Appeal No. UKEAT/0125/16/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 September 2016
Judgment handed down on 17 October 2016

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR A P ROWE — APPELLANT

LONDON UNDERGROUND LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR NICHOLAS TOMS (of Counsel) Instructed by: Thompsons Solicitors Congress House Great Russell Street London WC1B 3LW
For the Respondent	MR ANDREW ALLEN (of Counsel) Instructed by: Eversheds LLP Kett House Station Road Cambridge CB1 2JY

SUMMARY

TIME OFF

HEALTH & SAFETY

The right to paid time off for safety representatives - remedy for denial of the right - Regulation 11(3) of the ***Safety Representatives and Safety Committees Regulations 1977***

Having found that the Respondent had acted in breach of the **Regulations** by denying the Claimant (an appointed safety representative) paid time off work for a prescribed purpose, the ET made a declaration to that effect but concluded that no award of compensation should be made under Regulation 11(3) of the **1977 Regulations**. Whilst allowing that an injury to feelings award was permissible under the **Regulations**, the ET did not find that the Claimant had established any such injury in fact in this case. Considering the possibility of an award for what was just and equitable having regard to the employer's default and the loss sustained by the Claimant, more generally, the ET equally concluded that no award should be made.

The Claimant appealed, arguing that the ET had erred in its approach, alternatively had reached a perverse conclusion.

The Respondent resisted the appeal, relying on the ET's reasoning but also seeking to argue for the first time that no award for injury to feelings was permissible under Regulation 11(3).

Held: *dismissing the appeal*

There were no exceptional reasons to permit the Respondent to take a point for the first time on appeal but, *obiter*, injury to feelings awards related to claims of discrimination (applying **London Borough of Hackney v Adams** [2003] IRLR 402 EAT and **Santos Gomes v Higher**

Level Care Ltd UKEAT/0017/16/RN) and not to the non-discriminatory breach of a right for the purposes of Regulation 11(3).

The ET had approached its task correctly, whether viewed as considering compensation for injury to feelings or in respect of what was just and equitable more generally (following **Skiggs v South West Trains Ltd** [2005] IRLR 459 EAT). Its reasoning could not be read as limited to one paragraph; it had taken into account relevant factors and had reached a permissible conclusion on the material before it.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal against a Judgment of the London (Central) Employment Tribunal (Employment Judge Henderson, sitting with members on 16 and 17 July 2015; "the ET"), sent out on 12 August 2015. Representation before the ET was as before me.

2. By that Judgment, the ET allowed the Claimant's claim under the **Safety Representatives and Safety Committees Regulations 1977** ("the 1977 Regulations") - that the Respondent had failed to permit him to take paid time off to investigate a dangerous occurrence at the workplace - but declined to make any award of compensation, either by way of compensation for injury to feelings (it found no such injury proved) or simply for infringement of the Claimant's right. It is in respect of the ET's failure to award compensation that the Claimant now appeals, contending that it erred in its approach to the possible heads of compensation, alternatively reached perverse conclusions.

3. By its Answer to the appeal (although not before the ET), the Respondent questions whether injury to feelings can be a potential head of loss under Regulation 11 of the **1977 Regulations**, and otherwise resists the appeal, essentially relying on the ET's reasoning.

The Background Facts and the ET's Findings and Reasoning

4. The Claimant is a train operator employed by the Respondent. In January 2014, he was elected as a safety representative for the RMT trade union at White City, where there was also a more experienced ASLEF health and safety representative, Ms Tily.

5. On 22 and 23 June 2014, the Claimant was party to a request made by Ms Tily to carry out a health and safety investigation under Regulation 4 of the **1977 Regulations**, relating to an incident on 15 June 2014, involving a broken conductor rail (the rail carrying the power which runs underground trains) on the approach to White City station. This had caused arcing (sparks) which had been observed early in the morning; the break in the rail was discovered in the early afternoon. The Respondent had decided it was safe to continue running trains in the interim, although the station was subsequently closed at 4pm, for an hour and a half, to enable a temporary repair of the rail; a permanent repair was carried out overnight. The incident had been (the ET found) a dangerous occurrence, for the purposes of Regulations 4 and 6 of the **1977 Regulations**.

