to the Tribunal in respect of the Claimant's dismissal and, if it was, the conclusion of a series of similar acts previous

detriments, was because of conciliation attempts between 19 January and 19 February 2015, 20 March 2015. The ET1 claim form was issued on 13 March 2015 and stamped as received on 15 March 2015.

23. The first finding in issue in this hearing arises on the Claimant's cross-appeal. It is common ground that if I decide that ground in favour of the Claimant, then the Respondents' grounds of appeal fall away. At paragraphs 342 to 344 the Tribunal concluded that Ms Vickers believed that she was dealing with a "bona fide performance procedure" because she believed what Mr Widmer told her, supported as it was by the Claimant's email to him of 13 November 2013, and because she had not been provided with copies of subsequent disclosures and documents, and because of the Claimant's illness had no opportunity to interview her. The Tribunal's conclusions were set out at paragraphs 345 to 346:

> **"345. Given the information that was before her, it was not only not surprising but was in fact inevitable that Ms Vickers would choose to dismiss the claimant and would choose to do so for the reasons she sets out in her letter of 21 July 2014 at paragraph 3, essentially on the grounds of performance. We find that, in terms of her own reasoning, the fact that the claimant had made protected disclosures was not part of her reasoning and that she genuinely believed that the claimant was a poor performer. In this context, we note that she had not even seen any of the written disclosures which we have found to be protected disclosures (the emails of 8 and 12 November 2013). Following the case of *CLFIS (UK) v Reynolds* [[2015] ICR 1010], Ms Vickers must herself have been motivated by the protected disclosures and, notwithstanding that the evidence before her was hugely tainted as a result of Mr Widmer and others, there is no basis on which her decision can be said to be based on the disclosures on the basis of someone else's motivation. Therefore, the principal reason for the decision was not the making of the protected disclosures and the complaint of automatically unfair dismissal under section 103A of the Employment Rights Act 1996 fails.**
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> **346. However, given Mr Widmer's actions, including the treatment which he meted out to the claimant as a result of her protected disclosures, the email trail that he prepared in this context, and his other actions as set out in these reasons above, it was inevitable that Ms Vickers would, as she did, dismiss the claimant."**

24. The Claimant's cross-appeal against that decision has been advanced by Mr Paxi-Cato. He submits that on the Employment Tribunal's findings of fact it should have concluded that her dismissal was automatically unfair under section 103A and erred in law in deciding otherwise. With the agreement of counsel, I have proposed to determine this issue first. The

statutory scheme is in simple language and on its face straightforward. It is contained in sections 47B, 48, 49 and 103A of the **1996 Act**. Section 47B provides:

> **"47B. *Protected disclosures***
>
> **(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.**
>
> **(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done -**
>
> > **(a) by another worker of W's employer in the course of that other worker's employment, …**
>
> **(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer."**

25. Subsection 1A of section 47B reverses the decision of the Court of Appeal in **Fecitt v NHS Manchester** [2012] ICR 372 to the effect that an employer could not be vicariously liable for something that was not a civil wrong committed by an employee in the course of his employment. Section 47B(2) disapplies section 47B(1) and (1A) in respect of the detriment of dismissal:

> **"2. … this section does not apply where -**
>
> > **(a) the worker is an employee, and**
> >
> > **(b) the detriment in question amounts to dismissal (within the meaning of Part X)."**

26. An employee may complain to an Employment Tribunal about a breach of section 47B (see section 48(1)A). Section 49(1) provides for remedies on a complaint under section 48(1):

> **"49. *Remedies***
>
> **(1) Where an employment tribunal finds a complaint under section 48 … (1A) … well-founded, the tribunal -**
>
> > **(a) shall make a declaration to that effect, and**
> >
> > **(b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure of the act to which the complaint relates."**

27. It is to be noted that there is no provision for the payment of compensation by an employee who subjected a claimant to a detriment, in the course of the former's employment.

The only remedy available against an employee is, therefore, a declaration. In respect of the detriment of dismissal for making a protected disclosure the sole statutory remedy is provided by section 103A:

> **"103A.** ***Protected disclosure***
>
> **An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."**

28. The remedies are set out in Part X chapter 2 and include an order for reinstatement and uncapped compensation under sections 114 and 124(1A). The Employment Tribunal appears to have believed that, notwithstanding the terms of section 47B(2), it could treat the earlier acts of victimisation as giving rise to a claim for compensation for loses flow from dismissal subject only to proof of causation. The view which is expressed in the course of its reasoning was made abundantly clear by paragraph 2 of a case management summary sent to the parties on 26 November 2015. Although I have not heard argument on this issue I believe that the Employment Tribunal's approach to this question of compensation to be erroneous. Section 47B(2) expressly excludes the detriment of dismissal and so of necessity to the financial and other consequences of dismissal from consideration whatever the causative link.

29. The Tribunal's conclusion was based, I believe, on a misunderstanding or misapplication of paragraphs 39 and 43 of the judgment of Underhill LJ in **Reynolds v CLFIS (UK) Ltd** [2015] ICR 1010, in which he explained the subject to proof of causation in a discrimination claim under the **Equality Act 2010**, it was possible for compensation to be awarded when dismissal followed acts of unlawful discrimination, subject only to proof of causation. There is, however, no read across from discrimination principles and the discrimination scheme, which contains no equivalent to section 47B(2), and the whistle blowing

scheme (see **Kuzel v Roche Products Ltd** [2008] IRLR 530 at paragraph 48, per Mummery LJ).

