Appeal No. UKEAT/0151/17/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 30 November 2017
Judgment handed down on 30 January 2018

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

SOUTH YORKSHIRE FIRE & RESCUE SERVICE — APPELLANT

MR D MANSELL & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID MITCHELL (of Counsel) Instructed by: Barnsley Metropolitan Borough Council Legal Services PO Box 600 Barnsley South Yorkshire S70 9EZ
For the Respondents	MR OLIVER SEGAL (One of Her Majesty's Counsel) Instructed by: Thompsons Solicitors Coverdale House 15 East Parade Leeds LS1 2BH

SUMMARY

WORKING TIME REGULATIONS - S.43A detriment

The Claimant firefighters were members of the Fire Brigades Union (FBU). They made complaint against the Respondent fire authority of "*working time detriment*" pursuant to sections 45A and 48(1ZA) in Part V **Employment Rights Act 1996**. The claims arose from introduction of a new shift system (CPC). Without variation of a collective agreement between the FBU and the Respondent the CPC involved a breach of **Working Time Regulations** as to night work and daily rest. The Claimants were unwilling to volunteer for CPC and in consequence were transferred to other fire stations. The claims succeeded on liability.

As to remedy under section 49 **Employment Rights Act**, the Respondent contended that there was no jurisdiction to make awards for injury to feelings or other non-pecuniary loss in a section 45A case. It was common ground that such awards were available for "*whistleblowing detriment*" claims under Part V (section 47B) and (outside Part V) for claims of detriment arising from trade union membership or activities; on the basis that they were akin to discrimination claims. The Respondent contended that there was no basis to go beyond those established categories.

On a Preliminary Hearing the ET held that awards for non-pecuniary loss, including injury to feelings, were potentially available. This was on the basis that a section 45A claim amounted to a claim of discrimination and of victimisation; and also having regard to the EU principle of equivalence. On the appeal, the Respondent accepted that there could be an award under section 45A for non-pecuniary loss other than injury to feelings.

The EAT dismissed the appeal, holding that all claims of detriment under Part V were akin to claims of discrimination and victimisation. The question of whether an award for injury to feelings should be made was a question of fact in each particular case.

THE HONOURABLE MR JUSTICE SOOLE

1. This appeal raises the question of whether the Employment Tribunal has jurisdiction to award compensation for injury to feelings when determining compensation under section 49 **Employment Rights Act 1996** (ERA) in respect of successful complaints of "*working time detriment*" under sections 45A and 48 of that **Act**. By a Decision dated 13 April 2017 the Employment Tribunal (ET) at Leeds (Employment Judge Lancaster and lay members) held that it did have such jurisdiction. I will refer to the parties as the Claimants and Respondent, as below.

2. The ET also held that it had jurisdiction to award compensation for other non-pecuniary loss. The Respondent's grounds of appeal also challenged that decision. However in the course of oral submissions Mr David Mitchell conceded that non-pecuniary loss other than injury to feelings was recoverable in such claims and thus confined the appeal to that type of award.

3. The background to the claims is summarised in the ET's Judgment on liability dated 16 December 2015. The Claimants are firefighters who were compulsorily transferred from one of two stations in South Yorkshire in consequence of the Respondent's introduction of a duty system called Close Proximity Crewing (CPC). This involves working for consecutive 24-hour shifts, each divided into a 12 hour day-shift and 12 hours "on call" at night, followed by 4 days off. The "on-call" hours would be spent at or near the station on the Respondent's premises.

4. This contrasted with the traditional 2-2-4 duty system involving two day-shifts in succession followed by two night-shifts (or vice versa) and then four days off; the shifts averaging 12 hours.

5. The Claimants were all members of the Fire Brigades Union (FBU) which had a collective agreement with the Respondent and other fire authorities. Without variation of that agreement, the CPC involved a breach of **Working Time Regulations** (WTR) 6 (length of night work) and 10 (daily rest). The Claimants were unwilling to volunteer for CPC and in consequence were transferred.

