Appeal No. UKEAT/0154/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 October 2013
Judgment handed down on 24 June 2014

Before

HIS HONOUR JEFFREY BURKE QC

MR B BEYNON

MISS S M WILSON CBE

THEATRE PECKHAM — APPELLANT

MS A BROWNE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS S BEWLEY (of Counsel) Direct Public Access Scheme
For the Respondent	MS A BROWNE (The Respondent in Person)

SUMMARY

VICTIMISATION DISCRIMINATION – Detriment

JURISDICTIONAL POINTS – Claim in time and effective date of termination

The Claimant claimed that she had been subjected to detriment for making a protected disclosure by putting forward a grievance about her treatment by another employee. The Tribunal considered 6 alleged detriments and found in the Claimant's favour on detriments 2, 5 and 6 but against her on the others. The last detriment was the only one which occurred within the primary time limit. The Tribunal held that it formed the last of a series of acts and that the claim was, therefore, in time.

On appeal, **held**:-

1 The 6th detriment, as found by the Tribunal, was based on an act or acts which had not been pleaded or relied upon by the Claimant; the principle in **Chapman v Simon** applied; the finding in the Claimant's favour could not stand.

2 The Respondents' arguments that factual decisions of the Tribunal were perverse failed.

3 It had been open to the Tribunal to conclude that, by seeking to persuade the Complainant to leave on agreed terms, the Respondents had subjected her to detriment.

4 The Tribunal's conclusion that the protected disclosure relied upon had caused or influenced the Respondents to act as they did was reached without considering the principle in **NHS Manchester v Fecitt** that where there was a dysfunctional situation and the employer claimed to have been acting to remedy it discrimination could only be inferred if the employer's account was found to be false - as had not been found in this case.

5 The conclusion, on the basis of detriment 6 that there was a series of acts, so that all 3 detriments were not out of time was not perverse; but without detriment 6, which could no longer be relied upon (see para. 1 above), the claim was out of time. No case for an extension had been put forward or could, on the evidence, succeed.

6 Appeal allowed.

HIS HONOUR JEFFREY BURKE QC

The facts

1. This is an appeal by the Respondents before the Employment Tribunal, Theatre Peckham, against the judgment of that Tribunal, sitting at London South and presided over by Employment Judge Corrigan. By that judgment, the Tribunal found that the Respondents had subjected the Claimant, Ms Browne, to detriment by reason of her having made a protected disclosure in 3 out of the 6 respects in which she complained that she had been so treated. We will describe the parties in this judgment as Respondents and Claimant, as they were before the Tribunal.

2. The facts are somewhat complex, although they relate to a dispute between the Respondents and the Claimant the consequences of which seem to have been rather greater than its origins. We take the facts from the Tribunal's findings; some of those findings are said by Ms Bewley on behalf of the Respondents to have been perverse; and we will indicate, where necessary, below which those findings are.

3. The Respondents are a small theatre company and charity, which provides dance and drama courses to children and young people in Southwark on Saturdays and Mondays during school terms. The Claimant was employed by the Respondents as a workshop support worker and worked as such for 12½ to 14 hours per week at the local school where the courses took place. On 26 March 2011 some incident occurred between the Claimant and the head of dance, Ms Green. The Tribunal were not asked to and did not make findings as to what had happened in that incident; its immediate consequence was that, in the following few days, the Claimant raised a grievance against Ms Green; and Ms Green raised a grievance against the Claimant. For reasons which are not spelt out in the judgment, separate panels of the Respondents'

Management Board investigated the 2 grievances; no doubt the decision to proceed in that way was well meant; but it can be seen, with hindsight, that it caused problems which perhaps might have been foreseen. The Claimant said in her grievance that the situation between her and Ms Green was affecting her health; and, as a result, she was asked not to return to work until the situation had been resolved. Ms Green did not raise any health issue; and she continued at work.