30. The starting point is the language of section 103A. What must be determined is "the reason (or, if more than one, the principal reason) for the dismissal". The long accepted statement of Cairns LJ in **Abernethy v Mott, Hay and Anderson** [1974] ICR 323 explains what this is. It refers to the:

> **"Set of facts known to the employee or it may be beliefs held by him which cause him to dismiss the employee."**

31. It was put in slightly different words by Mummery LJ in **Kuzel** at paragraph 54 and 56:

> **"54. Ffithly, the reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employer's knowledge.**
>
> **…**
>
> **56. … Thus, it was clearly for Roche to show that it had a reason for the dismissal of Dr Kuzel; that the reason was, as it asserted, a potentially fair one …"**

32. In the vast majority of cases all that is necessary to discern is the set of facts known to the person who made the decision to dismiss. He or she will be the sole, or where the decision is a joint one, they will be the joint human agents of the employer who determine the decision. There is, however, no binding statement in the authorities that the mind of that person or those persons must in all circumstances be equated with that of the employer. In **Cooperative Group Ltd v Baddeley** [2014] EWCA Civ 658 Underhill LJ dealt with the circumstances in which the decision maker was manipulated at paragraphs 41 to 42:

> **"41. … Cairns LJ's exact language may not be wholly apt in every case, but the essential point is that the "reason" for a dismissal connotes the factors operating on the minds of the person or persons who made the decision to dismiss. The same approach applies to the "ground" for a putative detriment contrary to section 47B.**
>
> **42. That requires the identification of the decision-maker(s). It was accepted before us, and appears to have been accepted by the ET, that the relevant decision-makers - that is, the persons with whose motivation we are concerned - are Mr Atkinson and Mr Logue. In principle, therefore, it is immaterial what Mr Berne may have thought or wanted *except* to the extent that that operated on their minds. There was some discussion before us whether that approach was applicable in all cases or whether there might not be circumstances where the**

actual decision-maker acts for an admissible reason but the decision is unfair because (to use Cairns LJ's language) the facts known to him or beliefs held by him had been manipulated by some other person involved in the disciplinary process who has an inadmissible motivation - for short, an Iago situation. Mr Carr accepted that in such a case the motivation of the manipulator could in principle be attributed to the employer, at least where he was a manager with some responsibility for the investigation; and for my part I think that must be correct. …"

33. Mr Gorton QC submits that the observations may only apply to the fairness of the decision and not the reason for the decision, but there can be no reason why the reason held by the manipulator of an ignorant and innocent decision maker cannot be attributed to the employer anymore than the unfairness of his motivation and nothing in the words of Underhill LJ, which I have cited, suggested that he intended to draw a clear distinction between the two.

34. I can see no reason of principle why any such clear distinction should be drawn. A man can manipulate what a person believes as to his reason just as well as he manipulates what a person believes as to the fairness of decisions which flow from having that reason. I, therefore, reject Mr Gorton's submission on that issue. I am satisfied that, as a matter of law, a decision of a person made in ignorance of the true facts whose decision is manipulated by someone in a managerial position responsible for an employee, who is in possession of the true facts, can be attributed to the employer of both of them.

35. It is necessary to consider whether on the facts found by the Employment Tribunal the same principle can apply in more nuanced circumstances such as those which exist here. I am satisfied that they can and should for the following reasons. First, Mr Widmer was the Claimant's line manager responsible for induction and supervision and for allocating duties to her and, in due course, for reporting upon her performance. Secondly, she made protected disclosures to him, disclosures which he realised were serious and of significance to him, to those in positions senior to him and to the Respondents generally. Thirdly, she was deliberately

subjected to detriments by him from the moment that she made the disclosure until he ceased to be her line manager. Fourthly, his temporary replacement, Mr Reed, displayed no difference in approach from that adopted by Mr Widmer. Fifthly, Mr Widmer "was setting up a paper trail which set her to fail". Sixthly, he succeeded. Seventhly, he lied to Ms Vickers about the disclosures made by the Claimant by "explaining disingenuously that this was an issue which had been raised but that the Claimant had told him that she had got her wires crossed" and by giving her email to him of 13 November 2013 to Ms Vickers, but not the earlier emails of 8 and 12 November 2013. Eighthly, Ms Vickers was deprived of information for unexplained reasons by Human Resources who did not give her copies of the emails of 6 February and 25 and 26 February 2014 and by the decision to separate the grievance from performance issues.

36. In those circumstances, it is not only the mind of Ms Vickers which needs to be examined to discern the Respondents' reasons for dismissal. The reason and motivation of Mr Widmer must also be taken into account. Once it was, as the Employment Tribunal found, it was inevitable that dismissal would occur and it did occur on the Tribunal's findings by reason of the fact that the Claimant had made prohibited disclosures principally to Mr Widmer.

37. For those reasons the cross-appeal succeeds. As agreed between counsel the remainder of the case of the appeal falls away. Formally I think I should dismiss the Respondent's appeal against the Employment Tribunal's decision and findings but I will invite counsel on how matters should proceed in the light of the decision which I have made.