Appeal No. UKEAT/0241/16/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 February 2017
Judgment handed down on 1 March 2017

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

PENINSULA BUSINESS SERVICE LIMITED — APPELLANT

MR L P BAKER — RESPONDENT

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For the Appellant	MR MARCUS PILGERSTORFER (of Counsel) Instructed by: Steeles Law Solicitors Lawrence House 5 St Andrews Hill Norwich NR2 1AD
For the Respondent	MR NICHOLAS TOMS (of Counsel) Instructed by: Thompsons Solicitors LLP Congress House Great Russell Street London WC1B 3LW

SUMMARY

VICTIMISATION DISCRIMINATION - Other forms of victimisation

HARASSMENT

DISABILITY DISCRIMINATION

DISABILITY DISCRIMINATION - Disability

DISABILITY DISCRIMINATION - Discrimination by other bodies

The Employment Tribunal ("the ET") held that the Claimant's employer subjected him to harassment related to disability and victimised him. The Employment Appeal Tribunal ("the EAT") held that the ET had erred in law. First, the tort of harassment protects a person who has shown that he is a disabled person within the meaning of section 6 of the **Equality Act 2010** ("the 2010 Act") and other limited categories of case such as where the complainant is associated with a disabled person. The Claimant had not shown he was disabled, nor that he fell into another recognised category; instead he relied on having asserted he was disabled. The EAT held that this was not sufficient. Second, the ET had not applied the right test to the victimisation claim; and its findings of fact were insufficient to support the conclusion that the Respondent had victimised the Claimant. Third, the ET erred in holding that the Respondent was liable for surveillance carried out by its agent, who did not know anything about the protected acts relied on by the Claimant. The EAT held that the ET had misinterpreted section 109 of the **2010 Act**. The EAT also held that the ET had erred in law making findings which were outside its remit and by not accurately reflecting its decision the formal record of its Judgment.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

1. This is an appeal from a decision of the Employment Tribunal ("the ET") sitting in East London. The ET consisted of Employment Judge Ferris, Mr C Row and Mrs E Colvill. In a Judgment sent to the parties on 18 May 2016, the ET's decision, formally recorded under the heading "Judgment", was "It is the unanimous judgment of [the ET] that:- the Claimant succeeds in his complaint of harassment related to disability and his complaint of unlawful discrimination through victimisation". This is not a full record of what the ET decided. The Claimant made three specific allegations of harassment. In paragraph 131 of its Reasons, the ET dismissed two of those allegations.

2. In this Judgment I will refer to the parties as they were below. Paragraph references are to the ET's Judgment, unless I indicate otherwise. The Respondent was represented on the appeal by Mr Pilgerstorfer and the Claimant by Mr Toms, both of counsel. I thank them both for their helpful skeleton arguments and for all the help they gave me in the course of their oral submissions. For convenience, I will identify and describe their submissions by referring to their respective clients.

3. The first ground of appeal raises an interesting question of law on which I was told that there is no authority. This is whether a claim for harassment can be based on "unwanted conduct related to the protected characteristic of disability" if the Claimant has not shown that he has a disability for the purposes of section 6 of the **Equality Act 2010** ("the 2010 Act"), but merely asserts that he has a disability. The sixth ground raises an interesting question about the construction of sections 109-111 of the **2010 Act**. Grounds 2-5 challenge the ET's reasoning in

support of its decisions on harassment and victimisation. Ground 7 argues that the ET exceeded its jurisdiction by making findings about issues which were not before it, and ground 8 seeks the amendment of the formal Judgment to reflect the fact that the ET dismissed two of the Claimant's pleaded claims.

The ET's description of the issues it had to decide

4. In paragraph 5, the ET set out the Claimant's amended harassment claim. He claimed that deciding to put, and putting, him under surveillance between 1-5 September 2014, and later telling him for disciplinary purposes about the surveillance (even though it did not show that he was engaged in fraudulent conduct), was unwanted conduct related to the protected characteristic of disability which had the effect of violating his dignity and/or creating an intimidating, hostile, degrading humiliating or offensive environment for him. The ET set out, in paragraph 3, a letter from the Claimant's solicitors in which they noted that the Respondent had not said whether it accepted that the Claimant was a disabled person but asserted that it was not necessary for the Claimant to show that he was actually disabled in order to establish the tort of harassment. "It is sufficient if the action taken against him was related to the protected characteristic of disability".

5. At paragraphs 9-15 the ET listed the issues for the hearing which had been agreed by the parties. From the issues listed under the heading "Victimisation …" it emerges that the protected acts the Claimant relied on were his assertions that he was disabled and his requests for reasonable adjustments in his emails dated 10 June 2014 to Mike Morton and dated 20 June 2014 to Marc Ramsbottom, and in a conversation on or around 20 June 2014 with Mr Ramsbottom. The Claimant complained that the Respondent's decision to subject him to

surveillance, and/or the surveillance itself, amounted to a detriment and that the Respondent did those things because of those protected acts.

6. The ET summarised the Respondent's case at paragraph 16. This was (in short) that Mrs English, the Respondent's director of legal services, decided to carry out the surveillance on or about 14 August 2014 because she had reasonable grounds to believe that the Claimant was not devoting all his time and attention to his work with the Respondent.

7. At paragraph 17, the ET recorded the parties' agreement that the ET should decide the issues of liability "as a discrete issue and if appropriate, following a further hearing, deal with compensation and any other remedy".

The ET's significant findings of fact

8. Although this material comes before paragraph 19, in which the ET says that it made "the following findings of fact", part of the background (paragraph 1) is that the Claimant is a lawyer. When the ET1 was presented, the Claimant was working for the Respondent providing legal advice and representation in tribunal hearings. He had, since that date, been dismissed for redundancy.

9. The Claimant's early relationship with the Respondent was productive. He had good appraisals. Mrs English became concerned that he wanted to build up a private case load. The ET did not accept that she had any such suspicions in 2012 and 2013. The Claimant was careful to ask for permission when he wanted to do a private case and accepted it when he was told he could not. There was no evidence that he abused the Respondent's system.

10. On 8 January 2014, the Claimant told Mr Ramsbottom, the Respondent's advocacy manager, that he had dyslexia. This was the first time he mentioned it to the Respondent. Mr Ramsbottom recorded this in a file note in which he also said that the Claimant had been hostile and belligerent. He copied the note to Mrs Coucill (paragraphs 40 and 60). The ET decided that Mrs English also read the file note. On 22 January Mr Ramsbottom wrote to the Claimant. He said (inaccurately) that he had not told anyone else about the Claimant's dyslexia. He asked if the Claimant needed any adjustments in relation to his work.