6. Returning to the request made by the Claimant and Ms Tily, the Respondent initially refused paid time off for this purpose, contending that any request for time off under the **1977 Regulations** must be reasonable and stating that the Claimant and Ms Tily did not have the necessary technical experience to conduct an investigation of this kind.

7. Ms Tily replied on 25 June, again writing on her own behalf and that of the Claimant, stating they had been "*surprised and confused*" by the response and clarifying their intention was not to carry out a technical investigation but a safety investigation into the operational response and the effect on union members. Subsequently, in September 2014 (after some escalation of the issue), the Respondent allowed that paid time off should be granted and apologised for the delay in consenting to this (although not for the original refusal).

8. Accepting that the Claimant had requested time off to perform an investigation of a dangerous occurrence under Regulation 4(1)(e) **1977 Regulations**, the ET identified that the

question for the Respondent had not been whether the investigation was necessary but whether the paid time off was. The Respondent had initially refused paid time off in June, albeit it had subsequently been granted in September 2014. The Claimant therefore succeeded in his claim in respect of the initial refusal to permit him to take time off to investigate a dangerous occurrence under Regulation 4(1)(a) and (e) of the **1977 Regulations**, the Respondent having acted in breach of Regulation 4(2)(a).

9. The ET turned to remedy. Regulation 11 of the **1977 Regulations** provides that a safety representative such as the Claimant may pursue a complaint to the ET where:

> **"(a) the employer has failed to permit him to take time off in accordance with Regulation 4(2) … [this case]; or**
>
> **(b) the employer has failed to pay him in accordance with Regulation 4(2) …"**

10. Regulation 11(3) then provides that, where an ET has determined that a complaint under (a) above is well founded (as here), it:

> **"… shall make a declaration to that effect and may make an award of compensation to be paid by the employer to the employee which shall be of such amount as the tribunal considers just and equitable in all the circumstances having regard to the employer's default in failing to permit time off to be taken by the employee and to any loss sustained by the employee which is attributable to the matters complained of."**

11. In respect of a successful complaint under (b), Regulation 11(4) provides, in contrast:

> **"Where … an employment tribunal finds that the employer has failed to pay the employee the whole or part of the amount required to be paid … the tribunal shall order the employer to pay the employee the amount which it finds to be due to him."**

12. In the present case, having made a declaration of liability, the ET turned to the question whether it should make an award of compensation under Regulation 11(3). It first considered whether the Claimant was entitled to compensation for injury to feelings but found he had not suffered any notable or significant stress or injury to feelings as a result of the refusal in June 2014: it was unlikely the Claimant had been seriously offended or insulted by the reference to

his lack of experience; he was relatively inexperienced and had described the Respondent's remark in this regard as only *"a little bit"* insulting. In the circumstances, the declaration of unlawful conduct was sufficient remedy; the ET declined to make any award for injury to feelings.

13. The ET then considered whether, more generally, it would be "just and equitable" to award any compensation to the Claimant, having regard to the Respondent's default. Although the Respondent had been wrong in considering the **Regulations** required the request for time off to be "reasonable", the ET noted its collective agreement with the RMT and ASLEF trade unions stated that a TU official should only be granted "reasonable" time off with pay where it was necessary to enable them to carry out trade union duties. The ET also noted that the initial, June 2014, request for paid time off had not specifically referred to an investigation into an operational response; the Respondent's reaction was to what it had understood to be a technical investigation; the unions' position was only clarified later and that had subsequently been accepted. Accepting that the case of **Skiggs v South West Trains Ltd** [2005] IRLR 459 EAT allowed for compensation for breach of the right, absent any requirement for proof of loss, the ET considered such an award would not be just and equitable in the circumstances of this case. Whilst it had regard to other ET decisions where awards of compensation had been made in claims under the **1977 Regulations**, it considered the facts of those cases were distinguishable from the present.

14. Finally the ET considered but distinguished the case of **Susie Radin Ltd v GMB and Ors** [2004] EWCA Civ 180: that case related to a protective award under section 189(3) **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA"); providing a sanction for breach of section 188 **TULRCA**, not compensation for employees' losses. In contrast,

A Regulation 11(3) of the **1977 Regulations** specifically referred to compensation for the employee and any loss sustained by him.