4. The panel which investigated the Claimant's grievance upheld it, finding that Ms Green had been aggressive towards her; but the panel which investigated. Ms Green's grievance partly upheld that grievance too, finding that the Claimant had been unco-operative. Ms Smith, the Respondents' Executive Director, said in evidence that Ms Green's panel formed the view that, if the evidence before it had also been before the Claimant's panel, the latter would not have found that Ms Green had been aggressive. However, the Claimant was unaware of this, although she was informed that the panel which had heard Ms Green's grievance had asked the Claimant's panel to take their findings that the Claimant had been unco-operative into account in deciding what action, if any, to take. The Respondents then decided to encourage the 2 employees who had fallen out to go to mediation. The Claimant agreed to that proposal; Ms Green did not.

5. By this time the end of the school year was close; the question of the Claimant's return to work was shelved. The Claimant asked what the Respondents were going to do and when, in the light of the grievance decision in her favour. Mr Medawar, a board member, wrote to her to inform her that both grievances had been upheld, at least in part, that no action was to be taken and that he believed that both should be withdrawn. The Claimant declined to do that and asked if the mediation would proceed because it was needed before she returned to work. Mr Medawar pointed out to the Claimant that Ms Green was not willing to proceed to mediation

and asked whether she did not want to work for the Respondents again unless mediation were to take place.

6. Meanwhile the Respondents had appointed a new General Manager, Ms Sharpe, who on 12 August wrote to the Claimant to invite her to meet off-site in order to resolve the situation and facilitate the Claimant's return to work. They met on 15 August. Ms Sharpe, the Tribunal found, saw that there was stalemate. The Claimant would not return to work without mediation; Ms Green would not agree to mediation. She told the Claimant that that was the position and asked her if she would be interested if there were a money offer to move things forward. The Claimant believed that Ms Sharpe was proposing to compensate her for her grievance and that she should return to work. Ms Sharpe intended a compromise by which, in return for compensation, the Claimant would leave. This misunderstanding only became clear a few days before the new term started in September; when the Claimant understood what was being offered, she declined and said that she would return to work on the first relevant day of term. Ms Sharpe saw this as a tactical ploy by the Claimant to get more money and continued to press her to a consensual departure; as a result, the Claimant lodged a second grievance and sought clarification as to whether she was or was not still employed. Ms Smith stepped in, made it clear that the Claimant was still employed and told her that she would be welcomed back to work. After a return to work meeting, the Claimant did return.

7. That was, however, not the end of the problems. The Claimant complained about Ms Sharpe's observing her work; more significantly, Ms Sharpe felt, and the Tribunal found that she honestly felt, that the Claimant could be more engaged and positive; she told Ms Tuitt, the Claimant's line manager, that the Claimant needed to be more engaged and less withdrawn and sullen and asked her to speak to the Claimant as part of her supervision of the Claimant. The Tribunal found that Ms Sharpe honestly held these views of the Claimant and was not

motivated by the Claimant's earlier grievance in forming that view. Ms Tuitt told the Claimant what Ms Sharpe had said, although she did not regard Ms Sharpe's perceptions of the Claimant as correct. This occurred on 26 November 2011. Ms Tuitt made it clear to Ms Sharpe that she did not agree with her views.

8. The next episode was the omission of the Claimant and Ms Tuitt from the invitees to the Respondents' Christmas party in December 2011. The Tribunal found that that had occurred as a result of an administrative error for which management were not responsible and for which they apologised profusely when they learnt of it.

9. On 7 February 2012 Ms Sharpe and Ms Smith met Ms Tuitt; they told her that she should not have passed on to the Claimant that she was regarded as withdrawn and sullen and should have spoken to her on the basis that she was not engaging with customers and staff. Ms Smith told Ms Tuitt that she too had concerns about the Claimant's demeanour. However Ms Tuitt repeated what had been said to her on 7 February to the Claimant, although she had not been told to do so. The Claimant's response was to write to the Respondents, complaining that she had been bullied and harassed and that she was going to lodge a Tribunal claim but was open to negotiation. This was treated by the Respondents as a further grievance which was heard on 9 March 2012 by an independent Human Resources consultant who did not uphold it.

10. The Claimant then presented her claim to the Tribunal, on 6 May 2012, that she had been subjected to detriment for making a protected disclosure. It was conceded that her grievance of March 2011 constituted a protected disclosure; it was agreed by the Claimant that her second grievance was not relevant because, on her case, the detriments of which she complained occurred by reason of the first grievance.