11. The Claimant had an appraisal on 21 February 2014. The Claimant's dyslexia and his arthritis in his neck were discussed. Mr Ramsbottom's file note about it contained an "implicit" reference to the Claimant's dyslexia. On 10 June 2014, the Claimant warned Mr Morton, his allocations manager, in an email, that he might not be able to cover a case. He said that he had a disability which Mr Ramsbottom knew about. It meant that it took him longer to do certain things. This was the first protected act relied on by the Claimant. Mr Ramsbottom replied. He said that now that the Claimant had described his condition as a disability for the first time, the Respondent had to consider it more formally. A meeting should be arranged as soon as possible to discuss what reasonable adjustments the Respondent could make. He would need more information from the Claimant about his condition and how it affected his ability to do day-to-day activities.

12. Shortly before a telephone conversation between them on 20 June 2014, the Claimant disclosed to Mr Ramsbottom two pages. The first was a covering letter for a psychologist's report. It said that the psychologist had found that the Claimant was dyslexic. The second page was the conclusion of that report. It referred to a specific learning disability (paragraph 51). That disclosure was the second protected act relied on by the Claimant.

13. Mr Ramsbottom acknowledged this material. He told the Claimant that he intended to get a confidential medical report from the Claimant's GP to enable the Respondent to assess what adjustments might be necessary. The Claimant and Mr Ramsbottom discussed the Claimant's dyslexia on the phone on 20 June (see paragraph 53). There was a file note of this. The Claimant said it took him "extremely long" to do some things and his condition had got worse. His arthritis was being treated by his GP. The Claimant had been "struggling for a while now". Mr Ramsbottom said he would discuss with Mr Morton the late allocation of cases and that he would seek a medical report. That conversation was the third protected act relied on by the Claimant.

14. There was then correspondence about how to investigate the Claimant's condition. In paragraph 59, the ET found that Mrs English "would also have been updated" by the end of June by Mr Ramsbottom "about the Claimant's reference to his dyslexia disability in the context of his ability to do certain work". The ET referred to various matters to which it had had regard in reaching that conclusion; "the earlier events noted by this Tribunal, including the January expenses meeting and the file note about that meeting sent copied [sic] by Mr Ramsbottom to Mrs English and Ms Coucill and followed a few weeks later by the appraisal, which again focussed on one of the Claimant's alleged disabilities, that is the consequences of dyslexia, and then the disclosure of the diagnostic assessment, and the conversation between the Claimant and Mr Ramsbottom on 20 June". This is the only finding which the ET made about Mrs English's knowledge of the protected acts relied on by the Claimant. One of the issues in this appeal is whether that finding is enough to support the ET's conclusions on the victimisation claim. This finding is linked to a finding in paragraph 78, which I shall mention in due course. The finding is to be set against the evidence which I am told Mrs English gave

to the ET, which was that she did not know about any of these protected acts, and the fact that, according to Mr Pilgerstorfer, that evidence was not challenged.

15. By 24 July, Ms Coucill had referred the Claimant to the Respondent's occupational health provider. The form asked among other things about reasonable adjustments and whether the Claimant was likely to be considered disabled for the purposes of the **2010 Act**. The ET recorded in paragraph 60 the information about the Claimant which the Respondent included in the referral.

16. The Claimant was referred to an occupational health doctor in Manchester. The ET found that Mrs English knew that he was being examined in respect of his claimed disability. The ET set out extracts from that doctor's report in paragraphs 63-65. The doctor recommended reasonable adjustments and said that the Claimant was likely to be considered disabled. That report was sent to Mr Ramsbottom on 11 August. The Claimant had asked for an extra advocate to be allocated to one of his cases. He was told that that could not happen and was referred to Mr Ramsbottom. He told the Claimant, two days after getting the report, that another consultant could not be allocated to the case.

17. In paragraph 68, the ET noted that the offices of Mr Ramsbottom and of Mrs English were on the same floor. The ET said it was clear from the chronology that they worked closely together and that their geographic proximity was "significant". On 14 August Mr Ramsbottom questioned some of the doctor's views. He frankly conceded that he thought the Claimant had put words in the doctor's mouth to the effect that the Claimant should not do cases lasting longer than three days. It turned out that that was not so. The ET referred to a supplementary report which made that clear, and in which the original advice was confirmed by a more senior

doctor. That report, though dated 15 August, was not received by Mr Ramsbottom until 18 August. The ET said that before he got that report, he was harbouring a suspicion that the Claimant had engineered the report in his favour.

18. On 14 August Mrs English instructed an employee in her department, Mr Hulme, to ask Brownsword Group ("BG") to subject the Claimant to covert surveillance between 1 and 5 September. The ET said that "The intention was to catch out the Claimant engaged in private work" (paragraph 72). The ET noted that only one document had been disclosed by the Respondent which dealt with "this rather surprising exercise in covert surveillance as a management tool". This was an email from the surveillance company to Mr Hulme, sent to his private email address. This email recorded that the reason for the surveillance was "that the subject is believed to be working elsewhere during the time he is being paid by [the Respondent] or that he is simply not carrying out the duties for which he is being paid". There were no other documents about this. Mrs English had used surveillance before, but not since 2012.

19. The ET recorded Mrs English's evidence that she did not know that the Claimant was alleging that he was a disabled person when she authorised the surveillance, although she did know that he was "receiving occupational health assistance". She said she had not seen the 11 August report by 14 August. The ET also recorded Mr Ramsbottom's evidence that he did not know on 14 August that Mrs English had authorised the surveillance of the Claimant, and did not know until 16 September. In paragraph 94, the ET recorded her denial in evidence that "she had ordered the covert surveillance triggered by the Claimant's assertion to be disabled".

20. The ET rejected Mrs English's evidence that she did not know about the occupational health report when she authorised the surveillance and Mr Ramsbottom's evidence that "he did not know about the surveillance exercise which was authorised on 14 August". The ET made no specific finding about when he knew about it. The ET said that she and he were senior executives working closely together. They had a keen interest in the Claimant who "had been tagged as someone who was becoming increasingly difficult to manage and on their accounts was reluctant to receive his due allocation of cases" (paragraph 77).