B **The Appeal**

15. By his first ground of appeal, the Claimant takes issue with the ET's refusal to award compensation for injury to feelings. By the third ground, he contends this was perverse. By his second ground of appeal, the Claimant challenges the ET's decision not to make any award of C compensation based on the employer's default, alternatively, by ground four, he says this was perverse.

D 16. The Respondent resists the appeal, largely relying on the ET's reasoning but also now taking, for the first time, the point that no award of compensation could be made as a matter of principle under Regulation 11(3) in any event. Accepting that the EAT would generally not E entertain points not been taken below, Mr Allen urged that this was an exceptional case where I should exercise my discretion in the Respondent's favour. Having heard arguments on this question - and both parties being in a position to make submissions on the substantive point in issue in any event - I reserved my decision in this respect and proceeded to hear the appeal, F including this new point, *de bene esse.*

Submissions

G *The Claimant's Case*

17. On the question whether an injury to feelings award was permissible under Regulation 11(3), this had been accepted by the ET, no issue having been taken on this point below.

H

18. The Respondent now relied on the EAT decision in **Santos Gomes v Higher Level Care Ltd** UKEAT/0017/16/RN. In that case, the EAT (Slade J) had ruled that a claimant was not entitled to recover compensation for injury to feelings for a breach by the employer of the requirement under Regulation 12(1) **Working Time Regulations 1998** ("WTR") to provide rest breaks (that ruling being concerned with Regulation 30(4) **WTR**). That did not assist in determining whether compensation for injury to feelings was available under Regulation 11(3) of the **1977 Regulations**. A claim under the **WTR** was a claim based on an individual right applicable to every worker, akin to a breach of contract (**Santos Gomes**, paragraph 59). By contrast, a claim under the **1977 Regulations** was based on a Claimant's status, as a safety representative.

19. Whilst judicial decisions had restricted compensation for breach of individual rights to financial loss (**Dunnachie v Kingston upon Hull City Council** [2004] ICR 1052 HL - unfair dismissal; **Johnson v Unisys Ltd** [2001] IRLR 279 HL - wrongful dismissal; **Santos Gomes - WTR**), compensation for claims based on status had consistently been held to allow for awards for injury to feelings, unless expressly excluded (see express exclusions at: **Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000** ("PTR") Regulation 8(11), the **Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002** ("FTE") Regulation 7(10), and the **Agency Workers Regulations 2010** ("AW") Regulation 18(15)). Thus, absent express provision, it had been held such damages were available under section 149 **TULRCA 1992** (claims of union membership/activities detriment), see **Brassington v Cauldron Wholesale Ltd** [1978] ICR 405 EAT, **Cleveland Ambulance NHS Trust v Blane** [1997] ICR 851 EAT, **London Borough of Hackney v Adams** [2003] IRLR 402 EAT, and under section 49 **Employment Rights Act 1996** ("ERA") (protection from

suffering detriment in employment cases), see **Virgo Fidelis Senior School v Boyle** [2004] IRLR 268 EAT and **Commissioner of Police of the Metropolis v Shaw** [2012] ICR 464 EAT.

20. Whilst such damages were not available for dismissals ruled to be unfair due to status, that was because dismissal protection was related to contract. Detriments were a form of statutory tort, so injury to feelings awards were permissible. Breaches of the **1977 Regulations** were akin to being subjected to a detriment: the worker was subjected to detriment by being prevented from carrying out functions as a safety representative.

21. Further, the wording of Regulation 11(3) **1977 Regulations** was not the same as Regulation 30(4) **WTR**; specifically, Regulation 11(3) did not separate into different categories the matters to which the ET is to have regard.

22. Moreover, given that Regulation 11(3) addressed complaints under Regulation 11(1)(a) - concerned with a failure to permit the employee to take time off to carry out their safety duties - whereas Regulation 11(1)(b) dealt with the failure to pay someone for their time off (with a separate remedy limited to pay, see Regulation 11(4)), it was difficult to see what compensation under Regulation 11(3) could relate to if not injury to feelings.

