Case Number: 2206326/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mrs K Anandarajah		**Commissioners for HM Customs & Revenue**

REASONS FOR THE RESERVED JUDGMENT SENT TO THE PARTIES ON 8 DECEMBER 2017

Introduction

1. The Respondents, a non-departmental government body, describe themselves as the UK's tax, payments and customs authority. The response form does not give an up-to-date figure, but in 2015 their headcount stood at about 65,000.

2. The Claimant, Mrs Suki Anandarajah, who is of Asian descent, was employed by the Respondents from 19 February 1979 until 26 May 2016. In those 37 years she progressed from Clerical Assistant to Senior Officer. Her employment ended with dismissal on the stated ground of gross misconduct namely, to put the matter shortly, bullying her staff. At the date of leaving her annual salary stood at just over £43,000.

3. By a claim form presented on 24 June 2016 the Claimant brought complaints of racial discrimination, all of which were resisted in the response form.

4. The interlocutory history of the case is lengthy. There is no need to recite it in full but we must mention that complaints of victimisation and unfair dismissal were added by amendment and the discrimination claims were eventually withdrawn. At a case management hearing on 26 May 2017, Employment Judge Davidson defined the issues to which the victimisation claims gave rise in these terms.

> **1. Did the Claimant do a protected act within the meaning of s27(2) Equality Act 2010? The protected acts relied upon by the Claimant are:**
>
> **1.1 A discussion with Gail Filby when she refused the bonus when questioned on 26 July 2013. It being the Claimant's case that she felt she was being treated differently, the Claimant did not say the different treatment was because of race ("protected act one");**
> **1.2 Her grievance filed on 18 December 2013 ("protected act two").**

2. Did the Respondents subject the Claimant to detrimental treatment because she had done a protected act:

2.1 Ms Gail Filby forcing the Claimant to move to a FLM (front line manager) role in Croydon on 8 November 2013 ("detriment one");
2.2 Dismissing the Claimant on 26 May 2016 ("detriment two").

3. Did the Respondent subject the Claimant to detrimental treatment because she had done a protected act:

3.1 For detriment one, the Claimant relies on protected act one;
3.2 For detriment two, the Claimant relies on protected acts one and two.

The judge went on to note that a time point arose in relation to detriment one. She also summarised the unfair dismissal issues which arise in any 'conduct' case, but we do not think it necessary to set those out here.

5. The final hearing came before us on 19 June this year. Five days had been allowed but we were only able to sit for the first four. The Claimant was represented by Miss Ghazaleh Rezaie, counsel, and the Respondents by Ms Jane Russell, counsel. Having taken time to read into the case we heard evidence over days two and three. On the morning of day four, counsel handed up written submissions but also asked for time because they were in settlement discussions. We were happy to oblige them and delighted to be told not long afterwards that they had agreed terms in principle and were entirely confident that a binding settlement would be effected in short order. In the circumstances, we granted their joint application for a stay of the proceedings and adjourned at their request without hearing oral argument.

6. Unfortunately, counsel's optimism was not vindicated and the Tribunal was notified that the litigation had not been compromised. We arranged to meet in chambers at the first available opportunity, 13 November. We did not see fit to call on the parties to present oral argument. Counsel had stated on 22 June that, in the improbable event of the settlement failing, they would be happy to rely on their written submissions alone. Moreover, the case was, to our minds, straightforward and the added costs to the parties and the Tribunal of a further face-to-face hearing would have been out of proportion to any small additional benefit which we could have derived from hearing counsel.

The Statutory Framework

Equality Act - Victimisation

7. By the 2010 Act, s27, victimisation is defined thus:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

…

> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**

A 'detriment' arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that he has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see eg *Shamoon-v-Chief Constable of the RUC* [2003] IRLR 285 HL.

8. Employees are protected against victimisation in the form of dismissal or other detrimental treatment by the 2010 Act, s39(4)(c) and (d).

