Appeal No. UKEAT/0344/16/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 August 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

LEEDS TEACHING HOSPITALS NHS TRUST — APPELLANT

(1) MRS D DEARING
(2) MRS Y JAVED
(3) MR S PANTON — RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR DAVID READE (One of Her Majesty's Counsel) Instructed by: Hill Dickinson LLP 50 Fountain Street Manchester M2 2AS
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SUMMARY

VICTIMISATION DISCRIMINATION

Victimisation - section 27 ***Equality Act 2010***

The Claimants were switchboard operators who had earlier pursued ET proceedings complaining of race discrimination in which they had made various criticisms of their managers. Although the ET had dismissed those claims, it was not suggested they were pursued in bad faith and the earlier ET proceedings were accepted to constitute a protected act. Subsequently, on seeking to return to their roles (the Claimants had each been on long-term sick leave), the Claimants were told they would be redeployed into alternative positions, the relevant manager accepting the positions of the two lower level managers criticised in the ET proceedings and failing to explore the possibility of mediation. The Claimants lodged a grievance and the two lower level managers were asked to provide statements in response, the content of those statements being informed by the managers' view of the allegations made against them in the earlier ET proceedings. Throughout the discussions concerning redeployment and the grievance process, the Claimants had understood that a fellow worker had been dismissed, which - given that their difficulties with that other worker had formed part of the basis for the first ET proceedings - made it easier for them to return. In fact the worker in question had successfully appealed her dismissal and had been reinstated into a different role, albeit she had not actually returned to the workplace at the time when the Claimants finally learned of her reinstatement. The Claimants complained that these three issues - (i) the redeployment decision; (ii) the content of the managers' statements in the grievance process; and (iii) the failure to inform them of the other worker's reinstatement - amounted to acts of victimisation. The ET agreed. The Respondent appealed.

Held: allowing the appeal in part, on the first and third issues.

(i) The ET's reasoning failed to demonstrate that it had specifically made a finding as to the motivation (conscious or subconscious) for the managers' decision that the Claimants should be redeployed. Although the ET had made a number of permissible findings adverse to the Respondent's case, which might well have justified it drawing the inference that the real reason was the protected act, it had not actually stated that this was what it had found. The operative part of the ET's reasoning was at paragraph 5.29 but that suggested it had fallen into the error of approaching the reasoning on a composite basis (contrary to **Reynolds v CLFIS (UK) Ltd** [2015] ICR 1010 CA). Reading the ET's reasoning as a whole, its findings still did not demonstrate that it had gone beyond stating that the protected act was a significant part of the causative context; it does not expressly find it was the decision taker's reason why.

(ii) On the grievance statements issue, the answer to the appeal was that the ET had found that the lower level managers had engaged in acts of victimisation in the content of their statements: they said what they said because of the protected act. As the Respondent had accepted vicarious liability in this regard, it could not escape that liability by relying on the fact that the Claimants had not complained about the managers' earlier protestations: the fact the Claimants failed to bring a claim in respect of an earlier similar detriment did not mean they could not do so in respect of a repetition of that detriment in a different form at a later stage.

(iii) As for the failure to provide information about the reinstatement of the co-worker, the ET had failed to adequately explain its conclusion on detriment, in particular as to whether it had distinguished between two possibilities: (1) that the detriment arose from the possibility of coming across the other worker (in which case, the ET would have needed to deal with the factual issue that the worker had not actually returned to the workplace); and (2) that it in fact arose from the loss of trust and confidence once the Claimants learned of the failure to tell them of the reinstatement (in which case the ET needed to address the timing when the detriment actually arose, in particular in the light of its finding as to when the victimisation ceased in this regard). The ET had further failed to adequately set out its reasoning on the "reason why"

question. Whilst it might have permissibly determined the issue on the application of the shifting burden of proof, it had not explained which primary findings of fact had led it to conclude the burden had shifted.

The matter would be remitted to the same ET for reconsideration of the two points on which the appeal had been allowed.

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HER HONOUR JUDGE EADY QC

Introduction

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1. The appeal in this matter questions the approach taken by the Employment Tribunal ("the ET") in a claim of victimisation, alternatively, the adequacy of the reasons provided. In my Judgment I refer to the parties as "the Claimants" and "the Respondent", as below, save where necessary to distinguish between the Claimants, in which case I will do so by name.

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2. This is the Full Hearing of the Respondent's appeal from a Reserved Judgment of the Leeds ET (Employment Judge Maidment sitting with Mrs Anderson-Coe and Mr Corbett, over six days in January and February 2016, with a further day in chambers), sent out on 7 April 2016. The parties were then legally represented but not by the advocates who now appear.