21. The ET concluded that Mrs English knew, before she gave instructions for the surveillance on 14 August, about the Claimant's alleged dyslexia and about the impact he said it had on his work. "We have reached that conclusion on the basis of the facts we have found about her state of knowledge of the theme of dyslexia, which begins to run through the evidence … in January … and which surfaced at the time of the appraisal in February and again in June, July and early August …" (paragraph 78). There was no record of the decision to authorise surveillance because she and Mr Ramsbottom shared a suspicion that about the true extent of the dyslexia. "The trigger for Mrs English's decision by 14 August to instruct surveillance agents would have been her knowledge of the Claimant's imminent attendance for an occupational health examination on 5 August and her profound suspicion that this was part of a sophisticated strategy by the Claimant to cheat his employers". The Respondent had not explained why it did not document the decision to authorise surveillance. "But if it was knowledge of the claim to be dyslexic and disabled which actually triggered the decision to engage in covert surveillance it becomes clear why there is no documentation relating to the highly unusual decision to covertly watch the Claimant" (paragraph 79).

22. In paragraph 80 the ET said "… the extraordinary step of arranging covert surveillance on an employee who had been working for the company for nearly five years and whose performance appraisals had been consistently and strongly favourable cannot have been triggered by anything other than the suspicion that the Claimant was not dyslexic, or at least not very dyslexic".

23. The ET then considered the evidence about the Claimant's workload in the relevant period. The ET was not persuaded that the evidence supported the Respondent's explanation (related to the Claimant's workload) for the decision to engage in covert surveillance. The explanation lay elsewhere (paragraph 90). The suggestion that the Claimant was doing private work "did not stand up to scrutiny" (paragraph 92). Mrs English nonetheless persisted in her evidence in the assertion that she suspected that he was.

24. In paragraph 95 the ET held that three matters relied on by the Claimant were all protected acts "within the meaning of Section 27(1)(a)" of the **2010 Act**. The ET made no finding about which of three types of protected act described in section 27(2) any protected act was. It can perhaps be inferred that the ET considered that the relevant provision was section 27(2)(c). The ET returned to this topic in paragraph 137.

25. In paragraph 96 the ET made significant findings about "the true reason for [the] covert surveillance". It was "the Claimant's disclosure that he was disabled and his contention that reasonable adjustments were necessary in order to enable him to continue to work for the [Respondent] … The decision … was a reaction by Mrs English to her suspicions about the Claimant's reliance on a purported disability about which she shared the suspicions expressed by Mr Ramsbottom in his … email to Health Work and which [he] frankly admitted. Nothing

in the evidence … supports the conclusion that the decision to carry out covert surveillance would have been made had the Claimant not asserted that he was disabled and asked for reasonable adjustments".

26. Mrs English received the surveillance report shortly after 16 September. The ET found that it did not show that the Claimant was moonlighting. The ET considered the report in paragraphs 97-99. It showed that on four out of the five relevant working days the Claimant went to his mother's house for periods ranging from one to three hours. The ET found that Mrs English gave the surveillance report to Mr Ramsbottom in the week starting on 22 September. Mr Ramsbottom's view, having read the report, was that there was enough material to suggest, subject to what the Claimant said, that he was not devoting all his time to his work for the Respondent. The ET found that Mrs English certainly contributed to, and probably directed, that decision.

27. The ET found in paragraph 101 that on 3 October the Respondent invited the Claimant by letter to a disciplinary hearing. He was then told, for the first time, that he had been the subject of surveillance, and a copy of the report was sent to him. In paragraph 103 the ET quoted extensively from a letter the Claimant sent to Mr Clarke, his line manager, and copied to Mrs English. He said that knowing that he had been the subject of surveillance was giving him sleepless nights, and was having a "profound effect on [his] general wellbeing". He described how this had given him a general feeling of paranoia, a suspicion that he was being followed in his car, and a reluctance to talk on the phone, or to talk to visitors to his home. His visitors did not want to talk in his home, either. He was feeling very emotional. He could not concentrate on his duties. He felt that he needed to go on sick leave.

28. In paragraph 104, the ET said "There is no doubt from the evidence of the Claimant, which we accept, that the revelation about covert surveillance and the notification of the disciplinary proceedings to follow on from that surveillance had a profound and detrimental impact on the Claimant". In paragraphs 105-129 the ET considered the disciplinary proceedings in detail. In paragraph 124, it said that its analysis had been helped the cross-examination of Mrs English by Mr Toms. That analysis, and the findings about the disciplinary proceedings "reaffirm the Tribunal's conclusions earlier expressed about the true reasons for the covert surveillance". The ET concluded, in paragraph 129, that there were no reasonable grounds for a conclusion that the surveillance showed misconduct by the Claimant. No reasonable employer could have reached that conclusion. No reasonable employer could have imposed a sanction on the Claimant at the end of that defective process. There was no investigation, the surveillance was not justified and would not have led a reasonable employer to the conclusions reached by the Respondent.

The ET's approach to the issues

29. The ET did not, in its Judgment, set out or analyse the law which applied to these claims, or, other than very briefly, the rival legal submissions. The final section of the ET's Judgment is headed "Inferences and conclusions" (paragraphs 130-143). The ET said that the Respondent made two legal points: the Claimant had not shown that he was disabled and therefore could not show that he had suffered harassment; and that if there was conduct which amounted to harassment, that could not also be a detriment for the purposes of the victimisation claim. This is an extremely brief summary of the Respondent's written submissions, which were with the documents for this appeal.

30. In paragraph 131, the ET held that neither the decision to put the Claimant under surveillance, nor the surveillance, amounted to harassment, because the Claimant did not know about either at the time. The ET did hold that telling the Claimant (on 3 October) about the surveillance for disciplinary purposes was harassment. "Our findings of fact lead us to the conclusion that the effect of notification of the surveillance created an intimidating, hostile, degrading, humiliating or offensive work environment for the Claimant; and that was the Claimant's reasonable perception. The conduct was unwanted" (paragraph 132). This finding to some extent tracks the statutory language, but the word "work" is not present in section 26(1)(b)(ii) of the **2010 Act**. The "findings of fact" referred to in this passage may be the findings in paragraph 104, but the ET does not say so expressly.

31. The ET then considered, in paragraph 133, whether that harassment was "related to disability". The question was whether the Claimant could bring such a claim if he had not shown that he was a disabled person. The ET had much to say about the prospective merits of such a claim. Indeed, it said that "… the evidence … contained more than sufficient evidence for the Tribunal to reach a conclusion that the Claimant was disabled". The ET recognised, however, that it had not been asked to decide that issue, and that the Respondent had not had an opportunity to put in expert evidence. The ET therefore approached that question "on the basis that the Claimant may well not have been disabled" (paragraph 134).