Equality Act - Burden of proof

9. The 2010 Act, by s136, provides:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

10. On the reversal of the burden of proof we have reminded ourselves of the case-law decided under the pre-2010 legislation (from which we do not understand the new Act to depart in any material way), including *Igen Ltd-v-Wong* [2005] IRLR 258 CA, *Villalba-v-Merrill Lynch & Co Inc* [2006] IRLR 437 EAT, *Laing-v-Manchester City Council* [2006] IRLR 748 EAT, *Madarassy-v-Nomura International plc* [2007] IRLR 246 CA and *Hewage-v-Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned (as other distinguished judges had done before him) that it is possible to exaggerate the importance of the burden of proof provisions. Giving the only substantial judgment in the Supreme Court, he said this[1]:

> **[The burden of proof provisions] will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.**

In other words, our task in the ordinary case is simply to confront the 'reason-why' question[2] and decide it by reference to all the relevant evidence placed before us. But if and in so far as recourse must be had to the burden of proof, we take as our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful treatment, the onus shifts formally to the employer to prove the contrary. All relevant material, other than the employer's explanation relied upon at the hearing, must be considered. In this regard we bear in mind the provisions governing

[1] Para 32
[2] See *eg Nagarajan-v-London Regional Transport* [1999] IRLR 572 HL.

codes of practice (see the Equality Act 2006, s15(4)) and questionnaires (the 2010 Act, s138) and the line of authority beginning with *King-v-Great Britain-China Centre* [1992] ICR 516 CA and ending with *Bahl-v-Law Society* [2004] IRLR 799 CA. We remind ourselves that s136 is designed to confront the inherent difficulty of proving discrimination (and associated tortious conduct such as victimisation) and must be given a purposive interpretation.

Equality Act - Time

11. By the 2010 Act, s123(1) it is provided that proceedings may not be brought after the end of the period of three months ending with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. "Conduct extending over a period" is to be treated as done at the end of the period (s123(3)(a)). The 'just and equitable' discretion is a power to be used with restraint: its exercise is the exception, not the rule (see *Robertson-v-Bexley Community Centre* [2003] IRLR 434 CA).

Unfair dismissal

12. The Claimant invokes the protection against unfair dismissal enacted in what is now Part X of the Employment Rights Act 1996 ('the 1996 Act'). The key provision is s98. It is convenient to set out the following subsections:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it – …**
>
> **(b) relates to the employee's conduct …**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

Although our central function is simply to apply the clear language of the legislation, we are mindful of the assistance available, both legislative and judicial. By the Trade Union and Labour Relations (Consolidation) Act 1992, s207(2), any ACAS Code of Practice which appears to be relevant to any question in the proceedings is admissible in evidence and "shall be taken into account in determining that question". We bear in mind the guidance applicable to misconduct cases contained in *British Home Stores Ltd-v-Burchell* [1978] IRLR 379 EAT (although that authority must be read subject to the caveat that it reflects

the law as it stood when the burden was on the employer to prove not only the reason for dismissal but also its reasonableness). The criterion of 'equity' (in s98(4)(b)) dictates that, the more serious the allegation and/or the potential consequences of the disciplinary action, the greater the need for the employer to conduct a careful and thorough investigation (*A-v-B* [2003] IRLR 405 EAT and *Salford Royal NHS Foundation Trust-v-Roldan* [2010] IRLR 721 CA). From *Iceland Frozen Foods Ltd-v-Jones* [1982] IRLR 439 EAT and *Post Office-v-Foley; HSBC Bank-v-Madden* [2000] IRLR 827 CA we derive the cardinal principle that, when considering reasonableness under s98(4), the Tribunal's task is not to substitute its view for that of the employer but rather to determine whether the employer's decision to dismiss fell within a band of reasonable responses open to him in the circumstances. That rule applies as much to the procedural management of the disciplinary exercise as to the substance of the decision to dismiss (*Sainsbury's Supermarkets Ltd-v-Hitt* [2003] IRLR 23 CA).

13. Remedies for unfair dismissal include compensation, which divides into basic and compensatory awards. The former is calculated as the claimant's weekly earnings (subject to a cap) multiplied by his or her years of continuous service, but subject to this (1996 Act, s122):

> **(2) Where the tribunal considers that the conduct of the complainant before the dismissal … was such that it would be just and equitable to reduce … the amount of the basic award to any extent, the tribunal shall reduce … that amount accordingly.**

The compensatory award, governed by the 1996 Act, s123, is designed to compensate for monetary loss caused by an unfair dismissal subject to (*inter alia*) the following:

> **(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.**

It is well-established that, in this context, contributory conduct entails acts or omissions which are "culpable" or "blameworthy" (see *Nelson-v-BBC (No. 2)* [1980] ICR 110 CA).

14. The compensatory award may also be reduced under the '*Polkey*' principle. This holds that, where a dismissal is found to be unfair on procedural grounds but the employer shows that, absent the procedural flaw, there would have been at least a real possibility that the claimant would have been dismissed in any event and such dismissal would have been, in substance, fair, the award must be adjusted downwards to reflect that possibility.