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3. By its Judgment, the ET upheld the Claimants' complaints of unlawful victimisation pursuant to section 27 of the **Equality Act 2010** ("the EqA") in respect of three detriments: (1) on 25 March 2015 they were told they could not return to their positions on the switchboard but must be redeployed; (2) the content of statements made by Mrs Goodwin and Mrs Adams in respect of the management case in the Claimants' grievance of 28 April 2015; and (3) the Respondent's failure to inform the Claimants up to and including the grievance appeal on 30 July 2015 that another employee, Ms Lee, had been reinstated. Various other complaints of victimisation were dismissed.

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4. In initially considering this matter on the papers, Simler P took the view that no reasonable basis was disclosed for the appeal to proceed. That view was tempered somewhat on the Respondent's subsequent application under Rule 3(10) of the **EAT Rules 1993**, which

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took place before Kerr J on 30 November 2016, when the appeal was permitted to proceed on limited grounds. The Respondent challenged Kerr J's Order and, after consideration on the papers, Underhill LJ allowed that appeal and directed that the appeal should be permitted to proceed on all grounds. Thus the matter now comes before me on the three grounds of appeal which separately attack the ET's conclusions on the three detriments I have identified above. The Claimants resist the appeal, relying on the reasoning provided by the ET.

Relevant Background and the ET's Decisions

5. The Claimants all worked for the Respondent as switchboard operators. Mrs Dearing's employment commenced in 2002, Mr Panton's in 2004 and Mrs Javed's in 2009. Prior to 2011, there had been two switchboards; one at the Leeds General Infirmary and the other at St James' Hospital. In 2011, the switchboards were merged with all switchboard operators working on a single switchboard at the Leeds General Infirmary, something that led to the Claimants working alongside another switchboard operator, Ms Lee.

6. There were difficulties in that working relationship (I put it neutrally) and the Claimants each lodged ET claims, making complaints of race discrimination relating to how they alleged the Respondent tolerated behaviour from Ms Lee (who was black) because, the Claimants contended, it was concerned that she would otherwise bring a complaint of race discrimination. In addition, Mrs Dearing also complained of disability discrimination and Mrs Javed made a claim of sexual harassment, relating to a different employee.

7. In those first ET proceedings, a number of the Claimants' allegations involved their managers, Mrs Adams and Mrs Goodwin (to whom Mrs Adams reported), and to a lesser extent, a more senior manager, Mrs McGinnes (to whom Mrs Goodwin reported). Mrs Adams,

Mrs Goodwin and Mrs McGinnes all attended at least part of the first ET hearing - which took place over some 14 days in July 2014 - gave evidence and were cross-examined. Although the ET did not uphold the Claimants' claims, it did make certain findings critical of their managers.

8. The ET provided its Judgment on the first claims on 4 December 2014. It dismissed all but Mrs Javed's sexual harassment claim, which it allowed in part. Although the ET rejected the Claimants' various complaints concerning the alleged differential treatment of Ms Lee, it accepted that they all had a real serious and genuine fear of Ms Lee and were affected by her, to the extent that this had caused them significant stress and anxiety. Each of the Claimants had taken time off work due to ill health: Mrs Dearing from 29 January to 14 March 2013 and again from 10 June 2013 to 1 February 2015; Mr Panton from 9 July 2013 to 8 February 2015; and Mrs Javed from 1 October 2013 to 1 February 2015. The ET accepted this was, to a significant extent, due to the issues arising in respect of Ms Lee.

9. During the course of the first ET hearing it was clarified that Ms Lee had, in fact, been dismissed on 4 July 2014 due to disciplinary issues. Unknown to the Claimants, however, she successfully appealed against her dismissal and, in October 2014, it was agreed she would be reinstated but redeployed into an alternative position. In fact, Ms Lee then remained off work due to sickness, followed by a period of maternity leave, until she eventually returned to work in one of the Respondent's medical records departments on 24 August 2015.

10. Turning then to the second ET proceedings with which this appeal is concerned, it was the Claimants' case that they had been victimised due to their first ET claims, suffering a number of detriments thereby. Relevantly, for the current appeal, the Claimants complained they had suffered detriments in the following respects: first, in March 2015, on being told they

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could not return to their positions on the switchboard but must be redeployed ("*the redeployment decision*"); second, by virtue of the content of the statements made by Mrs Goodwin and Mrs Adams in response to the Claimants' grievance of 28 April 2015 ("*the grievance statements*"); third, due to the Respondent's failure to inform them that Ms Lee had been reinstated ("*the failure to provide information about Ms Lee's reinstatement*").