6. The Claimants alleged breach of section 45A which falls within Part V of the **ERA**. That Part is headed "*Protection from suffering detriment in employment*". Under the sub-heading "*Rights not to suffer detriment*" are the various rights set out in sections 43M to 47G. These include jury service, health and safety cases, Sunday working, working time cases, trustees of occupational pension schemes, employee representatives, employees exercising the right to time off work for study or training, protected disclosures, leave for family and domestic reasons, tax credits, flexible working, studying and training, and employee shareholder status.

7. Section 45A is headed "*Working time cases*" and provides as material:

> **"(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker -**
>
> > **(a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,**
> >
> > **(b) refused (or proposed to refuse) to forgo a right conferred on him by those Regulations, …"**

8. The enforcement provisions for the Part V rights are contained in section 48. Section 48(1ZA) provides:

> **"(1ZA) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 45A."**

9. Section 49 sets out the "*Remedies*" and provides as material:

> **"(1) Where an employment tribunal finds a complaint under section 48(1), (1ZA), (1A) or (1B) well-founded, the tribunal -**
>
> **(a) shall make a declaration to that effect, and**
>
> **(b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.**
>
> **(2) Subject to subsections (5A) and (6) the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to -**
>
> **(a) the infringement to which the complaint relates, and**
>
> **(b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right.**
>
> **(3) The loss shall be taken to include -**
>
> **(a) any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates, and**
>
> **(b) loss of any benefit which he might reasonably be expected to have had but for that act or failure to act."**

10. By their Particulars of Claim the Claimants identified the detriment which they had suffered as a result of their moves to other stations. In addition to financial loss, these included increased journey times; interference with care obligations; loss of free time, leisure time, and family time; the loss of existing congenial working arrangements; and disruption to their work patterns and working relationships.

11. The claims succeeded and a Preliminary Hearing on remedy was ordered in these terms: "*whether or not the tribunal has jurisdiction in a case of this nature to award compensation for injury to feelings and/or other non pecuniary loss*".

12. In upholding the potential availability of compensation for non-pecuniary loss, including injury to feelings, the ET in particular:

(1) noted the authorities to the effect that:

(i) such an award was not available at common law for breach of contract, e.g. for wrongful dismissal; nor was it available for statutory claims of unfair dismissal;

(ii) breach of the **WTR** was equivalent to breach of the contract of employment and thus such claims were caught by the common law bar;

(iii) section 49 **ERA** permitted such awards in "whistleblowing" cases under Part V, i.e. section 47B claims of detriment on the grounds of protected disclosures;

(iv) such awards were recoverable outside Part V **ERA** for claims of detriment on the grounds of trade union membership;

(2) rejected the Respondent's submission that such awards under Part V and section 49 were confined to "whistleblowing" cases;

(3) held that a complaint under section 45A amounted to a claim of discrimination and of victimisation, in either case with the consequence that compensation for injured feelings was potentially recoverable ("Discrimination/victimisation");

(4) held that this conclusion was consistent with "parallel" provisions in the **Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000** (PTWR), **Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002** (FTER) and **Agency Workers Regulations 2010** (AWR) ("Regulations");

(5) held that the EU law "*principle of equivalence*" also required this conclusion ("EU law").

13. The ET's central conclusions are set out in paragraphs 35 and 36 of its Judgment:

> **"35. In this case our unanimous decision is that a complaint under section 45A of the Employment Rights Act 1996 is one of discrimination. It is certainly a case where we can envisage, as in *London Borough of Hackney v Adams* significant injury to feelings, although it will not necessarily follow in each individual case. The reason why significant injury to feelings may flow in a case such as this is because the less favourable treatment has been suffered on the grounds that they are part of a group who have been identified by the Respondent by reference to a particular defining characteristic, namely that they were refusing to acquiesce in a breach of their employment rights. That is the essence of discrimination. We are informed in coming to this conclusion particularly by drawing upon the experience of the lay members of the tribunal. Sitting as an "industrial jury" we are very aware of the very real divisions that can be engendered within a working community between those who are prepared to toe a hard management line and those who are not. In the most extreme cases the aftermath of such workplace disputes can divide communities along almost sectarian lines. Where these types of division are fostered by the actions of an employer we have no hesitation in describing the difference in treatment afforded to one group as opposed to the other as discriminatory.**
>
> **36. To be more precise we might describe this as an instance of victimisation. Victimisation under section 27 of the Equality Act 2010 is of course treated in the same way as any other complaint under the Act so far as remedy is concerned and an award of damages under sections 119(4) and 124 expressly includes compensation for injured feelings."**