Oral Evidence and Documents

15. We heard oral evidence from the Claimant and, on behalf of the Respondents, Mrs Gail Filby, Regional Assistant Director, and Mrs Alison Dean, Assistant Director. All gave evidence by means of witness statements. We also read two statements: one on behalf of the Claimant in the name of Mr Stuart Goodden, a trade union officer, and one on behalf of the Respondents in the name of Ms Jacqueline Hall, now retired but at all relevant times People Engagement

Lead for Individual & Small Business Compliance.

16. In addition to witness evidence we read the documents to which we were referred in the three-volume agreed bundle. A fourth volume, containing policy documents, was also produced.

17. Finally, we had the benefit of the written closing submissions on both sides and the Respondents' written opening, a cast list and chronology, a document list relating to the collective grievance and a suggested timetable.

The Facts

18. The evidence was wide-ranging. We have had regard to all of it. Nonetheless, it is not our function to recite an exhaustive history or to resolve every evidential conflict. The facts essential to our decision, either agreed or proved on a balance of probabilities, we find as follows.

Protected acts

19. On 26 July 2013 a meeting took place between the Claimant and Mrs Filby, who was then her line manager. It seems that the main purpose of the meeting was to review the Claimant's performance, but at the outset she raised a complaint. She had recommended her team for a bonus to recognise strong performance and felt aggrieved that the recommendation had been accepted but she, the manager of the team, had not been rewarded with any bonus. She did express the view that she had been "treated differently" in this regard. But she did not say or imply that the alleged difference had anything to do with her race or any other personal characteristic.

20. On 18 December 2013 the Claimant issued a written grievance against Mrs Filby complaining about her indicative performance grading for 2013/14 and the recent decision to move her to the Croydon Compliance Team (detriment one), as to which we will make brief findings immediately below. The grievance included the allegation that:

> **… the Department through managers like Gail [Filby] does not appear to be seriously interested in helping women like me from an ethnic minority background to be represented in the senior positions.**

Detriments

21. In her witness statement, paragraphs 19-24, Mrs Filby set out apparently rational and unremarkable grounds on which she claimed to have based her decision to move the Claimant to the Compliance Team. We have no reason to doubt her explanation but, for reasons which we will explain, the claim based on detriment one is doomed without any evidence from the Respondents. In those circumstances further primary findings on it would be superfluous.

22. As to the dismissal, the story begins with a group grievance presented on 17 September 2014 by seven Higher Officers in the Claimant's team, complaining of bullying and harassment by her. Five of the seven grievances were ultimately

upheld. A disciplinary investigation followed. Mr Steve Billington, a 'specialist fact-finder' was appointed. He performed an investigation resulting in a recommendation given in a brief document dated 24 November 2015 – more than 14 months after the group grievance – that the matter be treated as a "minor misconduct" case. In a fuller report published on 27 January 2016, he stated:

> **The recommendation in this case is that there is a case to answer of bullying based on two factors. The continued frustration caused to the team by the actions of SA and the lack of acceptance or ownership by SA for the situation that she has evidently, whether purposefully or not, exacerbated.**

He did not resile from his earlier view that this was a "minor misconduct" matter.

23. The first of several mysteries in this case is how Mr Billington's assessment was overridden and a decision taken to proceed to disciplinary action alleging "gross misconduct". The person responsible for that decision was not, so far as we can recall, identified and we were not, so far as we can recall, shown any document evidencing the decision or the process leading to it. We judge it highly unlikely that the decision could have been taken without any memo or email being generated. The Respondents' apparent failure to produce disclosable documents was not explained.

24. The disciplinary hearing was conducted on 19 May 2016 by Ms Hall. As we have stated, we read a statement in her name but she did not attend to give evidence. Because of the remarkable procedural course which the case subsequently took, to which we will very shortly turn, her decision, that the Claimant was guilty of gross misconduct and should be dismissed, was not relied upon as of itself a fair dismissal. Rather, the Respondents contended that any unfairness was cured by later events. In the circumstances we simply record that Ms Hall dismissed the Claimant on 26 May 2016.