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11. The same ET heard these complaints of victimisation and was thus familiar with the first proceedings, which were relied on as amounting to a protected act for the purposes of section 27 of the **EqA**.

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12. Turning then to the detriments complained of (so far as relevant for today's appeal), the issue of the Claimants' perspective return to work was handled by Mrs McGinnes assisted by Human Resources Advisor, Ms Little. Mrs McGinnes was on maternity leave by the time of the second ET Full Merits Hearing and Ms Little gave evidence around this decision making, albeit that the ET found she was unable to cover all the issues. Ms Little was, however, able to explain that Mrs McGinnes had seen both Mrs Goodwin and Mrs Adams after the ET's first Judgment had been received and had observed that they had both been distressed by the process and the ET's findings. She further explained the understanding at that stage amongst the managers that there was no expectation that the Claimants would return to work in the switchboard area. That understanding explained Mrs McGinnes' initial response to the Claimants when they spoke of returning to work and were told they would be given redeployment forms to fill in. Although there was a lack of documentary records in the relevant meetings with the Claimants in this respect, the ET accepted that each made clear that they wished to return to work on the switchboard, considering that they had achieved closure with the ET Judgment and would be able to work with the switchboard managers. Although Mrs

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McGinnes was aware by this stage that Ms Lee had been reinstated, the Claimants were not told of this fact. More generally, the ET did not accept that the Claimants said they would not be prepared to consider mediation, and it found that Mrs McGinnes uncritically accepted the position of Mrs Adams and Mrs Goodwin, failed to consider the possibility of mediation, and proactively sought further Occupational Health advice, disappointed that it did not then support the Claimants' redeployment away from the switchboard.

13. On 25 March 2015, the Respondent wrote to the Claimants to explain that they would be redeployed into different roles due to the apparent breakdown in relations with their managers, and they were asked to complete redeployment forms. Ms Little gave further insight into the Respondent's thinking behind this decision in her evidence to the ET, referring, in part, to the apparent contradiction between earlier correspondence from the Claimants to the Respondent's Chief Executive and their stated willingness to work with the same managers. She explained how she and Mrs McGinnes had been aware of the effect that the allegations made in the ET proceedings had had on Mrs Goodwin and Mrs Adams, both of whom were suffering from stress and undergoing counselling. It was observed that the Respondent had a duty to the managers as well as to the Claimants and also had to take into account the potential operational risk to the switchboard service from a dysfunctional working environment. Ms Little further explained how it was easier to move the Claimants than the managers, although the ET was not satisfied that the limited contact which would arise - given the different working hours - had been actively considered.

14. On 30 March 2015, supplemented by statements of 28 April 2015, the Claimants lodged a grievance relating to that redeployment decision. In subsequently presenting the management's case in response, Mrs McGinnes relied on statements obtained from Mrs

Goodwin and Mrs Adams who both expressed difficulties in any future working with the Claimants given the allegations made against them during the first ET proceedings.

15. During the course of the grievance hearing, the Claimants referred to being willing to engage in mediation given that Ms Lee had been dismissed. Although those present on management side were aware Ms Lee had since been reinstated, this was again not clarified with the Claimants.

16. The Claimants' grievance was initially rejected, but on appeal it was allowed that mediation might still provide a way forward, albeit that the Claimants would be asked to agree to temporary redeployment in the interim.

17. The Claimants were unhappy with that outcome, but attended mediation on 8 September 2015 with an ACAS officer, which was positive. Subsequently, however, they learnt that Ms Lee was, in fact, still employed by the Respondent. Although the Respondent was not prepared to discuss Ms Lee's personal circumstances with the Claimants due to data protection issues, it confirmed that any redeployment position would not bring them into direct contact with her. The Claimants were, however, concerned they had not previously been told of Ms Lee's reinstatement and also raised other issues with the redeployment opportunities then offered. Subsequently, the ACAS officer made clear he did not consider it would be appropriate to continue with the mediation process.