32. The ET's reasoning on this question is in paragraph 135. It said that this case showed why the **2010 Act** was modified. "It is precisely this sort of case in which a Tribunal is permitted to reach a conclusion that there has been harassment related to disability". It repeated its finding that "the trigger for the decision to engage in covert surveillance was the Claimant's reliance on disability". The ET then referred to the Respondent's occupational health advice

"firmly supported the view that the Claimant was disabled". It then said that this was a case in which the Respondent had "reacted adversely to the evidence of an individual's disability and engaged in an aggressive and unjustified strategy against an employee. The trigger is the disability issue. This is a clear case of harassment related to disability".

33. In paragraph 136, the ET recited further conclusions about the harassment claim. "… it was unwanted conduct, related to disability and … it had the effect of violating the Claimant's dignity and it created an intimidating, hostile, degrading, humiliating and offensive environment for him". The ET had "no doubt that informing the Claimant about the covert surveillance in the context of an invitation to a disciplinary hearing had the alleged harassing effect taking into account the perception of the Claimant, other circumstances of the case and whether it was reasonable for the conduct to have that effect". I note that the ET did not consider, in this paragraph, the Respondent's argument that it was complying with the ACAS Code in providing the Claimant with the report, so that he could see the evidence on which the Respondent relied for the purposes of the disciplinary hearing; it was a necessary part of a fair disciplinary procedure.

34. In paragraph 137 the ET explained its conclusion, expressed earlier in paragraph 95, that the three disclosures the Claimant relied on were protected acts. It said that there was no dispute that these were protected acts, because the Claimant asserted that he was a disabled person and was asking for reasonable adjustments. The next question the ET considered was whether the decision to subject the Claimant to surveillance, or the surveillance itself, was a detriment. "Detriment" should be given a wide meaning. The decision to authorise the surveillance, and the carrying out of the surveillance, were both detriments. The ET noted that section 212(1) of the **2010 Act** provided that "detriment" does not include conduct which

amounts to harassment. Telling the Claimant about the surveillance could not, therefore, also amount to a detriment.

35. The ET considered whether the two detriments were "because of" protected acts in paragraph 141. It said it had already "engaged in a fact finding exercise in connection with the Respondent's … motivation to decide that the Claimant should be placed under surveillance". The ET found that he was placed under surveillance "because of the protected act". He had therefore been victimised.

36. In paragraph 142 the ET noted the Respondent's argument that BG, the Respondent's agents, knew nothing about the protected acts and so "there can have been no connection or no sufficient causal connection between any of the protected acts and the alleged detriment. The Tribunal is content that the agents were acting under the instructions of the Respondent for the purposes of carrying out the covert surveillance and on that basis there is no sufficient disconnection between the conduct of the agent acting on the express instructions of its principal, the Respondent, and a sufficient causal connection between the protected act operating on the mind of the principal and the detriment visited upon … the Claimant, through the actions of the principal's agent …"

37. Article 1 of the relevant **Directive** (Directive 2000/78 EC) ("the Directive") says that its purpose is to lay down a general framework for combating discrimination on the grounds of … disability … with a view to putting into effect in the Member States the principle of equal treatment". Article 2 is headed "The concept of discrimination". The principle of equal treatment means that "there shall be no discrimination whatsoever on any of the grounds referred in Article 1" (Article 1.1). Article 2.3 makes provision about harassment in terms very

similar to those of section 26 of the **2010 Act** (see below). Article 2.4 provides that "an instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1". Article 11 is headed "Victimisation". It obliges Member States to introduce such measures as are necessary to protect employees against dismissal or other adverse treatment by employers as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

*The relevant provisions of the **Equality Act 2010** ("the 2010 Act")*

38. Section 6 is headed "Disability". P has a disability if P has a mental or physical impairment, and it has a substantial long-term adverse effect on P's ability to do normal day-to-day activities. It is thus obvious that whether P has a disability is a question of fact and degree for a fact-finder to assess. Whether someone is a disabled person can, depending on the facts, be open to debate. In this respect the protected characteristic of disability differs from some of the other protected characteristics. In this case, whether the Claimant was a disabled person was not decided as the Claimant did not put his case in that way. Section 15 contains a distinct definition of discrimination arising from disability. Discrimination consists of unfavourable treatment "because of something arising in consequence of B's disability" which A cannot show is a proportionate means of achieving a legitimate aim (cf section 15(1)(b)).

39. So far as relevant, section 26 provides that A harasses B if A engages in conduct "related to a relevant protected characteristic", and the conduct has the effect violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Section 26(4) provides that in deciding whether conduct has the described effect, "each of the following must be taken into account". The matters listed are B's perception, the other

circumstances of the case, and whether it is reasonable for the conduct to have that effect. Disability is a "relevant protected characteristic" (section 26(5)).

40. Section 27 provides, so far as is material, that A victimises B if A subjects B to a detriment because A does a protected act. Section 27(1) lists four types of protected act. They include bringing proceedings under the **2010 Act**, giving evidence or information in connection with such proceedings, "doing any other thing for the purposes of or in connection with" the **2010 Act**, and making an allegation that a person has contravened the **2010 Act**. Section 27(3) provides that giving false evidence or information, or making a false allegation is not a protected act if it is done in bad faith. It is thus clear that a person may do a protected act even if he relies on something which is not true, provided that he acts in good faith. It is also clear that the wide purpose of section 27 is to confer protection on people who make allegations, in good faith, which have the necessary connection with the **2010 Act**. Section 212 is headed "General interpretation". Section 212(1) provides ""detriment" does not, subject to subsection (5), include conduct which amounts to harassment". The effect of section 212(5) is that if the **2010 Act** disapplies the prohibition on harassment for the purposes of particular protected characteristic, that disapplication does not prevent conduct relating to that protected characteristic from being a detriment. There is no such disapplication for the protected characteristic of disability.

41. Part 8 of the **2010 Act** is headed "Prohibited Conduct: Ancillary". Section 108 makes provision about relationships which have ended.

42. Section 109 is headed "Liability of employers and principals". Section 109(1) provides that "Anything done by a person (A) in the course of A's employment must be treated as also

done by the employer", and section 109(2) that "Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal". Section 109(3) provides that it does not matter whether the thing is done with the knowledge or approval of the employer or principal. Section 109 does not apply to offences under the **2010 Act** (section 109(5)).

43. Section 110 is headed "Liability of employers and agents". A contravenes section 110 if A is an employee or agent and A does something which, by section 109(1) or 109(2), is treated as having been done by A's employer or principal, and the doing of the thing is a contravention of the **2010 Act** by the employer or principal. It does not matter whether, in any proceedings, the employer has a defence because he took all reasonable steps to stop the employee acting in that way (section 110(2)). It is a defence for A to show that A reasonably relied on a statement that doing the thing was not a contravention of the **2010 Act** (section 110(3)). Section 110(4) creates criminal offences of making a false or misleading statement to that effect.