14. The Respondent challenges each of the conclusions in points (3) to (5) above.

Discrimination/Victimisation

15. It is of course common ground that claims of discrimination *stricto sensu*, i.e. relating to protected characteristics of sex, race etc. may attract such awards. This was made clear in previous legislation "*for the avoidance of doubt*". This is replicated in the **Equality Act 2010** (EA) sections 119(4) and 124(6), albeit without the reference to doubt.

16. In mounting his argument Mr Mitchell inevitably accepts that the language of section 49 is capable of permitting an award of compensation for injury to feelings. This follows from his acceptance of the decisions which support such awards in "whistleblowing detriment" cases, i.e. within Part V and thus section 49. Accordingly and rightly he did not focus his submissions

A on the construction of that section. However he submits that there is no warrant to extend such awards to "*working time detriment*" claims or any of the other bases of claim under Part V.

B 17. Mr Mitchell's argument depends upon a close analysis of the authorities. As to subject matter, these can be broadly grouped into four categories, namely detriment arising from (i) trade union membership and activities, (ii) whistleblowing, (iii) working time, and (iv) health and safety representatives. I take these in turn.

C

Trade Union Membership and Activities

18. In **Cleveland Ambulance NHS Trust v Blane** [1997] IRLR 332 the employee's

D complaint was of action short of dismissal on grounds related to trade union membership or activities: section 146(1) **Trade Union and Labour Relations (Consolidation) Act 1992** (TULRCA). As to remedy, section 149(2) provided: "*The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances*

E *having regard to the infringement complained of and to any loss sustained by the complainant which is attributable to the [action] which infringed his right*".

F

19. The EAT (HHJ Peter Clark and lay members) upheld an award of compensation for injury to feelings. Contrasting the statutory words relating to compensation for unfair dismissal (section 123 **ERA**) it held that the words in section 149(2) **TULRCA** "… *having regard to the*

G *infringement complained of* …" provided the necessary power. It continued:

> **"… Given the scope for awards to complainants who have suffered by way of sex or race discrimination to reflect injury to feelings, we see no reason in principle why the words of the section cannot extend to such award. Put another way, what do the words add to the normal formulation of available pecuniary loss claims for unfair dismissal, if not to include an award for non-pecuniary loss including injury to feelings?" (Paragraph 31)**

H

20. Mr Mitchell submits that this decision is confined to complaints of this type; reflects a policy of protecting the characteristic or status of trade union membership and activity; and depends on no wider principle.

21. For the Claimants, Mr Oliver Segal QC points both to the similarity of language between section 149(2) **TULRCA** and section 49(2) **ERA**, i.e. as to "*having regard to the infringement*", and to the EAT's analogy with sex and race discrimination claims.

22. In **London Borough of Hackney v Adams** [2003] IRLR 402, the EAT (Elias J and lay members) dismissed an appeal on quantum of compensation for injured feelings in a case of discrimination on the grounds of trade union activities. Under the heading "*Compensation depends on the ground of discrimination*", it observed that:

> **"… there are no grounds for asserting that discrimination on trade union grounds will justify lower awards of compensation to other forms of discrimination, such as race or sex discrimination. In each case it is necessary to establish the loss by focusing on the particular injury suffered. …" (Paragraph 10)**

It continued:

> **"That is not to say, however, that it will in all cases be just as easy to establish injury to feelings in relation to one form of discrimination as another. We doubt whether that can be right. Sometimes such injury will be the almost inevitable concomitant of the discrimination having occurred. …" (Paragraph 11)**
>
> **"By contrast, other forms of discrimination may leave the victim relatively, if not wholly, unscathed from any real distress. …" (Paragraph 12)**

Discrimination on the grounds of being a non-unionist was a possible example in that respect, since "*The status of not being a trade union member is not likely, at least in most cases, to be an essential part of an individual's make-up, or to be a characteristic which is central to a person's sense of self-respect and self-esteem*". In each case it was a question of fact for the ET: paragraph 12.