23. The wording of Regulation 11(3) of the **1977 Regulations** was very similar to section 149 **TULRCA** and section 49 **ERA**, where injury to feelings compensation was recoverable. There was no good reason why Regulation 11(3) should not be similarly construed. And there were strong public policy reasons for doing so: safety representatives perform a vital function and are entitled to special protection by reason of their status (and the fact the protection was

A tied to their status meant - unlike claims under the **WTR** - there was no danger of the floodgates being opened).

B 24. Turning then to the ET's decision to make no award, whilst accepting compensation under Regulation 11(3) was not mandatory (the use of "may" meant it was discretionary), if there was no compensation the effect of the **1977 Regulations** was likely to be seriously diminished. Whilst deterrence should not be a factor in an assessment, full compensation is C itself the deterrent (**Ministry of Defence v Cannock and Ors** [1994] ICR 918 EAT, at 954D). Further, although the ET was bound to focus on loss sustained not sanction (**Hackney v Adams**), injury to feelings should not be too difficult to prove (**Cannock** at 954E). Whilst the D Claimant had not overstated his case ("*a little bit insulting*"), that did not mean he suffered no injury to feelings. A nil award was only appropriate in an exceptional case and the ET had not expressly stated this was an exceptional case.

E 25. Alternatively, the ET's decision was perverse. Specifically it failed to take into account that which was common ground (that Ms Tily was acting on her and the Claimant's behalf) and failed to have regard to evidence as to how the Claimant had escalated matters himself, which F had included (see the ET's finding at paragraph 25) his complaint to the Office of the Rail Regulator and (on the unchallenged evidence before the ET) had escalated it within the RMT. The ET cited the absence of reference to any injury to feelings in the Claimant's witness G statement but that could not outweigh his oral testimony; the ET appeared to hold the Claimant's lack of overstatement against him.

H 26. Further, the ET erred in not making an award of compensation based on the employer's default. The **1977 Regulations** do not require an employee to prove loss for an award to be

A appropriate; by Regulation 11(3), loss sustained by an employee is a matter to which the ET should "have regard" along with the employer's default. And, where a right in the workplace has been breached, a Claimant does not have to prove any consequential loss but can simply be compensated for the infringement of the right (**Skiggs**). Here, the ET considered the principle of an award based on the employer's default but did not make such an award because it (see paragraph 57 of its Reasons) considered the Claimant had displayed little concern; wrongly focusing on *his* actions rather than the Respondent's default. In the alternative, the ET's decision in this regard was perverse (see above).

The Respondent's Case

D 27. The Respondent's first contention was that no injury to feelings award was permissible under Regulation 11(3) as a matter of principle. Such awards were expressly allowed in discrimination claims (see sections 124 and 119 of the **Equality Act 2010** ("EqA")), but there was no equivalent provision in the **1977 Regulations**.

28. Whilst injury to feelings awards had been allowed (absent express legislative provision) in cases such as those involving detriments due to trade union membership and activities (see **Cleveland v Blane**) and whistle-blowing (**Virgo Fidelis**), that was not invariably so (and not all the cases relied on by the Claimant in these respects were so clear-cut). Specifically, in **Santos Gomes** the EAT ruled no such award could be made in a claim for compensation for not allowing adequate rest breaks required under the **WTR**. Apart from the structure of the provision, Regulation 30(4) **WTR** was identically worded to Regulation 11(3) of the **1977 Regulations**. In **Santos** the EAT had held that the need for express exclusion of an injury to feelings award in the **PTW**, **FTE** and **AW Regulations** was because they were all anti-discrimination provisions rather than health and safety protection, which was the purpose of the

WTR. Because the **WTR** were not concerned with discrimination, express wording to exclude injury to feelings awards was unnecessary.