18. In considering the decision that the Claimants should be redeployed to alternative positions, the ET was clear that this was an act of detriment (see paragraph 5.12). It accepted that Mrs Adams and Mrs Goodwin had genuinely suffered distress and upset arising from the

A allegations made in the first ET proceedings and had communicated those feelings to Mrs McGinnes and Ms Little in January 2015. It noted it had then been assumed that the Claimants would not be returning to the switchboard and Mrs McGinnes had taken no steps to explore the B possibility of mediation at that stage. The ET considered there was nothing other than the allegations made by the Claimants in the first ET proceedings that could have caused the feelings that Mrs Goodwin and Mrs Adams had towards them. Whilst the feelings were genuine, an element of robustness might reasonably have been expected, such that the managers C could have been persuaded to engage with mediation. Allowing that the Respondent owed a duty of care to the managers as well as the Claimants, the ET also felt it was relevant that managers have a duty to manage their staff, even when complaints are made against them:

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> **"5.24. … management, in the form of Mrs McGinnes, uncritically accepted the position of Mrs Adams and Mrs Goodwin that they would not work with the Claimants and without any consideration of any potential solution whereby the Claimants might return to their switchboard roles. …"**

19. The ET did not see this case as on all fours with that in **<u>NHS Manchester v Fecitt and</u>** E **<u>Others</u>** [2012] ICR 372 CA (see further below). The breakdown in relationships was with managers criticised in the first ET claim and was not a breakdown in relationships in the workforce more generally. The ET considered the question whether the response of Mrs F Goodwin and Mrs Adams, informed by the allegations of discrimination made in the first proceedings, might still, legitimately, be taken into account by the Respondent, but felt that would run counter to the purpose of the victimisation protection.

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> **"5.28. The Tribunal considers that quite starkly the purpose of this legislation would be significantly undermined if in the circumstances of this case as described in detail above the Respondent could refuse the Claimants the possibility of a return to work to their substantive position."**

20. Concluding that this allegation of victimisation had been made out, the ET explained its H reasoning as follows:

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> **"5.29. The test indeed is whether the [Claimants'] bringing of Tribunal proceedings had a significant influence on the Respondent's decision not to return them to their ordinary positions and on the basis of the Tribunal's conclusions it cannot but determine that there was indeed such significant influence causative of the detriment which the Claimants suffered in being forced to pursue potential re-deployment opportunities. The [Claimants'] complaint of victimisation in respect of this issue therefore succeeds."**

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21. Turning to the allegation of victimisation in relation to the statements of Mrs Goodwin and Mrs Adams in the grievance process, the ET did not accept that providing the statements to the Claimants itself had any material linkage to their bringing the first proceedings but did find that the content of the statements and the views expressed within them had been so informed and, as the Respondent accepted it was vicariously liable for the actions of the managers, that amounted to an act of victimisation (see paragraph 5.31).

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22. The ET rejected various other complaints of victimisation made by the Claimants, including a complaint regarding the outcome of the grievance appeal which, the ET found, had been a genuine attempt to focus on a practical solution that would have got the Claimants back to work uninfluenced by the first ET proceedings (paragraph 5.36).

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23. It then turned to the final complaint made which related to the failure to inform the Claimants of Ms Lee's reinstatement. The ET considered this was reasonably viewed by the Claimants as being to their detriment:

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> **"5.38. … All of the Claimants had been significantly adversely affected in terms of their mental health by the conduct and behaviour of Miss Lee towards them and were in genuine fear of her and what she might do to them if they came across her in the workplace or indeed in any other setting. To find out at such a late stage in the process came as a genuine shock to them in circumstances where it undermined their trust and confidence in a process of returning them to work. It reactivated feelings of fear they had regarding a return to work in circumstances where they might come across Miss Lee."**

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24. As for the reason for the Respondent's decision in this respect, the ET's conclusion was derived from the operation of the shifting burden of proof, as it explained:

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> **"5.40. … in these circumstances the Tribunal has had proven to it primary facts from which it could conclude that the failure to inform the Claimants of Miss Lee's reinstatement was because of their having brought Tribunal proceedings. The burden shifts to the Respondent to explain why the Claimants were not informed and to show that this reason was in no sense whatsoever the [Claimants'] protected act.**
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> **5.41. On a full consideration of the evidence the Tribunal cannot but conclude that the Respondent has failed to satisfy this burden up to the point of the grievance appeal on 30 July 2015. …"**

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The Relevant Legal Principles

25. The ET was here concerned with a claim of victimisation brought under section 27 of

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the **EqA**, which provides as follows:

> **"27. *Victimisation***
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> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because -**
>
> > **(a) B does a protected act, or**
> >
> > **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act -**
>
> > **(a) bringing proceedings under this Act;**
> >
> > **(b) giving evidence or information in connection with proceedings under this Act;**
> >
> > **(c) doing any other thing for the purposes of or in connection with this Act;**
> >
> > **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
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> **(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."**

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26. A detriment for the purposes of the **EqA** has been broadly interpreted as requiring nothing more than treatment of such a kind as a reasonable worker would or might see as being to their detriment, amounting to something more than an unjustified sense of grievance (see