44. Section 111 is headed "Instructing, causing or inducing contraventions", and section 112, "Aiding contraventions". These prohibit A from instructing, causing, inducing, or aiding B to do anything in relation to the Claimant which contravenes specified Parts and provisions of the **2010 Act**. Such contraventions are labelled "a basic contravention" (section 111(1)).

Discussion

(1) Harassment

45. There are two issues in the relevant grounds of appeal. They are whether:

i. The Claimant could succeed in a claim of harassment without showing that he had a disability for the purposes of section 6 of the **2010 Act**, but simply by asserting that he had one; and

ii. The ET understood and applied section 26(4) of the **2010 Act** in deciding that the Respondent's conduct in telling the Claimant, for disciplinary purposes, that he had been the subject of surveillance had effect described in section 26(1)(b).

(a) C*ould the Claimant's harassment claim succeed on the basis of a claim that he was disabled?*

46. The Respondent accepts that the law recognises that A may, in some circumstances, bring a discrimination or harassment claim when he does not have a protected characteristic.

i. A does not have a protected characteristic but the Claimant, with whom A is closely associated, does, and A suffers unwanted conduct of the kind proscribed by section 26 which is related to the Claimant's protected characteristic (**Coleman v Attridge Law** (Case C-303/06) [2008] IRLR 722).

ii. A does not have a protected characteristic but one is attributed to him by B, who subjects him to unwanted conduct of the kind proscribed by section 26 which is related to the protected characteristic attributed by B to A (**English v Thomas Sanderson Blinds Ltd** [2009] IRLR 206). In that case a heterosexual man, who was known by his tormentors to be heterosexual, was subjected by four colleagues to repeated name-calling, suggesting, contrary to the facts known to all, that he was gay.

iii. In some, but not all, cases, A is perceived (wrongly) to have a protected characteristic and is subjected to proscribed conduct related to that protected characteristic. The Respondent said paragraph 38 of **English** gives an example of

this. Sedley LJ said that it was common ground that tormenting a person who the tormentor believed was gay, but who was not, would amount to harassment.

47. The Respondent submits, however, that the **2010 Act** does not protect, from the conduct described in section 26(1), a person who claims to have a disability. The Respondent submits that this would be a novel claim and that its existence is not supported either by the language of the **2010 Act** or of the **Directive**, or by the policy of either instrument.

48. In support of that submission, the Respondent relies on the decision of the Underhill P (as he then was) in **J v DLA Piper UK LLP** [2010] IRLR 936. In that case the ET dismissed the claimant's claims that the respondent had discriminated against her by withdrawing a job offer because of her disability. The ET held that she was not disabled. On appeal she tried to argue that her claim could succeed even if she did not have a disability, because the respondent's perception was that she had a disability. The EAT refused permission to her to argue that point. Underhill P made some obiter comments about this argument. He said that what B perceives may not necessarily be a disability, unless the disability is objectively obvious, such as blindness. He referred to the definition of "disability" in support of that point. That definition might not be in the mind of B at all when he forms his perception. He could not accept that argument without a reference to the Court of Justice. The Respondent also referred to the decision of Slade J in **Aitken v Commissioner of the Police for the Metropolis** [2011] 1 CMLR 58. Slade J expressed the view, obiter, that the **Directive** does not apply when a person acts on the basis of a perceived disability. The Respondent submits that a case of claimed disability is an even weaker candidate for recognition as a claim than the case of perceived disability.

49. The Respondent argues that an asserted disability is "a shadow of a protected characteristic". It is conceptually different from the three examples above. A claim based on an asserted protected characteristic does not have a sufficient engagement with a protected characteristic to satisfy the "related to" test. The conduct in this case has no intrinsic link with a protected characteristic (unlike the name-calling in **English**). Such a claim should not be recognised for three reasons.

i. The aims of the **Directive** are furthered by the associative discrimination recognised in **Coleman**. Those aims would be impeded by any recognition of claims based on asserted disability.

ii. Claims based on an asserted protected characteristic will almost always overlap with victimisation claims. Section 27, with its exception for false claims made in bad faith, is the natural home for claims based on the assertion, rather than the possession, or attribution (or perhaps perception), of a protected characteristic. An assertion which is made in good faith, but which is shown later to be unfounded, is protected by section 27. If the Claimant's argument is right, a person who claims a disability falsely and in bad faith could make a harassment claim, but would not be able to make a victimisation claim.

iii. To recognise such a claim would significantly increase the scope of the tort of harassment.

50. It is particularly problematic to recognise claims based on assertion in the case of disability, because of the precise definition in section 6. The Respondent relies on the obiter comments of Lawrence Collins LJ (as he then was) in **English**, at paragraphs 48 and 49, about whether saying a clumsy able-bodied person is "spastic" could amount to harassment. He said that the language of section 3B of the **Disability Discrimination Act 1995** ("the DDA")

A required "an actual disability" and that the word "spastic" though unacceptable does not normally denote a disability when being used offensively. The conduct in this case (covert surveillance) does not invoke the protected characteristic of disability.

B

51. The Respondent submits that in paragraph 135, the ET simply failed to engage with the legal issues. The ET said that the "trigger" for the surveillance was the Claimant's claim to be disabled. Whether the claim was reasonable, or supported, is irrelevant, but the ET's reasoning

C appears to be that if it was reasonable for the Claimant to make the claim, the conduct "related" to the protected characteristic of disability. There is no support in the **Directive** or the **2010 Act** for that gloss.

D

52. The Claimant started his submissions by reminding me of some of the familiar authorities which counsel this Tribunal against a captious and hyper-critical approach to the reasons given by an ET for its conclusions. I have borne those in mind, and I hope I have not

E used a fine-tooth comb. He also submitted that I should not rely too much on **English** or the **DLA Piper** case because they were decided before new statutory language was enacted. That new language recognises what is called "associative discrimination".

F

53. The Claimant argued that the purpose of section 26 was to prevent harassment in the workplace. It is wrong to pick on people because of their innate characteristics. It would be

G wrong to "make the gateway too prescriptive". It was not enough for the Claimant just to assert he was disabled. In addition to asserting he was disabled, the Claimant also had to satisfy all the other elements of section 26. The Claimant argued, without any obvious support in the

H statutory language, that if the Claimant had asserted that he was disabled and that assertion was

false and made in bad faith, conduct otherwise satisfying section 26 could not be harassment. "It may well be related to disability but it may well not satisfy the elements of harassment".