29. Moreover, not all status based rights carried an entitlement to injury to feelings compensation, as was apparent in respect of protection against automatic unfair dismissal. The Claimant was not denied paid time off *because* he was a safety representative: he had the right to paid time off because of his status but that was not why his exercise of the right had been denied. The point had been recognised in **Adams**, as referenced in **Santos Gomes**:

> **"56. Elias J (as he then was) in *Adams* explained the basis for the award of compensation for injury to feelings in trade union cases. Elias J held … that action taken against an individual because of their trade union membership or activities is treated as a form of discrimination …"**

30. Context was important: section 149 **TULRCA** was concerned with remedy for the section 146 protection against detriment; here the compensation was for breach of Regulation 4(2), which gave a specific right and was more akin to a breach of contract (and thus analogous to Regulation 30(4) **WTR**).

31. And Regulation 11(3) could still have a real purpose even if not allowing compensation for injury to feelings; it could, for example, relate to situation where the representative might have invested her own time or incurred expense when denied time off by the employer.

32. Even if incorrect on this point of principle, the ET had been right to make no award in this case. Some actual injury would have needed to have been sustained by the employee; an award did not follow as of right. The ET had made permissible findings of fact and had found the claim lacked plausibility and conviction (and, on perversity, see further, below).

33. Turning to ground 2 and the question of an award for employer default, the Respondent argued that the primary form of relief under Regulation 11(3) was the declaration. Accepting that the role of safety representatives (albeit employers such as the Respondent had other means of ensuring health and safety) was important, it did not follow that any breach of the **1977 Regulations** would give rise to compensation. Regulation 11(3) was concerned with compensation; that meant reparation, making good to an employee (as contrasted with a protective award, see **Miles v Linkage Community Trust Ltd** [2008] IRLR 602 EAT). Whilst it was true that the EAT in **Skiggs** (applying similar wording in relation to a trade union detriment case) had been critical of the ET for failing to have regard to the employer's default, it had still made clear that the principle was compensation to the individual, not the imposition of a fine or collective punishment on the employer.

34. It was not perverse for the ET to have made no award; a declaration might well be sufficient, particularly in cases not involving protected characteristics under the **EqA** (see **Adams** at paragraph 12). It was wrong to contend an award of compensation was necessary as a deterrence (**Cannock**). Moreover, the question was not whether the ET had found this to be an exceptional case but whether an award was appropriate on these facts. The ET plainly had in mind the relevant factors and was entitled to have regard to what the Claimant did, not what others in the RMT might have done. It was aware of his letter to the Rail Regulator but did not consider that assisted in showing any loss or injury on his part. The Claimant had never given evidence that he was insulted by the Respondent's response, just that the response regarding expertise was "*a little bit*" insulting. The ET did not rule out an award in respect of the employer's breach but permissibly had regard to the collective agreement, to the lack of clarity in the initial request and the Respondent's misunderstanding, to the ultimate resolution (an

investigation report which the Claimant said was "excellent") and to the apology for the delay in granting the request (albeit not for the original refusal).

Discussion and Conclusions

35. The first question arising on the hearing of this appeal is whether I should permit the Respondent to raise, for the first time, its objection to the ET's consideration of an injury to feelings award under Regulation 11(3) of the **1977 Regulations** as a point of principle.

36. Mr Allen accepts this is not a point he took below but contends he should be permitted to argue it on appeal; not least as the case of **Santos Gomes** had made clear that the ET's approach had erroneously assumed such an award might be possible. Accepting the general principle that new points will not be permitted on appeal, Mr Allen observes that I have a discretion in this regard and, while this should be exercised only in exceptional circumstances and for compelling reasons, the present case fell within the examples envisaged by the EAT (HHJ McMullen QC) in **Secretary of State for Health and Anor v Rance and Ors** [2007] IRLR 665 at paragraph 50(6); in particular because it was a discrete point of law, requiring no fresh findings of fact, and in respect of which the EAT was in possession of all the material necessary to dispose of the matter fairly without recourse to a further hearing.

37. For the Claimant, Mr Toms does not suggest he is prejudiced in terms of having to deal with this issue: it was raised in advance and both parties had addressed the point in their skeleton arguments. There were, however, no exceptional circumstances justifying the taking of this point on appeal when it was not the Respondent's position below and, as a point of principle, I should not exercise my discretion in the Respondent's favour.