The issues

11. The Tribunal therefore had to decide:-

(1) whether the Claimant had been subjected to any of the detriments of which she complained;

(2) if so, in each case was that detriment by reason of the first grievance;

(3) whether the detriment claims were presented in time and, if not, whether it had been reasonably practicable for the complaint to be presented within the relevant time limit.

12. It is not necessary to refer in detail to the statutory provisions which gave rise to these issues. Nothing in this appeal turns on their wording. There is no suggestion that the Tribunal's identification of the issues, in broad terms, was erroneous. There was a major issue before the Tribunal as to the admissibility of correspondence which was marked "without prejudice"; that is not a live issue before us.

The Tribunal's judgment

13. The Tribunal set out at paragraph 6.1 what, as they described it, were the detriments which they had to consider. They said that they were:-

> **"6.1.1 The Respondent seeking to persuade (the Claimant) to withdraw her grievance lodged in March 2011.**
>
> **6.1.2 The attempts made by the Respondents to terminate her employment.**
>
> **6.1.3 Excessive supervision of the Claimant by Ms Sharpe.**
>
> **6.1.4 Complaints made about the Claimant's performance.**
>
> **6.1.5 Excluding the Claimant and her Line Manager from the Christmas social event.**
>
> **6.1.6 The Respondent informing the Claimant of further anonymous complaints on 7 February 2012."**

There is a dispute as to how the last of those alleged detriments came to appear in that list, to which we will return; it can be seen by considering that list against the facts which we have summarised above and is not in dispute that that detriment was the only one of the 6 considered by the Tribunal which could be said to have occurred within the primary limitation period of 3 months prior to the presentation of the claim on 6 May 2012.

14. Having set out their findings of fact at paragraphs 10 to 51, the Tribunal at paragraphs 52 to 56 set out their self-directions as to the law and, having addressed the "without prejudice" issue, set out their conclusions at paragraphs 68 to 84. At paragraphs 68, 70 and 72 the Tribunal concluded on the facts that the 1st, 3rd and 4th complaints of detriment failed; the matters complained of did not amount to a detriment or, in the case of the Christmas party, a detriment for which the Respondents were responsible. However, they found, at paragraph 69, 71 and 73 that the 2nd, 5th and 6th complaints of detriment were established and that the Claimant had been subjected to those detriments because the Respondents were consciously or subconsciously motivated by the Claimant's original grievance. They then found, at paragraph 84, that the last of those detriments was the last of a series of such act or failures and that the claim as a whole was, therefore, in time. In order to understand the reasons for these conclusions which the Tribunal gave it is probably better to set out their precise words, rather than seeking to summarise them. Paragraphs 74 to 83 were in these terms:-

> **"74. For the avoidance of doubt, we have not found the Claimant was subjected to a detriment when the Respondent's board member asked her to withdraw her grievance. In any event, this was done to both the Claimant and Ms Green and had nothing to do with the fact that the Claimant's grievance amounted to a protected disclosure.**
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> **75. We have only found the Claimant was subjected to detriments by the acts of the Respondent set out at paragraph 69, 71 and 73 above, namely that there was an attempt by the Respondent to terminate her employment and complaints about her character/performance were relayed to her by her line manager on 2 separate occasions in a manner the Respondent agrees was inappropriate. Turning to whether those acts were down on grounds that the Claimant had made a protected disclosure when she submitted her first grievance.**
>
> **76. The Claimant brought a grievance which raised the fact that her colleagues conduct was affecting her health and that she considered the situation, if not addressed, placed at risk of further harm. It was expressly because the Claimant's grievances raised the concern that**

there was a risk to her health that the Respondent asked to remain off work until her grievance was resolved. Ms Green's grievance did not make such allegations.

77. The Claimant's grievance was upheld and she was then told to stay off until it was completely resolved. The suggested outcome was mediation. The Claimant agreed to this. Ms Green on the other hand, remained at work throughout, only had a grievance partially upheld and refused mediation. She suffered no adverse consequences as a result of submitting her grievance.