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<u>Chief Constable of the West Yorkshire Police v Khan</u> [2001] ICR 1065 HL at paragraphs 14, 37, 53 and 76; and **<u>Shamoon v Chief Constable of the Royal Ulster Constabulary</u>** [2003] ICR 337 HL paragraphs 31 to 37). Detriment is something further that is to be judged primarily from the perspective of the alleged victim (see **<u>St Helen's Borough Council v Derbyshire</u>**

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[2007] ICR 841 HL at paragraph 66). It must, however, be because of the protected act and that

requires a causative link between a protected act and the alleged victimisation, at which stage the focus will move to that which has (consciously or subconsciously) subjectively caused the relevant actor to subject the complainant to that detriment. That is not to be answered by applying a "but for" test of causation; it requires the ET to determine what, in fact, was the reason for the treatment in issue - whether the protected act was the reason for that treatment rather than simply part of the causative context (see **Khan** at paragraph 29).

27. In some cases, determining *the reason why* can require distinctions to be drawn between, for example, an allegation (which might amount to a protected act) and the *way* in which the allegation is made (which might not) - see **Martin v Devonshires Solicitors** [2011] ICR 352 EAT. The importance of establishing a causative link between the protected act and the treatment complained of can be seen in cases such as **Khan**, where the dispute centres on the reason for the treatment in issue; the key issue in such situations being the motivation - conscious or subconscious - behind the act by the employer which is said to amount to victimisation. That requires the ET to look into the subjective motivation of the particular decision taker, it cannot simply adopt a composite approach to decision-taking within an employer and thus assume that the decision maker was informed by the motivation of others (**Reynolds v CLFIS (UK) Ltd** [2015] ICR 1010 CA, paragraphs 34 to 47).

28. All that said, there is no requirement in victimisation claims for a complainant to show that the alleged discriminator was *wholly* motivated to act by the complainant's behaviour in carrying out a protected act; it is enough that the protected act was a significant influence - an influence that was more than trivial (**Nagarajan v London Regional Transport** [1999] ICR 877 HL, page 887 and **Igen Ltd v Wong** [2005] ICR 931 CA at paragraph 37). This can present challenges to the ET when faced with cases where the protective act forms part of the

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causative context but may not be the motivating reason for the act or omission in issue. Thus, by analogy, in the context of a dysfunctional working relationship in the whistleblowing case of **NHS Manchester v Fecitt and Others** [2012] ICR 372 CA, Elias LJ rejected the notion that there was some kind of inevitability that the redeployment of whistleblowers must lead to a conclusion of causative detriment observing that if that was so:

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> **"52. … The need to resolve a difficult and dysfunctional situation could never provide a lawful explanation for imposing detrimental treatment on an innocent whistleblower. I do not think that can possibly be right. It cannot be the case that the employer is necessarily obliged to ensure that the whistleblowers are not adversely treated in such a situation. This would mean that the reason why the employer acted as he did must be deemed to be the protected disclosure even where the tribunal is wholly satisfied on the facts that it was not."**

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The Submissions of the Parties

The Respondent's Case

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29. The Respondent does not take issue with the ET's self-direction as to the law but with its application of the relevant legal tests, in particular, as to whether it adopted a composite approach to the reasoning of the relevant decision taker instead of determining whether that individual had in fact been motivated by the protected act in issue (**Reynolds**, paragraph 36). It further erred in its approach to causation. What was required was a determination of the reason operating on the mind of the decision taker; not to be confused with the more general *but for* test of causation (see for example **Khan**, paragraph 29; **Martin**, paragraphs 32 to 37).

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The Redeployment Decision

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30. Turning then to the first of the specific findings under challenge (the redeployment issue), the ET's finding of victimisation rested upon the Claimants being told they would not return to the switchboard but must be redeployed. Having correctly referred to the statutory test and the Court of Appeal's judgment in **Fecitt**, the ET had erroneously focussed on whether there was anything culpable in the way the Claimants had conducted the first ET proceedings (see paragraph 5.20), apparently assuming that it was necessary to address why the

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dysfunctional situation had arisen and approaching the question on the basis that it was only if there was fault on the part of the Claimants that the reasoning in **Fecitt** would apply - an error of law. The ET thus failed to properly direct itself as to the underlying rationale for the reasoning in **Fecitt** that the focus is on the reasoning of the person who is acting in what is alleged to be a detrimental manner when faced with dysfunctional workplace. That question is not determined by whether there was any culpability on the part of the complainants or whether it was the product of the acts of others motivated by the protected acts. The ET's error could also have been seen to have arisen from its focus on the purpose of the victimisation legislation (paragraphs 527 and 528) - the Respondent did not take issue with the purpose identified by the ET but that did not obviate the need for an analysis for the treatment complained of. And here the ET had fallen into the error identified in **Fecitt**, by ignoring the forensic need to focus on the motivation of the perpetrator of the alleged detriment (see the ET's reasoning at paragraphs 5.12 to 5.29 and note the focus on the breakdown in the relationship between the Claimants, Mrs Adams and Mrs Goodwin, in particular at paragraph 5.22).