25. The Claimant appealed, lodging grounds on 8 June.

26. The appeal was entrusted to Mr Richard Boyes. He was not a witness before us, nor was any written evidence submitted in his name. He heard the appeal on 14 July. At the hearing, the Claimant, who was accompanied by a trade union representative, raised a number of challenges to the first-instance decision. Having reserved his decision and reflected on the matter, Mr Boyes concluded that the appeal should be allowed and a final written warning substituted. Here we encounter a second mystery. In circumstances which have not been explained to us by any witness, and which are not explained in any document drawn to our attention, Mr Boyes's conclusion was not communicated to the Claimant and was not implemented. Instead, in a letter signed by Mr Boyes (we have no idea who drafted it) dated 11 August 2016, she was advised of a quite different outcome. It included the following passages:

> **… After careful consideration and having consulted with HR I have decided that a new appeal hearing will be convened to allow you to present your points. Exceptionally, this will be a re-hearing of all the evidence and the decision will be final. At this meeting you will be allowed to discuss and/or comment on the evidence available to the Discipline decision manager which has led to the**

> **allegations of gross misconduct made against you. You will also be able to discuss the elements of your appeal.**
>
> **You should be aware that whilst the grievance decisions cannot be overturned, this will allow you the opportunity to make your representations to inform a decision as to whether your behaviours constituted gross misconduct and if so what the appropriate penalty would be.**
>
> **In the interests of impartiality a new appeal manager will be appointed. …**

This (second) critical procedural u-turn is nowhere recorded or referred to in any document in the bundle. As the letter states, HR was involved and it seems to us quite implausible that not one relevant memo or email was generated. Again, the Respondents' apparent failure to give proper disclosure was not explained to us.

27. The appeal, eventually fixed for 22 September, was assigned to Mrs Dean. She was a long-serving member of the Respondents' staff but had no experience whatever of conducting disciplinary hearings. The hearing was lengthy, occupying some seven hours inclusive of breaks. The Claimant made representations concerning the allegations of the complainants and the disciplinary procedure to date.

28. We explored with Mrs Dean her understanding of her function as appeal officer. She gave evidence that she believed that her role was to "replace" the "stage" originally allocated to Mr Boyes. This seemed to conflict with the note of the hearing (second page), in which she is recorded as saying that she was "going back to the decision meeting stage" (although, confusingly, the note immediately adds, "and re-running the appeal"). She told us that it was not for her to re-open the grievance because the complaints had been proven and it had been decided there had been bullying and harassment. There *could* be a debate about whether the proven misconduct was "gross" but this could not, seemingly, involve any inquiry into the *seriousness* or *weight* of the complainants' allegations. There could be no examination of, for example, the *timing* of the allegations or the *motivation* behind them. Mrs Dean also told us that the appeal hearing was a chance for the Claimant to bring fresh evidence. About what?, we wondered. To this Mrs Dean had no answer, other than to say that she could only go on the advice she received. Asked about this advice she told us that she was referring to HR advice sent to her by email. And why was this material also not disclosed and put before us? Again, Mrs Dean had no answer. At another point in her evidence Mrs Dean said that her role had been to decide two questions: first, "Had what happened happened?" and, second, the appropriate penalty.

29. By a letter dated 21 November 2016 Mrs Dean notified the Claimant that her appeal had not been upheld and that the decision was final.

30. There was no suggestion before us that the remarkable procedure adopted by the Respondents is prescribed or permitted under their written Disciplinary Procedure. As far as we can recall, the impenetrable policy documents in the fourth volume of the bundle were not referred to at all.

31. We are satisfied that there is nothing in the contention that Mrs Filby was "instrumental in driving forward the dismissal", as was suggested in cross-

examination on behalf of the Claimant. Some emails were copied to her, but she played no part in the process, and neither took nor influenced any material decision.

Secondary Findings and Conclusions

Victimisation

32. The first protected act relied upon[3] is not within the scope of the legislation. In the conversation of 26 July 2013 the Claimant did not allege any breach of the 2010 Act.

33. The grievance of 18 December plainly qualifies as a protected act.

34. The complaint based on the first alleged detriment is untenable since the act complained of predated the only protected act. Had that not been so, it would in any event have failed for want of jurisdiction, having been brought hopelessly out of time.

35. The complaint based on the second alleged detriment is unfounded. We are quite satisfied that there was no link between the protected act and the dismissal. We have found as a fact that Mrs Filby played no part in the dismissal. There is, in our view, no sensible basis for supposing that Mrs Dean's decision was materially influenced by the fact of the grievance (or any of its content), if she was aware of it at all.

Unfair dismissal

36. This dismissal was a travesty of a fair process. It was spectacularly unfair. In the first place, it was unfair, absent any explanation, to place the Claimant in jeopardy of losing her livelihood in circumstances where the appointed specialist investigator had decided that the case was one of "minor misconduct".

37. Secondly, the decision of Ms Hall was, on the Respondents' own case, unfair. Their case accepted Mr Boyes's view that she had not permitted the Claimant a proper chance to put forward her defence and that accordingly her decision could not stand.