54. The Claimant had a tendency in submissions to elide or to equiparate attributed, perceived and claimed protected characteristics. There was "no good reason" why the Claimant's claim should not succeed under section 26. The Claimant's answer to the argument that this approach would cast the net of section 26 too wide was to submit that the answer was that people should not abuse others in the workplace by using terms such as "mental" or "autistic". The Claimant submitted that the legislation did not single out the protected characteristic of disability.

55. On the second issue, the Respondent submitted, in short, that the ET's reasoning was inadequate. The Claimant submitted that in paragraphs 132 and 136 the ET had done all that was required of it.

56. I prefer the Respondent's submissions on the first issue. In my judgment, the purpose of the **Directive** and of the **2010 Act** is to prevent discrimination (and acts like discrimination, such as harassment) (1) on the grounds set out in the **Directive**, or (2) because of, or related to (a) an actual protected characteristic possessed by a person (whether or not that person is the victim of the statutory tort), or (b) the concept of a protected characteristic (as that protected characteristic is defined). The language of the **Directive** and of the **2010 Act** accommodates cases where the protected characteristic is possessed by someone other than the Claimant. It also accommodates cases where a protected characteristic is attributed by the discriminator or harasser to the victim (conceptual discrimination or harassment). In such a case, the concept of the protected characteristic causes the discriminator or harasser to act as he does (even if the

protected characteristic is not possessed by the victim). Where the protected characteristic is disability, I agree with the reasoning of Underhill P (as he then was) in **J v DLA Piper** that a conclusion that unwanted conduct related to a perceived disability can amount to discrimination is problematic because of the definition in section 6 of the **2010 Act**. I should say that I am not persuaded that his reasoning (or, come to that, the reasoning of Lawrence Collins LJ in **English** in the passage the Respondent relied on) hinges to any extent on the old statutory language. A conclusion that unwanted conduct related to a disability which is claimed by the Claimant but not accepted by the Respondent is even more problematic, in my judgment.

57. I also accept the Respondent's submission that the tort of victimisation is best adapted to providing protection for a person who alleges (whether falsely or not) that he possesses a protected characteristic and claims that he has suffered a detriment as a result, and for deterring people from imposing detriments on others who make such allegations. The drafting of section 27 shows that Parliament has considered the extent to which those who make allegations should be protected by a statutory tort, and has drawn the line between those who make false allegations and those who make false allegations in bad faith. If the Claimant's argument is right, a person who alleges, falsely, and in bad faith, that he has a protected characteristic, can nonetheless make a harassment claim. I do not accept that that can have been Parliament's intention.

58. It follows that the ET erred in law in deciding that the Claimant could make a claim of harassment based on a disability which he claimed but had not proved.

(b) Was the ET's other reasoning on the harassment claim flawed?

59. It is not necessary for me to go any further, but I should deal with the Respondent's argument that the ET's reasoning on the relationship between the conduct and the protected characteristic is flawed. I deal with this on the assumption that the conclusion I express in the previous paragraph is wrong. The ET used the word "trigger" at least five times in this context. A "trigger" would, in my judgment, without more, establish the necessary relationship between the conduct and the protected characteristic. So might a "trigger" with two components.

60. The Respondent submitted, however, that the ET's description of the "trigger" is inconsistent. For example, in paragraph 72, the ET held that the intention in ordering the surveillance was to catch out the Claimant doing private work. In paragraph 79, the "trigger" is described as Mrs English's knowledge that the Claimant was to have an occupational health examination and her profound suspicion that this was part of a sophisticated strategy by the Claimant to cheat his employers. In paragraph 80, the ET said that the decision to do the surveillance "cannot have been triggered by anything other than the suspicion that the Claimant was not dyslexic, or at least not very dyslexic". In paragraph 135, it found that the trigger was the Claimant's reliance on disability. It seems to me that the Respondent's suspicions are the other side of the coin of the Claimant's assertions. Both could simultaneously be a trigger, and that would, in my judgment, provide the required link with "disability".

61. I turn to the second ground of appeal on harassment. The ET expressed two conclusions about harassment. In paragraph 132, the ET said that its findings of fact led it to the conclusion that the effect of notifying the Claimant of the surveillance created an intimidating etc environment, and that that was the Claimant's reasonable perception. I note that whether the Claimant's perception is reasonable is not an issue which is posed by section 26. In paragraph

136 the ET said much the same thing, adding that the conduct was related to disability, and that it violated the Claimant's dignity. The ET added that it had no doubt that telling the Claimant about the surveillance "in the context of an invitation to a disciplinary hearing had the alleged harassing effect taking into account the perception of the Claimant, other circumstances of the case and whether it was reasonable for the conduct to have that effect".

62. The ET wove all of the ingredients of the tort of harassment into these two conclusions. But in my judgment, it did not do enough. The requirement in section 26(4) of the **2010 Act** to take three things into account in deciding whether conduct has the effect described in section 26(1)(b) is not merely a requirement to repeat those three matters in a conclusion. If that were its effect, it would be pointless. It is a requirement to make findings about those three matters and to explain why, having taken them into account, the ET has concluded that the conduct had the proscribed effect. Section 26(4) does not make the Claimant, or even the Claimant's reasonable perception, the arbiter of whether conduct amounts to harassment. The arbiter of whether the conduct had the proscribed effect is the ET, and deciding that question, Parliament has required the ET to consider the three matters listed in section 26(4).

63. The "other circumstances" of the case are not all the circumstances of the case. They are the circumstances, which, in the ET's Judgment, have a bearing on whether or not the conduct has the proscribed effect. So it is not enough for the ET merely to say "taking into account the other circumstances of the case". The ET did not explain what circumstances it took into account in reaching its conclusion. At the very least, on the facts of this case, as it had been pleaded, the ET was required say what it made of the Respondent's defence, which was that the Respondent was required to disclose the surveillance to the Claimant for the purposes of the disciplinary proceedings. The Respondent argued that this was required by the ACAS

Code. Had the Respondent taken disciplinary proceedings against the Claimant and not disclosed the surveillance report, it would have been rightly criticised. That is so whether the report showed that the disciplinary proceedings were well founded, or groundless.

64. Nor is it enough for the ET to say that it has taken into account whether it was reasonable for the conduct to have the proscribed effect. The ET should have made a finding about whether it was reasonable; and it did not do so. The only matter listed in section 26(4) which the ET made findings about is the Claimant's perception of the effects of receiving the disciplinary notice letter and surveillance report (see paragraphs 103 and 104).