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31. The ET had found that Mrs Adams and Mrs Goodwin were genuine in what they reported as their reactions and the Respondent had been entitled to conclude that this was the case and thus had a duty of care not only to the Claimants but also to the managers (see ET at paragraph 5.23). Even if the ET had found that Mrs Adams and Mrs Goodwin were not genuine in their reactions however, it still had to go on to look at the motivation of the decision taker - Mrs McGinnes, supported by Ms Little - and not combine the making of the decision in issue with the motivations of others (see **Reynolds**). There was a lack of reasoning in the ET's findings - a failure to demonstrate it had addressed the question it needed to determine; i.e. whether Mrs McGinnes had any discriminatory motivation. That was most likely to be because the ET had failed to apply the correct legal analysis.

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The Grievance Statements

32. On the second detriment, the ET had concluded that the Respondent did not victimise the Claimants in disclosing the written statements of Mrs Goodwin and Mrs Adams to the Claimants as part of the grievance process for which they were created (paragraph 5.30), but did find (paragraph 5.31) that the content of the statements was an act of victimisation. The Respondent contends that the content of a statement cannot be separated out from the statement itself and its provision within the process: whatever the content, there could be no detriment absent the provision of the statement to the Claimants. Moreover, the ET did not find the statements were completed by Mrs Goodwin or Mrs Adams because the Claimants had made the protected acts, but because of the breakdown in relationships and the grievance: all Mrs Goodwin and Mrs Adams were doing was articulating what they had been asked to do, which was to explain their positions relevant to the deployment of the Claimants back onto the switchboard; they did no more. Finding that the content of the statements amounted to an act of victimisation but their provision was not, was an inconsistent finding.

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The Failure to Provide Information about Ms Lee's Reinstatement

33. This was an act of omission which was hard to understand as a detriment: the detriment appearing to be the knowledge of the reinstatement rather than the absence of knowledge. It was to be noted that at no material stage had Ms Lee actually returned to work, even though she had been reinstated. The ET did not identify what the detriment was and it was impossible to see how it could find detriment in a delay in being told that someone had been reinstated when they were not actually present in the workplace.

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34. Even if this had been a detriment, however, the ET's reasoning for this being an act of victimisation appeared to be an erroneous application of the shifting burden of proof. The ET

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had failed to set out what the primary facts were that it had found proven, such that it could conclude that the failure to inform was because the Claimants had brought ET proceedings. It was not even possible to identify who it was within the Respondent that had victimised the Claimants by the omission (necessary in order to consider whether they had the requisite knowledge of the protected acts). All these matters were lacking and the ET had erred in law in failing to provide a properly reasoned Judgment (**English v Emery Reimbold & Strick Ltd** [2002] EWCA Civ 605; **Meek v City of Birmingham District Council** [1987] IRLR 250 CA).

The Claimants' Case

35. The key issue for the ET had been whether the protected act was more than a trivial influence on the reason for the detriment in question (per **Khan**, paragraph 29); *the reason why* an act was done is a question of fact for the ET and the EAT should be slow to interfere.

The Redeployment Decision

36. The ET had been entitled to refer back to the facts which distinguished this case from others, such as **Martin v Devonshires**, and to recognise that the issue here was not the culpability of the Claimants (see ET paragraphs 5.20 and 5.21); that was doing no more than addressing points taken in argument before it. It had then distinguished this case from **Fecitt** - a case where the dysfunctional relationship concerned different groups of employees, not managers (paragraph 5.22); it did not err by thinking **Fecitt** could only apply where the employee had acted in a culpable or blameworthy manner. The ET had asked itself the correct question: whether the Claimants' bringing of the first ET proceedings had a significant influence on the Respondent's decision not to return them to their ordinary positions (paragraph 5.29). It had not then applied that question to the position of Mrs Goodwin and Mrs Adams,

but correctly focussed on Mrs McGinnes (see paragraph 5.15), making a number of adverse findings about her decision making (see paragraphs 5.15, 5.23 and 5.24).

37. On the reasons challenge on this point: the ET had found that Mrs McGinnes had been significantly influenced by the protected act; that was sufficient - once that was established, it did not matter whether she was also influenced by other factors. The ET's observations as to the purpose of the legislation should not be taken to detract from its earlier findings.