78. The Respondent then subjected the Claimant to moves to terminate her employment. Whilst we find this was because the Respondent misunderstood the Claimant's position in relation to whether she was returning to work without mediation, we find this misunderstanding itself was not based in fact on the Claimant's conduct in the process , but on assumptions made by the Respondent in the circumstances. These assumptions and the misunderstanding arose because of the nature of the Claimant's grievance (that her health was being affected by the situation) and the way the Respondents chose to handle that grievance (asking her to remain off work). The approach to terminate the employment was a continuing part of the process. The Respondent adopted to deal with that grievance and the aspect that her health was being affected by the situation. No such approaches were made to Ms Green, who was neither asked to remain off work, nor if she was interested in leaving her employment. The differences between the 2 situations are that the Claimant's grievance raise more serious allegations and the fact that she believes the situation was impacting her health, which led to the response that the Respondent asked to stay off work until it was resolved and made moves to negotiate termination of employment when Ms Green would not agree to mediation. We find that the Respondent's conduct in pursuing a compromise agreement to terminate the Claimant's employment in these circumstances was consciously or subconsciously influenced by the nature of the Claimant's grievance and that it raised concerns that her health was being affected and at risk, and therefore was consciously or subconsciously motivated by the fact the Claimant had made a protected disclosure.

79. We accept that, following the Claimant's return to work there were genuine concerns about the Claimant's interaction with clients and colleagues held by senior management. Ms Sharpe linked those concerns to the Claimant's return after what had occurred with her grievance and the return to work. She acknowledged that Claimant had made progress but wanted more.

80. Ms Tuitt does not agree that these were valid concerns and believes that the senior management had preconceived ideas of the Claimant because of the history of her grievance and what had happened prior to the return to work with the negotiations around termination.

81. The two then fundamentally disagreed about how Ms Sharp's concern should be addressed with the Claimant, which led directly to Ms Tuitt, as her line manager, telling the Claimant Ms Sharpe's views about her in a way the Respondents find inappropriate and accept, was detrimental to the relationship.

82. We find it was certainly not the Respondent's intention to make things worse at this stage.. Management had fundamentally differing opinions about the Claimant and her conduct on her return to work in the difficult circumstances of having lodged her grievance. They disagreed on the way the Respondent had handled that grievance to date (with the negotiations) and differences of opinion in how the situation should be managed going forwards. These differing views remained unresolved prior to Ms Tuitt passing on to the client 2 (sic)" the information that Ms Sharpe found had disengaged and sullen in an unconstructive manner.

82. (sic) This was repeated on 7 February at the meeting between senior management and Ms Tuitt and again negative information was passed to the Claimant on 11 February.

83. We find the grievance and the nature of it (that it informed management of a perceived risk to the Claimant's health) and concerns about how it had been handled by the Respondent to date was a reason this impasse between the Claimant's managers and players she was and the way she was being managed by them, including the way Ms Tuitt informed of the comments made about her. We accept that there was no deliberate intent by any of the witnesses either to hurt the Claimant or to penalise her for having raised her grievance. Nevertheless, the fact of and the nature of the grievance and how it had been managed was a conscious motivation behind her managers' actions which led to her being told about the management's views of her in an inappropriate way on 2 occasions."

Ground 1: the February 2012 detriment

15. Ms Bewley of counsel appeared on behalf of the Respondents. Ms Browne was not represented and put forward submissions on her own behalf. We are grateful to both for their assistance.

16. Ms Bewley's attack on the Tribunal's judgment started, not unnaturally, with their decision that the Claimant suffered a detriment in February 2012 by reason of her May 2011 grievance; we say "not unnaturally," because if the Tribunal erred in concluding in the Claimant's favour on this issue, there would have been no subjecting of her to detriment within the primary 3 months time limit; the other 2 detriments as to which the Tribunal found in favour of the Claimant, at paragraphs 64 and 71, occurred in August and November 2011 respectively; as we have said, the claim was presented in May 2012.

17. Her submissions were, in summary, that: –

(i) The Claimant had not put forward what she had been told by Ms Tuitt on 11 February 2012 as a detriment arising from the original grievance; the Tribunal had added that as a sixth potential detriment themselves. Although the Tribunal concluded that the giving of the information about what Ms Smith and Ms Sharpe had said to the Claimant amounted to a detriment, it had never been part of the Claimant's case that Ms Tuitt, as opposed to Ms Smith and Ms Sharpe, had done anything which subjected her to detriment; the parties had not addressed that issue or cross- examined as to it.