23. Mr Mitchell again confines this decision to discrimination on trade union grounds. A further example is **Massey v UNIFI** [2008] ICR 62 where the Court of Appeal, without demur on the principle, allowed an appeal on the quantum of an award for injury to feelings resulting from a successful complaint of unjustifiable discipline by the claimant's union: **TULRCA** sections 64 and 67(5).

Whistleblowing

24. In **Virgo Fidelis Senior School v Boyle** [2004] ICR 1210, the complaint was of detriment on the ground that the employee had made a protected disclosure, i.e. section 47B **ERA** within Part V. The principle of an award of injury to feelings was not in dispute. The successful appeal was as to its amount. However the EAT (HHJ Ansell and lay members) made observations on the nature of such claims.

25. Having referred to the section 47B right, the EAT noted the "*other rights not to suffer detriment*" contained in Part V and stated that these closely followed the protection that had been given to trade union members in **TULRCA**: see paragraphs 28 and 29. It noted that "*The remedies provisions in respect of detriment are to be contrasted with the remedies available in respect of sex, race or disability discrimination*" (paragraph 31) and that:

> **"… [*Cleveland*] makes it clear that a distinction has to be drawn in trade union cases between action short of dismissal, where compensation for injury to feelings will be allowed, and those cases where the detriment complained of is dismissal, where an award for injury to feelings cannot be recovered." (Paragraph 40)**

26. In allowing the appeal and reducing the award, the EAT in particular stated that:

(1) section 49 "*… also covers detriment for less serious reasons, as we have set out above*", adding "*Clearly, the nature of the offence or its repetition may*

have an impact on the level of the award for injury to feelings …": paragraph 44; and that

(2) detriment suffered by trade union members "*… was clearly accepted in [London Borough of Hackney v Adams] as another species of discrimination and it is therefore important as far as possible that there is consistency in awards throughout all areas of discrimination … We see no reason for detriment under section 47B … to be treated differently; it is another form of discrimination*": paragraph 44.

27. Mr Mitchell accepts that this decision confirms (or at least assumes) the availability of such awards in section 47B claims, and as another species of discrimination. However, noting the reference to other forms of Part V detriment claims "*for less serious reasons*", he submits that this does not extend beyond section 47B cases.

28. Mr Segal submits that the observations support the proposition that all claims of detriment under Part V are akin to claims of discrimination; and that the decision whether to make an award and its amount will depend on the nature and gravity of the breach in any particular case.

29. In **Commissioner of Police of the Metropolis v Shaw** [2012] IRLR 291, the EAT (Underhill P and lay members), on an appeal against the quantum of the award of aggravated damages in a section 47B case, was content to follow **Virgo Fidelis** as authority for the proposition that:

> **"… the approach to the award of compensation for unlawful detriment under Part IVA[1] of the 1996 Act should be the same as is applied in cases of unlawful discrimination, notwithstanding the differences in the relevant statutory provisions … The subjecting of the**

[1] Part IVA relates to "*Protected Disclosures*"; however the detriment claim in that respect (section 47B) is in Part V.

> **claimant to the detriment is to be treated as a statutory tort, attracting an entitlement to compensation for so-called 'injury to feelings' and, in an appropriate case, aggravated damages. … We will henceforth for convenience use the term 'discrimination' to cover cases both of discrimination stricto sensu and of detriment such as that with which we are concerned here." (Paragraph 13)**

30. Mr Mitchell submits that "*detriment such as that*" again confines such awards in Part V to section 47B cases. Mr Segal disagrees and submits that the reference to "*statutory tort*" supports the availability of such awards in all forms of detriment under Part V.