65. I have no hesitation in concluding, first, that the ET gave inadequate reasons for the conclusions it expressed in paragraphs 132 and 136, and second, that those conclusions are perverse. It cannot be reasonable for a disclosure, made for the purposes of disciplinary proceedings, in order to comply with the ACAS Code, to have the proscribed effect. If that were right, it would mean that an employer would in these circumstances be compelled, for fear of facing an allegation of harassment, to conceal the evidence it relies on disciplinary proceedings, in circumstances where, whether the evidence was favourable or unfavourable to the employee, fairness and the ACAS Code required it to be disclosed.

(2) Victimisation

66. The Respondent made three points. First, the ET failed to apply the right test, "because of". Instead, it applied a range of different, but wrong tests. The test was not a "but for" test, or the looser "related to" test. The Respondent accepts that the ET stated the correct test in paragraph 141. The ET failed to distinguish between the Respondent's not accepting the content of the Claimant's allegations, and the content of those allegations.

67. The Respondent also submitted that the ET did not find, second, that the Respondent's reason for subjecting the Claimant to the surveillance was that specific protected acts relied on by the Claimant, or, third, that Mrs English knew about those acts.

68. The Claimant emphasised that the ET had rejected the Respondent's evidence about why it engaged in surveillance. The ET asked why the Respondent had done what it did, and did not accept the Respondent's explanations. It was absurd to suggest that the ET did not analyse the "reason why". The protected act was the assertion by the Claimant that he was disabled and his request for reasonable adjustments. There was enough in the ET's findings in paragraph 59 to show that the ET had found that the Claimant was subjected to a detriment because he did a protected act. There is a list in paragraph 36 of the Claimant's skeleton argument of all the passages in the Judgment in which the ET analysed the parties' cases about knowledge and the reason why Mrs English ordered the surveillance. The Claimant gives particular emphasis to paragraph 79 (see paragraph 36(g) of the skeleton argument). It is argued that the conclusion in paragraph 96 'is or should be an unimpeachable conclusion'.

69. The protected acts are not the specific occasions on which the Claimant claimed to be disabled and asked for reasonable adjustments. Those communications were but the medium for the protected acts. The protected acts were the information which the Claimant conveyed to the Respondent. It was enough that Mrs English knew this information. The ET was not obliged to find that she knew about the three specific communications. The Respondent's factual case on her knowledge was rejected.

70. I accept the Respondent's submission that the ET did not apply the right test in deciding that the Claimant had been subjected to a detriment because of a protected act. The ET needed

to ask why the Respondent subjected the Claimant to surveillance; what, consciously or subconsciously, was the reason for that (see **Chief Constable of West Yorkshire Police v Khan** [2001] UKHL 48; [2001] IRLR 830). There are three points. First, the repeated use of the word "trigger" suggests that the ET was considering "but-for" causation. Second, the ET describes different triggers with different contents in different passages in the Judgment. The Respondent's suspicions that the Claimant's allegation was untrue feature in some, but not all. Third, the finding in paragraph 80 suggests very strongly that the ET found that Mrs English's reason for the surveillance was nothing other the suspicion that the Claimant was "not dyslexic, or at least not very dyslexic". That suggestion is reinforced by the ET's conclusion that the Respondent's intention in ordering the surveillance was to catch out the Claimant doing private work.

71. I also accept the Respondent's two linked submissions about the protected acts. An employer incurs tortious liability if it victimises an employee. Section 26(1) refers to the doing by an employee of a protected act (or to the employer's belief that an employee has done a protected act). In my judgment, in both cases, an employee must identify a specific actual protected act, or believed protected act, in order to fix the employer with liability, and must show that the employer knew about that specific act, and that it imposed a detriment on the employee because of that specific protected act. The statute does not refer in general terms to disclosing protected information, which would support the Claimant's submission. Instead, it refers to a protected act.

72. The ET did not specifically find, either, that Mrs English knew about the two emails and the conversation on 20 June, or that those acts were the reason why she ordered the surveillance. The ET's findings lack the necessary precision. They are studiedly vague: see,

for example, paragraph 59, "her state of knowledge of the theme of dyslexia" (paragraph 78), and "the Respondent's (more particularly Mrs English's) motivation to decide that the Claimant should be placed under surveillance" (paragraph 141). In my judgment, the ET erred in law in concluding that the Respondent victimised the Claimant when it had not made the findings of fact which were necessary to support that conclusion.

(3) The surveillance by BG

73. The second alleged act of victimisation was that the Claimant was subjected to surveillance. The Respondent submitted that the Respondent did not carry out that surveillance. The Respondent ordered it to be carried out. In order to fix the Respondent with liability for victimisation in relation to the carrying out of the surveillance, the Claimant had to show that BG had victimised the Claimant, and that the Respondent was liable for that conduct. The Respondent accepted that it was liable for BG's conduct; but only if BG had victimised the Claimant. The Respondent submitted that the ET's findings in paragraph 142 "betray multiple errors of law".

74. The Respondent submitted that BG did the surveillance because it was asked to, because, the Respondent told BG, the Respondent believed the Claimant was working elsewhere. BG's act was an innocent one. BG incurred no liability under the **2010 Act** by doing it. So while the Respondent is responsible for that act, that responsibility does not impose any liability on the Respondent under the **2010 Act**. The question, then, is whether in some way any suspect motivation on the part of the Respondent can be combined with BG's lack of motive in order to make the Respondent liable for the carrying out of the surveillance. The Respondent submits that such a "composite" approach is inconsistent with **CLFIS (UK) Ltd v Reynolds** [2015] EWCA Civ 439; [2015] IRLR 562. If such an approach were right, it

would have the unfair consequence that BG would be liable for victimisation, by virtue of section 110(1), when it knew nothing about the protected acts and did not act because of them.

75. The Claimant submitted that the effect of the Respondent's argument is to enable the Respondent to escape scot-free from liability for an act of victimisation if the Respondent is astute enough to instruct an innocent third party to carry it out. This cannot have been Parliament's intention. Section 109 does not make the agent's knowledge of the unlawfulness of the acts it is told to do a condition of the principal's liability. It says "anything" not "anything which is a contravention of the **2010 Act**". The Claimant supported this argument by referring to section 110, which, he said, also imposes liability without any requirement of knowledge.

76. I accept the Respondent's submissions. Section 109 makes a principal liable for anything his agent does within the scope of his agency. It only makes the principal liable for a breach the **2010 Act**, however, if what the agent does is, itself, a breach of the **2010 Act**. This is supported by the language of section 110, which makes an agent liable for something for which the principal is liable only if that act is a contravention of the **2010 Act** by the principal. This construction is also supported by the Explanatory Notes to sections 109 and 110. Explanatory Notes are admissible (for what help they can give) for the purpose of construing primary legislation (see **Westminster City Council v NASS** [2002] 1 WLR 2956 at paragraphs 2-6 per Lord Steyn, and **R v Montilla** [2004] 1 WLR 3141 at paragraph 35). The Respondent also relies on the ECHR's Code of Practice in support of this construction. That is of limited help; as it does no more than to show how the ECHR interprets these provisions.