The Grievance Statements

38. The ET had properly focussed on the reason why Mrs Goodwin and Mrs Adams made the particular comments they did, which included, for example in Mrs Goodwin's statement:

> **"… My reputation was on the line, I was accused of racial discrimination and being a bully which I think are outrageous statements to make." (Page 118 in the EAT bundle)**

39. The ET found this was because of the first ET proceedings and that was an act of victimisation. The Respondent accepted that it was vicariously liable; that justified the ET's finding of victimisation in this case.

The Failure to Provide Information about Ms Lee's Reinstatement

40. Addressing first the question of detriment, while an employee will not be in a position to complain that information has been withheld until she realises that is the case, a reasonable worker could still feel disadvantaged by this omission. In this case, the ET found the Claimants were in genuine fear of Ms Lee and what she might do to them if they came across her (ET paragraph 5.38). Finding out that she had been reinstated at such a late stage in the process came as a genuine shock to the Claimants and undermined their trust and confidence in a

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process of returning to work. Withholding this information from the Claimants thus had a tangible effect and the ET's conclusion on detriment was adequately explained.

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41. As for *the reason why*, the ET found there was a lack of explanation in circumstances where this was remarkable; it was entitled to find the burden had shifted to the Respondent.

Discussion and Conclusions

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42. The ET's Judgment in this case shows a great deal of care and attention to detail. It is common ground that it properly set out the relevant legal tests and there is no challenge to the majority of its findings. The appeal is pursued only in respect of the three findings identified

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above and I bear in mind that the ET's conclusions in these respects are to be viewed in the light of its reasoning, read as a whole. Doing so, I turn first to the ET's finding in respect of the redeployment decision.

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43. The relevant decision taker was Mrs McGinnes. That posed certain difficulties, given she was unable to attend the ET hearing. The ET was, however, able to consider what had motivated her decision making from the other evidence (that of Ms Little and the documentary

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and other material - including the evidence of the Claimants - before it). Doing so, it is apparent that the ET did not entirely accept the way the Respondent sought to put its case on this decision. It did not see this, for example, as a case akin to that of **Martin v Devonshires** or

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as one that was on all fours with **Fecitt**. It was, further, critical of the approach adopted by Mrs McGinnes: her failure to explore mediation; her unquestioning acceptance of the positions of Mrs Adams and Mrs Goodwin; her response to the Occupational Health evidence. Those were all legitimate findings for the ET to have made and might well have justified it drawing the

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inference that the real reason for Mrs McGinnes' decision on redeployment was indeed the

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protected act or, at least, that that was a significant motivating factor - more than a trivial influence on her decision making.

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44. The difficulty is that the ET does not actually state that is what it has found. Having set out the contextual matters as I have described, the operative part of the ET's reasoning on this issue is then set out at paragraph 5.29. That paragraph, however, suggests that the ET fell into the error of approaching *the reason why* on a composite basis. I say that not simply because the

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ET refers to "the Respondent's" decision, but because its finding does not go beyond stating that the protected act was a significant part of the causative context; it does not expressly find that it was Mrs McGinnes' *reason why*.

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45. Even standing back and taking the ET's reasoning as a whole - allowing that the ET permissibly found this was not a case of dysfunctional relationships in the same way as existed

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in **Fecitt** and that Mrs McGinnes was reaching her decision uncritically accepting the positions of Mrs Adams and Mrs Goodwin, who were responding to the allegations made against them in the first ET proceedings - the ET still needed to make a specific finding that Mrs McGinnes' decision was informed by the protected act, as opposed to - for example - being an ill-informed

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and inept attempt to overcome a dysfunctional relationship between management and the Claimants and maintain a functioning switchboard service. I am simply unable to see that the ET has expressly undertaken this task and stated its conclusion in this respect. On this point,

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therefore, I consider that the appeal has to be allowed.

46. I then turn to the second issue, the grievance statements. Initially, I considered there might be some force in the Respondent's point on this issue: if there was no victimisation in the

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provision of the statements to the Claimants, how could the content of the statements - made for

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the purpose of the grievance process - amount to victimisation? On closer examination, however, I am satisfied that the point is a bad one. Put simply, the issue here was that the lower level managers - Mrs Adams and Mrs Goodwin - had (as the ET found) engaged in acts of

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victimisation in terms of the content of their statements: they said what they said in those statements because of the first ET proceedings. The Respondent could have avoided vicarious liability by taking reasonable steps to prevent such victimisation but it accepted that it had not and was thus liable for the victimisation that had occurred. That liability is not avoided by Mr

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Reade QC's observation that the Claimants had not complained about the earlier protestations made by Mrs Adams and Mrs Goodwin about working with them: the fact that the Claimants failed to bring a claim in respect of an earlier, similar detriment, does not mean that the

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Respondent avoids liability in respect of a repetition of that detriment in a different form at a later stage. On this point, I am satisfied that the appeal should be dismissed.