(ii) By so doing the Tribunal erred in law; **Chapman v Simon** ([1994] IRLR 124) established that it is not for the Tribunal to find a case proved on the basis of that act of which complaint has not been made.

18. The Claimant's ET1, compiled no doubt by herself, is in narrative form. At the relevant part of the account, on page 4, it says:-

> **"On 07/02/12 senior management advised Ms Tuitt that several members of staff had concerns about my work performance but they wished to remain anonymous. Ms Tuitt advised me of this decision on 11/02/12."**

There is no specific complaint that Ms Tuitt subjected the Claimant to a detriment by telling her what Ms Sharpe and Ms Smith had said; a general complaint about the February 2012 incident may be spelt out from this passage; but the meat of Ms Bewley's submission is that the Claimant did not ever suggest that Ms Tuitt had subjected her to detriment, as the Tribunal found to have occurred; the Tribunal had found, at paragraph 48, that Ms Smith and Ms Sharpe had not intended Ms Tuitt to act as she did, had given her the information which she then passed onto the Claimant not so that she would do so but in order to show to Ms Tuitt, who had directly to manage the Claimant, that there was an issue about the Claimant's behaviour. See paragraphs 48 (there are two paragraphs with that number; we refer to both) and 49.

19. The Claimant, by way of response to these submissions, did not suggest that she had made or intended to make a complaint against Ms Tuitt. She claimed that the Respondents had brought this appeal and were arguing this point because they were trying to protect Ms Sharpe by blaming Ms Tuitt for anonymous and unfair criticisms.

20. In our judgment there is considerable force in Ms Bewley's submissions. The Tribunal may well have been correct in stating at paragraph 6.1.6 that one of the issues was whether there had been a detriment by the Respondents' informing the Claimant of complaints on 7 February 2012 (the date should have been 11 February 2012, but nothing turns on that); for before the evidence was heard, it would not have been clear to the Tribunal that Ms Tuitt had

said what she had said on 11 February and had done so without being called on or encouraged to do so by Ms Smith or Ms Sharpe, but of her own volition. When on the evidence it became clear and the Tribunal found that Ms Smith and Ms Sharpe had acted only as set out in paragraphs 48 and 49, it was not open to the Tribunal to base their decision on this issue on Ms Tuitt's acts as opposed to what Ms Smith and Ms Sharpe had done. However the last sentence in paragraph 73 of the judgment is in these words:-

> **"Again this was an act done by the Claimant's Line Manager, which we find did subject the Claimant to a detriment."**

21. In our judgment it is not possible to avoid the conclusion that the Tribunal found that Ms Smith and Ms Sharpe had not intended MsTuitt to pass on what they had said about the Claimant to her and that it was Ms Tuitt who decided to do so because, as a friend of the Claimant, she was concerned about and disagreed with her managers' perception of the Claimant's manner at work. Ms Tuitt was a witness for and a supporter of the Claimant. The finding against the Respondents in respect of the events of February 2012 was based, in our judgment, on a case which had not been put forward and which the Respondents did not address during the course of the hearing. The principle in **Chapman v Simon**, to which Ms Bewley referred us, was correctly invoked and applies directly to the situation we have described.

22. Furthermore, there was no finding that Ms Tuitt was herself in any sense motivated or influenced, whether consciously or unconsciously, by the protected disclosure, that is to say the presentation by the Claimant of her original grievance in 2011.

23. Accordingly, in our judgment, the Tribunal's conclusions as to detriment in February 2012 cannot stand. That conclusion, inevitably, has an effect upon the Tribunal's decision that

the claims were not out of time; we will return to this later; but before we do so, it is necessary to consider the Claimant's other grounds of appeal.