38. Thirdly, the outcome of Mr Boyes's involvement was unfair. His initial adjudication was that the appeal should be allowed and the dismissal revoked. Absent any explanation of how, pursuant to what authority, by whom and in what circumstances, his will seems to have been overborne, it was grossly unfair that this second key decision in her favour (the first being Mr Billington's) was reversed and the Claimant again put in jeopardy. If the dismissal was not irredeemably unfair when Mr Billington's assessment was unaccountably overridden, it was certainly irredeemably unfair when the same thing happened to Mr Boyes's. The points that follow only serve to compound the unfairness.

[3] It appears from Ms Rezaie's closing submissions that only the dismissal-based claim founded on the second protected act was being pursued, but we seem to have no note of a formal withdrawal of the balance of the victimisation claim.

39. Fourthly, it was unfair to pass the case to a fresh decision-maker. The stated justification for doing so (to serve the interests of "impartiality") was disingenuous. Not having heard from Mr Boyes, the HR officer(s) involved or anyone else willing to admit to being involved, and not having been shown the disclosable documents generated at the time, we find it is hard to resist the inference that Mr Boyes was persuaded to stand aside at least in part because his first decision (to overturn the dismissal) was seen as unsatisfactory and the aim was to substitute someone disposed to reach a different conclusion. He may not have needed much persuading – no doubt he felt compromised by the machinations operating around him. But whether or not this speculation (to which we are driven by the extraordinary gaps in the evidence) is valid, it was irregular and unfair in any event for Mr Boyes to be excised from the process. He had been duly appointed and there was no valid ground for replacing him.

40. Fifthly, even if it had been permissible for Mr Boyes to yield up the appeal to another decision-maker, it was unfair to entrust this most serious case, which threatened to end the career of an employee of 37 years' standing, to someone (Mrs Dean) who had no experience at all in the conduct of disciplinary proceedings. That was an extraordinary act which no employer in the Respondents' position and with their size and administrative resources could reasonably take.

41. Sixthly, that impermissible risk is shown for what it was by the thoroughly confused mental processes of Mrs Dean. She did not have the skill or experience to ask the right questions. In particular, she failed to understand that the fact that five grievances alleging 'bullying and harassment' had been upheld did not preclude the Claimant from resisting a charge of gross misconduct in disciplinary proceedings based on those allegations and that justice could only be done to her defence if she was permitted (which she was not) to challenge the substance and weight of the complaints against her.

42. Seventhly, the effect of the bizarre procedure ultimately followed was to deny the Claimant the opportunity to defend herself at an effective disciplinary hearing and an effective appeal. The decision to grant a "re-hearing" tacitly nullified the Hall decision and started the disciplinary exercise again. Even if the dismissal had not been unfair for the many reasons already given, it was unfair for denying the Claimant the chance of an effective appeal against what, on the Respondents' own case, was the only valid disciplinary hearing.

43. Eighthly, the process followed was not only bizarre, it was also, not surprisingly, in conflict with the Respondents' disciplinary procedures and no justification for the departure has been offered, let alone made good.

Polkey

44. The Respondents wholly fail to make out any *Polkey* defence to the Claimant's remedy claims. As we have held, the dismissal was made irredeemably unfair by the decision to put her in peril in the first place or, at the

latest, when Mr Boyes's decision to overturn the Hall decision was mysteriously reversed.

Contributory conduct

45. Ms Russell urged us to find that, if the dismissal was unfair, the Claimant had substantially contributed to it and any compensation should be reduced accordingly. We cannot accept her submission. The Respondents bear the burden of making out this part of their case, which involves establishing blameworthy conduct on the Claimant's part. They have not called any of the complainants to give evidence. The fact that five of the seven grievances were upheld does not substantiate the defence. Presented with evidence, we might have reached a quite different view. We might, for example, have found that all the complaints were insincere and tactical. Or that they were overstated and amounted to no more than a gripe about a management style that they disliked. The Respondents have made a serious allegation against the Claimant. It is not made good to our satisfaction by the untested second-hand evidence relied upon.

Outcome and Postscript

46. For the reasons stated, the victimisation claim fails and the complaint of unfair dismissal succeeds. We have to say that the gross unfairness with which the Claimant was treated would reflect extremely badly on any employer. Such behaviour on the part of an arm of the State with huge administrative resources at its disposal is particularly deplorable. We sincerely hope that the Respondents will give careful consideration to the lessons to be learned from this case.

47. Unless the parties agree all matters of remedy in the meantime, a remedies hearing will be held at 10.00 a.m. on 14 February 2018, with one sitting day allocated.

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EMPLOYMENT JUDGE Snelson

Reasons entered in the Register and copies sent to the parties on 8 December 2017 for Office of the Tribunals