38. I agree with Mr Toms. Whilst he was able to deal with the arguments raised by this new point, there are, in truth, no exceptional circumstances arising such as to mean I should permit the Respondent to raise a point it had not taken below. As Mr Allen accepted, this was not a case where there was a pressing public interest to have the point determined (see, e.g. **Leicestershire County Council v UNISON** [2006] IRLR 810 CA per Laws LJ at paragraph 21), or where a party had been prevented from arguing the point because of some deception or unfair conduct by the other side (**Kumchyk v Derby City Council** [1978] ICR 1116 EAT, per Arnold J at p1123). Whilst the **Santos Gomes** case was decided after the ET hearing, it was not suggested before me that the Respondent's argument was dependent upon that judgment. Moreover, it is apparent (from other ET cases to which I have been referred) this is not the first time the Respondent has faced a claim involving consideration of Regulation 11(3) of the **1977 Regulations**; it was a point the Respondent could have taken earlier but did not. Had it done so, that may or may not have carried weight with the ET. If it had, whilst I suspect the Claimant might have wished to appeal in any event, it is impossible to say it would not have had any impact upon his decision. And so, even if not prejudiced in terms of dealing with the substance of the argument and even if the question does not require remission to the ET for further hearing, I would not consider it appropriate to allow the Respondent to take this new point for the first time on appeal given there is no exceptional reason why it should be permitted to do so.

39. Should I be wrong about that, I have, of course, heard full argument on the point at issue - and Mr Toms has made clear that the Claimant does not complain of prejudice in dealing with the legal arguments raised - and I therefore express my view on this question, albeit that this part of my Judgment must be strictly *obiter*.

40. As previously stated, Regulation 11(3) provides that any award of compensation:

> **"… shall be of such amount as the tribunal considers just and equitable in all the circumstances having regard to the employer's default in failing to permit time off to be taken by the employee and to any loss sustained by the employee which is attributable to the matters complained of."**

41. That is different to the wording of section 123 **ERA**, which provides for compensation for unfair dismissal, where no reference is made to the employer's default and in respect of which it is clear there is no basis for any injury to feelings award (**Dunnachie v Kingston upon Hull City Council** [2004] ICR 1052 HL). And whilst there is no express provision for an injury to feelings award in Regulation 11(3) (in contrast to sections 119(4) and 124 **EqA**), there is equally no such provision at section 149 **TULRCA** or section 49 **ERA**, both cases in which such an award has been held to be available (**Cleveland Ambulance NHS Trust v Blane** [1997] ICR 851 EAT; **Virgo Fidelis v Boyle** [2004] IRLR 268 EAT) and where the relevant wording of the statutory provisions is identical to that of Regulation 11(3) for these purposes (albeit section 49(2) **ERA** separates out the references to infringement (sub-paragraph (a)) and loss (sub-paragraph (b)).

42. Mr Allen submits that full consideration of the case-law apparently permitting injury to feelings compensation in such claims, absent any express statutory provision, raises some question as to whether the jurisprudence is quite as certain as is generally assumed. At this level, however, I see no reason not to follow the previous rulings of this Court which - as Mr Allen's argument allows - has given rise to a general understanding that injury to feelings awards are available in detriment cases other than those involving protected characteristics under the **EqA**.

A

43. Mr Allen's better point is made by reference to Regulation 30(4) of the **WTR**. That is also worded identically to Regulation 11(3) of the **1977 Regulations**, save that it separates out the reference to the employer's default (Regulation 30(4)(a)) from the loss sustained by the worker (Regulation 30(4)(b)) (reflecting a similar difference in structure to that apparent when comparing section 149 **TULRCA** and section 49(2) **ERA**, see above). For the Claimant, Mr Toms observes that the different structure of the provision at Regulation 30(4) **WTR** was significant in the **Santos Gomes** case because it was there conceded (by counsel for the employee) that injury to feelings could not be compensated for under Regulation 30(4)(b) (**Dunnachie** having made clear that "*loss sustained by the worker*" could not include pecuniary losses), so the argument was founded solely on the ability to make such an award under Regulation 30(4)(a) (and see paragraphs 6 and 51 of the judgment in **Santos Gomes** where that is made clear).