Grounds of appeal 2(vi) and (vii)

24. We have thus far, deliberately not referred to the Tribunal's finding, which is to be found most clearly at paragraph 26, that the Claimant did not know that Ms Green had refused the mediation which the Respondents proposed in June 2011 until she was so told by Ms Sharpe on 15 August. Ms Bewley submitted that that finding was perverse because the Claimant had herself said in evidence that she so knew some time before 4 August and had never disputed that she knew before she met Ms Sharpe on 15 August that she had that knowledge. In paragraph 26 the Tribunal recorded that the Claimant had said in evidence that she thought she had been told some time before 15 August that Ms Green was unwilling to mediate; Ms Bewley submitted that the Claimant accepted or admitted that she had been so told. We do not have any notes of evidence which will enable us to resolve the nuanced distinction between those two versions; but it is open to a Tribunal to conclude, if the weight of the evidence and particularly of the documents so demonstrates, that a witness has erred in her recollection of the sequence of events. To contend that, because the Claimant expressed herself as she did, the fact that she had knowledge of Ms Green's unwillingness to mediate earlier than at her meeting with Ms Sharpe on 15 August was an agreed fact, as Ms Bewley submitted, raises the effect of the Claimant's possibly mistaken evidence to a degree of formality which it cannot properly bear. It is far from unknown for a court or tribunal to treat an apparent acceptance of a fact by a party as erroneous.

25. However, Ms Bewley's argument is not restricted to that point. She is on stronger ground in her submission that the conclusion in paragraph 26 that there was no evidence that the Claimant was so told prior to the meeting with Ms Sharpe cannot stand. Between the first and 2nd days of the hearing before the Tribunal (which were 6 weeks apart) the documents at pages

62 to 65 of our appeal bundle, which had not been available on the Tribunal's first day, were added to the Tribunal's bundle; and at page 62 in the e-mail from Mr Medawar to the Claimant of 4 August to which reference is made by the Tribunal in paragraph 26 these words appear:-

> **"I did ask you and Jreena Green, separately, if you would be willing together to meet with an independent, external person. As only one of you is willing for such a meeting to take place, it can't go ahead."**

That email, it appears to us, is a clear and unequivocal provision to the Claimant of the fact that Ms Green would not agree to mediate. There was no suggestion that the Claimant would not so agree; she was always willing to mediate; the e-mail can only be read as informing the Claimant that Ms Green took the opposite stance.

26. Therefore the Tribunal's finding that the Claimant was not told prior to the meeting with Ms Sharpe that Ms Green was unwilling to mediate was in error; it was perverse in the sense that it failed to take into account that e–mail and its clear import.

27. That error, however, does not automatically undermine the Tribunal's conclusion as to detriment; the Tribunal did not find that the supposed failure of the Respondents to inform the Claimant of Ms Green's stance was of itself a detriment; and, therefore, we asked Ms Bewley how the error to which we have referred, if established, moved her appeal forward. She submitted that the incorrect finding pervaded the Tribunal's subsequent conclusions and went to the issues of the Respondents' motives for their subsequent actions; but we do not accept that submission. The conclusion set out in paragraphs 78 of the judgment are not based upon the finding to which we have referred. Paragraph 69 refers to the finding that the Claimant had not been informed that Ms Green was not willing to mediate; but we do not see how it can be said that the deletion of that finding from the Tribunal's reasoning would have affected their conclusion that the Respondents subjected the Claimant to a detriment by pursuing the

termination of her employment; and when the Tribunal made findings as to the Respondent's motives for so acting in paragraph 78, they did not refer to the impugned finding. The conclusion in paragraph 78 would not, in our judgment, have been expressed in a different way had the impugned finding not been made.

Ground 6

28. Grounds 3, 4 and 5 set out in the Notice of Appeal were not pursued; we move on, therefore, to Ground 6.

29. By Ground 6, the Respondents contend that the Tribunal's conclusion that the offer of a compromise agreement to end the Claimant's employment was made on the grounds that the Claimant had put forward her original grievance was perverse in the sense that no reasonable tribunal could have reached that conclusion. In oral argument, however, Ms Bewley put her case more firmly on the basis that the Tribunal had, in reaching that conclusion, applied the wrong test.