77. The policy of section 109 is to make an employer or principal liable for an act of victimisation (or other act, as the case may be) ("act 2") of an employee or agent which is carried out in the scope of the employment or of the agency, respectively. If act 2, viewed on its own, is not tortious, section 109 does not make the Respondent liable for a tort, even if the Respondent, when giving the instruction, had a state of mind which would have made the Respondent liable had the Respondent, rather than the agent, done the act in question. If the agent in doing act 2 does not know about any protected act and/or does not do anything because of a protected act, the agent does not commit the tort of victimisation. The fact that the principal's knowledge and reasons for acting could have made the principal liable for act 2, had he carried it out, does not mean that if the agent does act 2 when he lacks the principal's knowledge and/or purpose the agent commits the tort (see **CLFIS**).

78. If the agent incurs no liability for victimisation in relation to act 2, section 109(2) does not impose any liability on the Respondent for victimisation in respect of act 2. The Respondent does not necessarily get off scot-free, because the Respondent is liable for any act of victimisation which he carries out himself (act 1). The Respondent would also be liable if when the agent did act 2 he did so with knowledge of the protected act and because of the protected act. This construction is supported by the defence given to an employer (but not to a principal) by section 109(4). The structure of this defence suggests that it is intended to give employers an incentive to train employees not to commit acts such as discrimination and victimisation.

79. If the Claimant's construction is right, an agent who carries out an instruction from his principal to do something which if done by his principal would be tortious, but does not know

any facts which would make his own act tortious, would be made liable for committing a tort by section 110. This, to my mind, is an absurd and unreasonable result.

80. In paragraph 142, the ET mischaracterised the Respondent's argument as a causation argument only. The ET said that there was "no sufficient disconnection between the conduct of the agent acting on the express instructions of its principal, the Respondent, and a sufficient causal connection between the protected act operating on the mind of the principal and the detriment visited upon the victim, the Claimant, through the actions of the principal's agent, [BG]". It erred in law in two ways. First, it misdirected itself about causation: the test is "because of" not "whether there is a sufficient disconnection". Second, it added BG's act to the Respondent's knowledge and motives, contrary to the approach of the Court of Appeal in **CLFIS**, and contrary to what, I have held, is the correct construction of section 109.

(4) Did the ET make findings outside the scope of its remit?

81. I record, first, that both sides accepted that if, and to the extent that, the ET made findings which were not necessary to its decision on the pleaded issues, those findings could not create any issue estoppel. The parties would not be bound by them in any later litigation. I pressed the Claimant about this in oral argument, and I think in the end he was disposed to concede that the ET had made some findings in relation to the disciplinary proceedings which were outside the scope of the pleaded issues and were not necessary to its decision on those issues. The Respondent submitted that the findings at paragraphs 105, 111-2, 113-6, 126-9, and the quasi-finding that the Claimant was disabled person were such findings. I accept that submission. I also accept that submission that by making findings on issues that were not pleaded, the ET erred in law, because, as the issues were not pleaded issues, and the

Respondent did not realise that findings were to be made on them, it was deprived of the opportunity to deploy its case in relation to them.

82. More controversially, perhaps, the Respondent submitted that the ET's finding in paragraph 104, that the revelation of the surveillance and the notification of the disciplinary proceedings to follow on from that surveillance "had a profound and detrimental impact on the Claimant", was a finding not about liability, but about remedy. The ET recited in paragraph 17 the parties' agreement that the hearing was about liability only. It followed, the Respondent argued, that the ET should not have made that finding. I note that the ET found specifically found elsewhere, in paragraph 139, that the surveillance was a detriment. That finding was necessary, and sufficient (other things being equal) for that aspect its conclusions on the victimisation claim. The finding in paragraph 104 does not focus on the language of section 26. It was not necessary to the ET's conclusions on the victimisation claim. Nor was it necessary to its findings on the harassment claim. I therefore accept the Respondent's submission that the ET erred in law in making it, and that the ET will not be bound by it when it comes to consider remedy.

(5) Is the formal Judgment accurate?

83. I accept the Respondent's submission that the formal record of the Judgment is not accurate. The Claimant accepted in his skeleton argument that he would not oppose an application to the ET to amend its Judgment on this point, but submitted that this was not a ground of appeal. I of course accept the Claimant's argument that, if this point had stood alone, it would not have justified an appeal. The Respondent could, and should, have applied for a reconsideration, and asked the ET to amend the formal record. However, the Respondent was going to appeal in any event, and it seems to me that this was, in those circumstances, an

appropriate way of dealing with this point. HHJ Richardson, on the paper sift, agreed with this approach.

Disposal

84. I allow the appeal on grounds 1 and 2. In my judgment the ET was bound, on the basis of the findings it made, to dismiss the harassment claim, because the Claimant had not shown that he was a disabled person within the meaning of section 6 of the **2010 Act**. The harassment claim was therefore bound to fail. There is nothing to remit to the ET on this claim. Had it been necessary to do so, I would also have found that the ET's reasoning was inadequate, and that its conclusion that the acts complained of had the proscribed effect, perverse.

85. I also allow the appeal on grounds 3-5. In my judgment, the ET erred in law by applying the wrong test of causation, and its decision that the Claimant's victimisation claim succeeded was not supported by adequate findings of fact. Had the second point stood on its own, the decision whether or not to remit the case to the ET (or to a different ET) would not have been entirely straightforward. I do not know whether the ET did not make sufficiently precise findings because it felt unable to make them on the evidence it heard, or because it did not realise that it was required to make them. But this point does not stand on its own. The ET has made several attempts to capture "the reason why" the Respondent ordered the surveillance. At least one of those formulations is flatly inconsistent with the conclusion that the Respondent did so "because of a protected act". In my judgment, it was not open to the ET, on the findings it did make, to conclude that Mrs English ordered the surveillance "because of" a protected act, and that part of the claim must therefore fail.

86. I allow the appeal on ground 6. It was not open to the ET to hold that the Respondent was liable for the acts of surveillance. I also allow the appeal on grounds 7 and 8. Given my decisions on the other grounds of appeal, I see little point in remitting the decision to the ET for the sole purpose of requiring it to correct the record of its Judgment.