31. In the section 47B case of **Roberts v Wilsons Solicitors LLP** [2016] IRLR 586, Simler P noted the difference in language between section 49 and claims for the "*statutory tort of unlawful discrimination under the [EA] 2010 (and its predecessor legislation)*" and observed:

> **"It is closer to the language of s.123(1) ERA dealing with compensation for unfair dismissal. Nevertheless courts have treated the compensation principles applicable to unlawful discrimination claims as applicable in whistleblowing detriment claims: see [*Virgo Fidelis*] and [*Commissioner of Police v Shaw*] … albeit that in the latter case the [EAT] expressed itself as being content to follow *Virgo Fidelis* since neither side contended that it was wrongly decided." (Paragraph 21)**

Working Time Claims

32. In **Arriva London South Ltd v Nicolaou** [2012] ICR 510, the complaint was in the form of the present case, namely "*working time detriment*" under section 45A. The issue on the appeal concerned causation, namely whether the necessary link had been established between the "*protected act*" (exercise of the right not to opt out of the 48 hour maximum working week) and the claimed detriment (withdrawal of rest day working).

33. The EAT (HHJ Peter Clark) allowed the employer's appeal on the issue of causation. In the course of his judgment he:

(1) noted that the section 45A protection "*… forms part of a group of protective measures in Part V …*" (paragraph 7);

(2) noted observations of the Court of Appeal that "*Whistleblowing cases have much in common with discrimination cases, involving as they do an investigation into <u>why</u> an employer took a particular step, in this case dismissal*" [2] (paragraph 21);

(3) considered that "*… the same may be said of this section 45A complaint, which is part of the Part V … protection referred to earlier*" (paragraph 22);

(4) concluded that the section 45A protection was "*… akin to protection against victimisation. The "protected act" in this case is the claimant's right not to enter into a written agreement with his employer opting out of the 48-hour maximum working week … The prohibited act is where his employer subjects him to a detriment (by act or omission) on the ground that he has exercised that right (enshrined in section 45A(1)(c))*" (paragraph 23). This gave rise to "*the reason why question*", namely "*why did the claimant receive the treatment complained of?*" (paragraph 24).

34. The appeal was allowed on the basis that the reason for the withdrawal of rest day working from those employees who had not agreed to opt out was the implementation of a policy to ensure compliance with the employer's statutory duty (**WTR** Regulation 4(2)) to protect the health and safety of workers. In a postscript HHJ Peter Clark expressed satisfaction with a result which accorded with good sense and observed "*It would be a strange result if this employer were to be condemned for adopting a reasonable policy designed to ensure that its*

[2] *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126 per Maurice Kay LJ at paragraph 30.

employees who exercised their right not to opt out of the 48-hour week maintained that right" (paragraph 40).

35. Mr Mitchell submits that the section 45A protection is not to be regarded as akin to discrimination since it does not depend on the specific characteristics of the individual Claimant but is merely a facet of the right which is being involved. The detriment amounts to denial of a right rather than an act of discrimination. Furthermore, citing HHJ Clark's postscript, the claim was paradoxically founded upon the employer's preservation of the employee's **WTR** rights and this could not be an act of discrimination. Likewise in the present case the claims were not founded upon an assertion of the Claimants' rights under the **WTR**. In support he cited the ET in its liability Judgment: "*We are … satisfied on balance that the principal reason for the FBU's objections to CPC during this period was because of the possible implications upon pensions*": paragraph 57.