B

C

D

44. The arguments before me have - I consider, correctly - approached the construction of Regulation 11(3) of the **1977 Regulations** holistically: the arguments for or against the permissibility of a non-pecuniary award have been pursued without seeking to artificially separate out the different factors to which reference is made. And, if approached in this way, it seems to me that the wording of each of the legislative provisions relating to the question of compensation for action short of dismissal or detriment is very similar and cannot, of itself, explain the different conclusions reached on the question of the availability of non-pecuniary damages under section 149 **TULRCA** and section 49 **ERA** on the one hand and under Regulation 30(4) **WTR** on the other.

E

F

G

45. In my judgment, those different conclusions are, however, explicable by reference to the context in which each provision is to be considered. And that seems to me to be entirely right:

H

A the remedies provided by Parliament in each instance are not to be viewed in a vacuum; context is all.

B 46. In **Santos Gomes**, the EAT (Slade J) observed that the basis for the award of compensation for injury to feelings in trade union cases was because action taken against an individual because of their trade union membership or activities was to be treated as a form of discrimination (as had been explained by Elias J (as he then was) in **London Borough of Hackney v Adams** [2003] IRLR 402 EAT). Claims for breach of the **WTR** for failure to allow statutory rest breaks were, in contrast, akin to breach of the contract claims; an injury to feelings award could only arise if the refusal to permit rest breaks was on discriminatory grounds (which might include trade union activities or membership).

C

D

47. Returning then to Regulation 11(3) of the **1977 Regulations**, I note this concerns an important right afforded to employees who have taken on a distinct status as trade union appointed safety representatives. Mr Allen says that health and safety in a workplace such as the Respondent's might be protected by a number of other means and it should not be assumed that trade union safety representatives are the only way of ensuring such checks. Whilst this might be so, I do not consider that would detract from the very important role of the trade union safety representative and the public policy that underpins the protections with which this case is concerned.

E

F

G

48. I further note that Parliament has chosen to invest the right in the individual representative: the right to paid time off is afforded to the individual employee by virtue of her status as a safety representative for the purpose of performing her prescribed functions as such (and it is for that individual to pursue any claim in the ET). And I can allow, as Mr Toms

H

argues, that for an employer to act in breach of that right can be characterised as subjecting the employee to a detriment: the detriment of being prevented from performing their duties as a safety representative.

49. Thus defining the detriment, however, demonstrates why this is properly to be characterised as the denial of a right rather than an act of discrimination. The detriment is not suffered *because of* the employee's status as a safety representative: that status is necessary for the right but does not explain the breach of that right; the employer has denied the right to paid time off but has not thereby discriminated.

50. As Mr Allen argues, this is significant. All the cases in which injury to feelings awards have been allowed have involved some form of discrimination, whether because of a protected characteristic under the **EqA**, or in respect of the employee's status as a trade unionist (**TULRCA** section 149), or some other status which affords a right to remedy under section 49 **ERA** (and in the case of the protections to which section 49 **ERA** relates, I note that these include - see section 44(1)(b) **ERA** - the protection against detriment as a safety representative). If the right to claim compensation for injury to feelings thus arises because a complaint is properly to be described as one of discrimination (and I have no reason to depart from the approach laid down in **Adams** and **Santos Gomes** in this respect) then I consider the Respondent is correct: Regulation 11(3) does not permit such an award to be made.

51. That, however, gives rise to the question as to the purpose of Regulation 11(3). As Mr Toms observes, for those losing pay when taking time off to carry out their functions as safety representatives, Regulation 11(4) ensures they will be compensated. What then is the purpose of Regulation 11(3)?

52. I do not consider the answer to that question lies merely in the existence of the mandatory declaration (although I do not suggest that is unimportant). Equally, however, I do not consider Regulation 11(3) to have no real world application in terms of possible compensation. As Mr Allen speculated, one can envisage circumstances arising in which a safety representative is refused time off work and yet goes on to undertake the relevant tasks in their own time, possibly incurring consequently expenses. No doubt Parliament allowed for a broad approach to compensation under Regulation 11(3) so as not to rule out any particular circumstances which might arise: removing the possibility of an injury to feelings award does not deprive the provision of meaning; an ET has a wide discretion to award compensation for the employee safety representative deprived of the right to take time off for her prescribed duties.