30. There is, in our view, no doubt that it was open to the Tribunal to conclude that, by seeking to persuade the Claimant to agree to terminate her employment, the Respondents were subjecting her to a detriment. Ms Bewley referred to **Shamoon v Chief Constable of the Royal Ulster Constabulary** ([2003] IRLR 285), in which, at paras 34 and 35 Lord Nicholls said in the House of Lords:-

> **"34. The statutory cause of action which the appellant has invoked in this case is discrimination in the field of employment. So the first requirement, if the disadvantages to qualify as a "detriment" within the meaning of Article 8 (2) (b) is that it has arisen in that field…. The word detriment draws this limitation on is broad and ordinary meaning from its context and from the other words, with which it is associated… The court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.**

> **35. But once this requirement is satisfied, the only other limitation that can be read into the word is that indicated by the Lord Brightman. As he put it in *Ministry of Defence v Jeremiah* ([1980] QB 87 104B), one must take all circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to 'detriment'…"**

31. We can see nothing in the Tribunal's judgment, however, which demonstrates that they did not apply these principles; the Respondents chose in a situation of stalemate between two employees to seek to persuade the Claimant to bring her employment to an end; they did not act in that way in the case of Ms Green; that treatment was, in our judgment, of such a kind that a reasonable worker might regarded as a detriment. We have already said that the Tribunal's belief that the Claimant did not know that Ms Green was refusing to mediate is not of any substantial importance in this context.

32. As to the Respondents' motives, the position is different in our judgment. In **NHS Manchester v Fecitt** ([2011] EWCA Civ 1190) Elias LJ at paragraph 41 of his judgment in the Court of Appeal gave this important guidance:-

> **"Once an employer satisfies the Tribunal that he acted for a particular reason – here, to remedy a dysfunctional situation – that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the Tribunal considers that the reason given is false (whether consciously or unconsciously) or that the Tribunal is being given something less than the whole story that it is legitimate to infer discrimination in accordance with the *Igen* principles."**

33. Although the Tribunal did refer to that authority, at paragraph 54 of their judgment in the section in which they directed themselves as to the law, they did so only for a wholly different proposition; they reminded themselves, however, of the principle set out in **London Borough of Harrow v Knight** ([2003] IRLR 140), that it is necessary for a claimant in a case such as this to show that the fact that the protected disclosure had been made caused or influenced the employer to act (or not act) in the manner complained of and that it is not enough to show that the action or inaction complained of would not have occurred but for the disclosure; but the test

propounded by the Court of Appeal in **Fecitt** does not appear in the Tribunal's self-direction and cannot, as we see it, be detected in the Tribunal's approach to the causation issue in this case. The Respondent's case was that they were seeking to remedy a dysfunctional situation, produced by the dispute between Ms Green and the Claimant and the fact that those differences could not be remedied by mediation. The Tribunal did not find that that reason for the Respondent's actions in seeking to persuade the Claimant to leave on agreed terms was false, either consciously or unconsciously, or that they were being given less than the full story. They did find, at paragraph 78, that the Respondent's actions were consciously or unconsciously influenced by the Claimant's grievance; but the reasons in paragraph 78 to do not, in our judgment, support the view that the Tribunal applied the principle in **Fecitt** or applied any test more stringent than the "but for" test. The Tribunal's words in that paragraph:--

> **"The approach to terminate the employment was a continuing part of the process the Respondent adopted to deal with that grievance and the aspect that her health was being affected by the situation."**

appear to us firstly, to show that the Respondents had put forward a case similar to that considered in paragraph 41 of the judgment of Elias LJ in **Fecitt** and, secondly, that that the Tribunal had adopted a historical approach rather than an appropriately analytical approach. That view is supported by the first part of paragraph 83 of the judgment, which also appears to adopt a purely historical approach and does not reveal any analysis involving the approach required by **Fecitt**.

34. We are also concerned about the Tribunal's finding in paragraph 78 that the Respondents had made assumptions which caused them to misunderstand the Claimant's position in relation to whether she would return to work without mediation. It is far from clear to us how those erroneous assumptions were thought to have arisen. The Claimant made her position clear on 4 August in response to Mr Medawar's first e-mail of that day – that mediation was needed

before she would go back to work; Ms Green's position was already clear. It is not easy to see what misunderstandings had arisen or how any such misunderstandings could have played any part, legitimately, in a conclusion that the Respondents had acted with the motives found by the Tribunal to have existed.

35. For these reasons, in our judgment, the Tribunal's conclusions as to the first of the 3 detriments were reached in error of law and cannot stand.