36. Mr Segal submits that these latter considerations on causation and motive are nothing to the point on the issue of awards for injury to feelings. The observations in **Nicolaou** provide support, at least *obiter*, for the proposition that section 45A claims are akin to claims of discrimination and of victimisation. As to victimisation, he points to the comparable language of section 27(1) **EA**, namely:

> **"(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."**

37. I turn to claims under the **WTR** not falling within Part V and section 45A.

38. In **Miles v Linkage Community Trust Ltd** [2008] IRLR 602, the claim was for breach of the **WTR** in respect of compensatory rest. As to remedy, Regulation 30(4) provided:

> **"(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to -**
>
> **(a) the employer's default in refusing to permit the worker to exercise his right, and**
>
> **(b) any loss sustained by the worker which is attributable to the matters complained of."**

39. The complainant conceded that this provision did not permit an award for injury to feelings. In its judgment on the appeal on quantum the EAT (HHJ McMullen QC and lay members) recorded that "*The Claimant had no pecuniary loss and it is accepted there is no scope in these regulations for injury to feelings*" (paragraph 11). Thus the point did not fall for decision.

40. **Santos Gomes v Higher Level Care Ltd** [2016] ICR 926 was a claim for breach of **WTR** Regulation 12(1) concerning rest breaks. As below, Mr Mitchell places particular weight on this decision. The question on appeal was whether Regulation 30(4) permitted compensation for injury to feelings. The EAT (Slade J) upheld the ET's decision that it did not.

41. Of potential significance was the concession on behalf of the employee that no such award could be made under limb (b) of Regulation 30(4). This concession was made on the basis that its reference to "*loss*" was analogous to the language of section 123 **ERA** and equally excluded such an award: cf. **Dunnachie v Kingston upon Hull City Council** [2005] 1 AC 226. The argument therefore focused on limb (b) of Regulation 30(4).

42. Slade J held that its language did not allow such an award. In particular "*Where it is awarded in discrimination cases, compensation for injury to feelings is based on the effect on the claimant not on the default of the perpetrator*" (paragraph 47, see also paragraph 53).

43. In response to the argument that the ET had been wrong to conclude that compensation for injury to feelings was restricted to anti-discrimination statutes which protect a person's identity, Slade J noted that counsel was unable to point to any authority in which such compensation had been awarded in a claim not involving discrimination (paragraph 54). She noted the trade union cases which were treated as a form of discrimination; and held that **Vento** and **Virgo Fidelis** did not support the submission that such awards were not restricted to discrimination claims (paragraph 57).

44. Slade J further held that claims for breach of the **WTR** for failure to allow statutory mandated rest breaks were akin to claims for breach of the contract of employment and thus, reflecting the common law position, did not allow such awards. However she continued:

> **"… If such rest breaks are refused on discriminatory grounds a discrimination claim including, where relevant, for trade union activities or membership, could be brought. Such claims can attract compensation for injury to feelings for reasons explained by Elias J in *Adams*. However in my judgment the judge did not err in holding that compensation for injury to feelings is confined to discrimination cases." (Paragraph 59)**

Thus:

> **"… Claims for failure to allow rest breaks are not without more to be regarded as cases of discrimination which in other spheres could attract compensation for injury to feelings." (Paragraph 69)**

45. She added that counsel for the employer had "… *rightly recognised without formally conceding that breach of the obligation to grant rest breaks may lead to non-financial loss*" (paragraph 70). This provides the first basis for Mr Mitchell's concession in oral submissions

A that non-pecuniary loss (excluding injury to feelings) was potentially recoverable in the present case.

B 46. Mr Mitchell submits that the conclusions and observations in **Santos Gomes** are consistent only with the confinement of compensation awards for injured feelings to the established categories which have been treated as akin to discrimination *stricto sensu*, i.e. trade union activities and whistleblowing.

C

47. Mr Segal submits that: (1) as to Regulation 30(4) the decision is the consequence of an erroneous concession that the Regulation was to be divided into two limbs rather than

D considered as a whole; (2) the true and evidently correct ratio was that the claim was akin to a claim for breach of contract; (3) the observations do not confine awards in "discrimination" claims to the established categories.