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47. Finally, I turn to the third issue, the failure to provide information about Ms Lee's reinstatement. On this issue, I consider the appeal is made out on two points. First, on the question of detriment. Approaching that term broadly and seeing it from the perspective of the Claimants (as I do), I can see that the ET might have found there was a detriment arising from

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the impact on trust and confidence once the Claimants learnt of the Respondent's failure to inform them of Ms Lee's reinstatement at an earlier stage (one potential reading of the ET's reasoning at paragraph 5.38). The difficulty with that, however, is that it would suggest the

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detriment arose when the Claimants learnt of this failure, which might post-date the period when the ET found this was an act of victimisation (ET paragraph 5.41). Another way of seeing the detriment would be as a potential risk of coming across Ms Lee but it is hard to see how this would arise given she had not actually returned to work.

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48. Thus, the first difficulty with the ET's conclusion on this question arises when trying to understand how it reached its conclusion on detriment; whether it adequately separated out the two possible different detriments identified above: (1) the question of trust and confidence - which required it to deal with the issue when the detriment actually arose (something of particular importance given its finding that there was no continuing victimisation), and (2) coming across Ms Lee - which required it to deal with the factual issue that she was not physically back in the workplace.

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49. The second issue arises in relation to the ET's finding in respect of *the reason why*. It expressly reached its conclusion on the application of the burden of proof. That might not be wrong and I can allow that it might have been entitled to find that the burden had shifted simply by reason of the surprising failure to inform the Claimants of Ms Lee's reinstatement and the remarkable absence of explanation. Here, however, the ET refers to having made primary findings of fact that entitled it to conclude that the burden had shifted, without stating what those facts were. Further, it then deals with the absence of explanation at the second stage, suggesting that it was not part of its initial reasoning. The Claimants say the ET explains the primary facts in the preceding paragraph: it was the surprising failure that shifted the burden (which would be in keeping with the approach allowed in **Fecitt**). That might be right, but I consider there is a problem in the ET's explanation of its reasoning in this regard. As I am, in any event, allowing the appeal on this point on the detriment question, I also remit this issue (I think it is sufficiently difficult to work out the reasoning as to justify remitting this point too).

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50. For those reasons, I allow the appeal on the first and third issues but dismiss it on the second.

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51. Having given my judgment in this matter, I permitted the parties to address me further on the question of disposal. It is agreed by both sides that the matter has to be remitted. The Respondent says this should go back to a differently constituted ET. The Claimants say it should be the same. I have also been told that a third claim has now been lodged and reserved to the same ET. The Claimants say that strengthens the view this should be remitted to the same ET; the Respondent suggests it would support a direction that both the remitted points and the third claim should be heard by a differently constituted ET.

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52. I remind myself of the guidance provided in **Sinclair Roche & Temperley v Heard & Fellows** [2004] IRLR 763. This is a case where the ET has extensive knowledge of this case and it is bound to be proportionate for it to revisit the points I am sending back on remission. That is all the more so if it is also charged with determining a third claim arising out of the same background. The ET has made detailed findings on both the underlying original claim and the victimisation claim in issue before me; most of those findings have not been challenged. I have commented on the care that the ET has taken in these proceedings as it is certainly not a case where there has been a fundamental failure on the part of the ET in any respect. For the reasons I have sought to explain, the issues on which I have allowed the appeal are limited in scope and really require the ET to complete its task and/or expand on or clarify its reasoning. There is, furthermore, no suggestion of bias and I have no reason to doubt that the ET would be other than entirely professional in approaching the points remitted, keeping its mind open and approaching its task afresh. For those reasons, I am satisfied that the matter should be remitted to the same ET. As for the way in which the ET approaches its task on that remitted hearing and whether it allows any further evidence to be given or just considers that the matter should be dealt with by submission, that is a matter for the ET's own case management.

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53. The Claimants have also made an application for permission to appeal. In respect of the first issue, it is contended that the ET's Judgment should be read as a whole and that the reasoning was sufficiently clear; on the third, the Claimants seek to appeal both on the question of detriment, which should be given a broad interpretation and not approached with a fine-tooth comb, and also *the reason why,* where the reasoning was, again, sufficiently clear.

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54. For the reasons I have already provided, I disagree and I do not think I can add very much to what I have already said on those points. The Claimants are, effectively, repeating the submissions they have already made before me.

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