Grounds 7 to 10

36. The second and third of the 3 detriment arose from Ms Tuitt's passing on to the Claimant the criticisms of the Claimant's manner at work made to her by Ms Sharpe in November 2011, and by Ms Smith and Ms Sharpe in February 2012. Grounds 7 to 10 of the Notice of Appeal all go to the Tribunal's conclusion that the original grievance was, as the Tribunal found at paragraph 83, a "conscious motivation" behind, Ms Smith and Ms Sharpe's actions in saying to Ms Tuitt what she then passed on. That conclusion was attacked in the Notice of Appeal and by Ms Bewley in her argument in various ways; but we need to say no more than that in this area the Tribunal appear to us to have failed to apply the correct test, as set out in **Fecitt**, in the same ways that they so failed in our judgment in relation to the first detriment. Although they directed themselves to avoid a "but for" approach, they do not seem to have excluded that approach when they reached the conclusions which we are now considering; nor did they consider whether the Respondents' explanation had been shown to be false or did not provide the whole story. If the explanation had of itself been one which included conscious or unconscious motivation for the impugned actions based on the Claimant's original grievance, the position might have been different; but that was not the nature of the Respondent's case.

Ground 11: time

37. By Ground 11 of the Notice of Appeal the Respondents contend that the Tribunal erred in concluding, at paragraph 84 of their judgment, that the incidents of detriment constituted a series of similar acts or failures falling within section 48(3) of the **Employment Rights Act 1996** and, therefore, because the last of those incidents occurred on 11 February 2012, within the period of 3 months before the presentation of the claim on 6 May, the complaints in respect of all three detriments were in time.

38. This ground is based on perversity alone. However, on the Tribunal's findings of fact, it was, in our judgment, open to them to regard the three incidents as part of a series. Ms Bewley accepted that the second and third detriments could be seen as part of the series; the first detriment was of a different nature; but the differences between the incidents did not require the Tribunal to find that they were not part of the series of detriment to which the Claimant was subjected in the context of the history, which included and followed her grievance. Perversity has not been established.

39. However in the light of our conclusions that it was not open to the Tribunal to find in favour of the Claimant, as they did, in respect of the February 2012 incident, whether there was a series of incidents is not relevant. Once the February 2012 incident could not be relied upon, the complaint as to the earlier detriments was plainly made outside the primary 3 months time limit set out in the subsection to which we have just referred; the first detriment occurred in August 2011, 9 to 10 months before the presentation of the claim; the second detriment occurred in November 2011, over 5 months before the presentation of the claim.

40. The Tribunal did not in their judgment refer to any contention on the Claimant's part that it had not been reasonably practicable for her complaint to be presented before the end of that

primary hearing, that she had presented her claim within a reasonable time thereafter and that therefore she should fall within the potential extension of time set out in section 48(3)(b) of the Act. The Claimant did not put forward any argument that the primary time limit should not apply in her ET1 or in her answer to the Notice of Appeal; nor did she do so before us. It appears to be highly likely that she raised no such argument before the Tribunal; for, in terms of time, the Tribunal considered only the issue as to series of acts. It is possible, however, that the Tribunal restricted themselves to that issue because, having found in favour of the Claimant on it, at no other time issue was relevant.

41. If it were possible that the Claimant had raised before the Tribunal the potential extension of time and that she might have had any real case that she could fall within that extension, we would either ask the Tribunal whether the point was taken before them or simply remit the point to the Tribunal. However, we have no doubt that any such point, if taken, would inevitably have led to the conclusion that the Claimant could not bring herself within the "not reasonably practicable" exception which is, of course, very narrowly defined by authority and is much narrower than the "just and equitable" exception which applies in discrimination cases. The Claimant, as is clear from the correspondence, is articulate and intelligent; she was fully aware of the acts and omissions on the part of the Respondents of which she complained and knew to bring a formal grievance, on 2 occasions. When the Respondents made offers to bring her employment to an end, the Claimant said that she would be seeking legal advice. There is nothing to suggest that an argument that it was not reasonably practicable for her to put forward the first and second of the three complaints which succeeded in good time could have any prospects of success.

42. We therefore conclude that the claims in respect of the first and second incidents of detriment were presented out of time and must have failed, whatever may be the arguments about the substance of conclusions which the Tribunal reached as to them.

Conclusion

43. It follows from what we have set out above that the appeal must be allowed and the Tribunal's findings in favour of the Claimant be set aside.