E

Health and Safety Representatives

48. In **Rowe v London Underground Ltd** UKEAT/0125/16/JOJ the employee claimed for breach of the right to time off as a safety representative, pursuant to the **Safety Representatives**

F **and Safety Committees Regulations 1977**. As to remedy, Regulation 11(3) provided that upon a well-founded complaint the Tribunal:

> **"… shall make a declaration to that effect and may make an award of compensation to be paid by the employer to the employee which shall be of such amount as the tribunal considers just and equitable in all the circumstances having regard to the employer's default in failing to**

G **permit time off to be taken by the employee and to any loss sustained by the employee which is attributable to the matters complained of."**

49. In the appeal on compensation the EAT (HHJ Eady QC) considered (strictly *obiter*, the

H point not having been raised below) whether an award for injury to feelings was available. The Judge's observations included:

(1) "*… I see no reason not to follow the previous rulings of this Court which … has given rise to a general understanding that injury to feelings awards are available in detriment cases other than those involving protected characteristics under the [EA]*" (paragraph 42);

(2) The protections afforded by the Regulation were underpinned by public policy and the "*distinct status*" and "*very important role*" of trade union appointed safety representatives (paragraph 47);

(3) That breach of the safety representative's right to time off "*… can be characterised as subjecting the employee to a detriment: the detriment of being prevented from performing their duties as a safety representative*" (paragraph 48);

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

(5) However, a purposive construction of the language of Regulation 11(3) was broad enough to permit the award of non-pecuniary loss which the ET had made[3] (paragraphs 53 to 56).

50. Coupled with the observations in **Santos Gomes** Mr Mitchell concedes the potential entitlement to recovery of non-pecuniary loss in the present case, other than an award for injury to feelings. As to that, he emphasises HHJ Eady's distinction between the denial of a right and an act of discrimination; and her focus of a discrimination claim on the "*status*" of the complainant.

51. Mr Segal submits that HHJ Eady's reference to "*some other status*" in paragraph 50 is to all infringements under Part V; and that the analysis provides no support for a limitation of such awards to particular established categories.

Conclusions on the Authorities

52. In considering the authorities, it is necessary to guard against the risk of exposing individual observations to undue analysis and treating them almost as a statute. At times the submissions, sophisticated and subtle as they were, rather strayed in that direction. The underlying need is to focus on principle. I consider that the following propositions can properly be drawn.

53. First, as is common ground, the language of section 49 provides no bar to an award of compensation for injury to feelings. That is apparent from the established category of whistleblowing detriment claims under section 47B.

[3] In particular citing the comparable language of section 172 **TULRCA** and **Skiggs v South West Trains Ltd** [2005] IRLR 459 EAT.

54. Secondly, a breach of the right not to suffer detriment under Part V is a statutory tort. In the established categories, this gives right to a potential award for injury to feelings: see e.g. **Commissioner of Police v Shaw**. They are distinct from claims for breach of contract or claims akin to breach of contract: see e.g. the critical ratio of **Santos Gomes**.

55. Thirdly, a clear distinction must be drawn between the questions of (i) whether an award of compensation for injured feelings is potentially available under section 49 and (ii) whether it should be awarded, and if so how much, in a particular case: see e.g. **London Borough of Hackney v Adams**.

56. Fourthly, the established categories (trade union rights, whistleblowing) are treated as akin to discrimination cases in a relatively loose sense, namely that the claimant has suffered some form of detriment on the grounds of his protected right or act. Whilst the right may require a particular status (e.g. trade union member; health and safety representative (*obiter*)), the example of whistleblowing demonstrates that this is not essential, save in the requirement to be a "worker" (section 47B). What matters is the right, to which Part V gives further protection.

57. Fifthly, claims under section 45A are akin to claims of victimisation. This is supported by the comparative language of section 27 **EA** and of Part V, as the observations in **Nicolaou** recognise. I do not accept that the EAT's observations on the causation issue in that case, or the ET's conclusion on the reasons for the FBU's objections to CPC in the present case, have any relevance to the issue of principle in this appeal.

58. Sixthly, I see no principled basis to distinguish between the individual rights conferred by Part V for the purpose of awards for injury to feelings. In each case breach of the right is a statutory tort and the claim is akin to discrimination and victimisation. Whether an award should be made in a particular case, and if so in what amount, is simply a question of fact for the Tribunal in the particular case. In this respect I attach particular importance to the observations of the ET in the present case as to its role and conclusions as an industrial jury: see paragraph 35, also 33.