53. And that brings me on to the other aspect of the ET's consideration under Regulation 11(3), the availability of an award of compensation of such amount as the ET considers just and equitable having regard to the employer's default and any loss sustained by the employee. Considering identical wording in respect of the remedy available for breach of a representative's right to time off for trade union duties under section 172 **TULRCA**, in **Skiggs v South West Trains Ltd** [2005] IRLR 459, the EAT held that:

> **"17. … there may be compensation having regard to the employer's default even in the absence of proof of consequent financial or other loss: indeed … the absence of identifiable financial loss is likely to be the rule rather than the exception. In our judgment, tribunals can properly consider whether it is just and equitable to make some reasonable and proportionate award by way of reparation to the individual union official for the wrong done to him by the employer in preventing or impeding his proper union activities on behalf of his members, without infringing the principle that the purpose must be compensation to the individual, not the imposition of any form of fine or collective punishment on the employer. …"**

54. It has not been argued before me that **Skiggs** was wrongly decided and, indeed, the broad approach adopted in that case seems to me entirely consistent with the language of the legislation, both that which concerned the EAT in **Skiggs** and that which arises for

consideration in the present appeal. It is unhelpful to seek to define the nature of the award further - that would risk detracting from the broad discretion afforded the ET - but it permits of a more flexible approach than that arising (for example) in considering compensation for unfair dismissal and can allow for some compensation for non-pecuniary losses other than injury to feelings, which is a head of loss that arises in discrimination cases and not simply from the denial of a right on non-discriminatory grounds (and, for completeness, I would consider such an award to be permissible in a detriment claim under section 44(1)(b) **ERA**).

55. Returning then to the points raised by the appeal, did the ET err in its approach to an award of compensation under Regulation 11(3), whether considered as an injury to feelings award (as was assumed possible) or as, more generally, an award in respect of what was just and equitable having regard to the employer's default? I do not consider that it did. As Mr Toms has acknowledged, an award of compensation under Regulation 11(3) is discretionary (as contrasted with the mandatory declaration): whether or not such an award should be made is left to the ET to determine given what *it* considers just and equitable in the circumstances. A nil award in a particular case does not deprive the protection of effect; it has to be seen on the facts of that case. I do not consider that the ET here lost sight of the protective purpose of the provision but it equally had regard to what it considered to be just and equitable given its findings of fact. And it is not a fair reading of the ET's reasoning to suggest that it failed to have regard to the employer's default; to simply alight on one paragraph does not do justice to the fuller consideration of factors that this ET plainly engaged in, which included the Respondent's understanding as to the nature of the right, as derived from its collective agreement with the trade unions, as well as the initial lack of precision in the request and the misunderstanding to which this gave rise, and the subsequent change in position. Those were

all matters to which the ET permissibly had regard in assessing the Respondent's default; it did not make the error of solely focusing on the question of any loss sustained by the Claimant.

56. Can it be said that the decision to make no compensatory award was perverse? Again, I do not think it can. Whilst it might be unusual for there to be no award of compensation, the discretionary nature of Regulation 11(3) plainly allows for that possibility and leaves it to the ET to assess what is appropriate given the facts of the particular case. Here, I do not think it can be said the ET lost sight of the relevant factors: it was aware that matters had been escalated within the RMT and that the Claimant had written to the Regulator, but did not consider those actions demonstrated loss sustained by him. It was entitled to consider the claim of injury to feelings against the evidential background, which included a failure to attest to such an injury in the Claimant's witness statement and his almost neutral characterisation of the Respondent's initial response as "*a little bit*" insulting. Whether another ET might have felt it appropriate to make an award of compensation on these facts is, of course, not the test. On the evidence, I am simply unable to say that this, three-member, ET reached a decision that was "almost certainly wrong" such as to meet the high test required of a perversity appeal.

57. Given that I neither consider that the ET approached its task wrongly nor that it reached a perverse conclusion (whether considered as relevant to an injury to feelings award or to just and equitable compensation more broadly defined), I must dismiss this appeal.