59. It follows that I agree with the conclusions of the Tribunal in this case; and with the observations of the editors of *Harvey* to the effect that an award for injury to feelings under section 49 should not be restricted to whistleblowing claims but should be potentially available to all the forms of detriment claim under Part V: paragraphs 244.10 and 466[4].

60. This is sufficient to dispose of the appeal, but I should deal briefly with the further grounds on which the ET relied and which are challenged in the appeal namely: (1) provisions of the Regulations: **PTWR**, **FTER** and **AWR**; and (2) EU law.

The Regulations

61. The ET drew a parallel with these provisions, observing that: "*A claim for injury to feelings is expressly excluded in respect of a breach of these Regulations - just as it is for a breach of the **WTR** - but not in respect of a detriment claim. We see no reason why a similar position should not ensue in this case*" (paragraph 34; see also paragraph 38).

[4] I also note that in respect of every Part V right, save section 47C, the provisions do not apply if the detriment in question amounts to dismissal: see e.g. section 45A(4).

62. Taking the example of the **PTWR**:

Regulation 5(1) provides that:

> **"(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker -**
>
> **…**
>
> **(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer."**

Regulation 7 provides that:

> **"(2) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on a ground specified in paragraph (3).**
>
> **(3) The reasons or, as the case may be, grounds are -**
>
> **(a) that the worker has -**
>
> **…**
>
> **(vi) refused (or proposed to refuse) to forgo a right conferred on him by these Regulations, …"**

Regulation 8(11) provides that

> **"(11) Compensation in respect of treating a worker in a manner which infringes the right conferred on him by regulation 5 shall not include compensation for injury to feelings."**

63. The ET's inference from Regulation 8(11) was that a claim under Regulation 7 could attract an award of injury to feelings. This also reflected the similarity of language between that Regulation and the comparable provisions of Part V and of section 27 **EA**: see paragraphs 34 and 38.

64. Mr Mitchell points to the language of Regulation 5(1)(b) , namely the protection against "*being subjected to any other detriment*"; and submits that it must follow that awards for injury to feelings are not available to claims of detriment under Regulation 7.

65. I consider that the ET was right to treat these provisions as supportive of and consistent with the conclusions which it otherwise reached.

EU Law

66. The ET also relied on the EU law principle of equivalence. Thus:

> **"27. As this is a case upon UK legislation implementing an EU Directive granting rights to workers there must be provided an effective remedy for breaches of those rights and a dissuasive sanction. There is a principle of equivalence. In particular therefore the availability of an appropriate remedy must be equivalent to the remedy available in the context of similar domestic claims or actions based on national law: *Fuß v Staadt Halle (No 2)* [2011] IRLR 176 CJEU at page 185 paragraph 95.**
>
> **…**
>
> **39. Furthermore, under the principle of equivalence, as cases of trade union detriment, whistleblowing detriment, and (by clear implication) part-time workers' or fixed-term employees' or agency workers' detriment may lead to compensation for injury to feelings under domestic law so too must the comparable claim of detriment under section 45A."**

67. Mr Mitchell challenges this on the essential bases that (i) the decisions in the **Fuß** litigation were not germane, since they concerned German domestic legislation which (unlike UK) had not transposed into national law any protection against detriment for workers refusing to opt out of the 48-hour working week; and that (ii) the principle of equivalence does not arise because section 45A goes much further than the Working Time Directive, defining detriment much more broadly.

68. This is a complex area and both counsel rightly focussed almost all their written and oral submissions on the detailed analysis of the domestic decisions discussed above. If the EU point had been potentially determinative it would have been necessary to allocate further time. Whilst I am not persuaded that the ET was wrong in this respect, I consider that the issue in this appeal rests fundamentally on principles drawn from domestic law.

Second Ground of Appeal

69. The second and very much subsidiary ground of appeal is that the Tribunal had "pre-judged the remedy" by its observations in paragraph 35 that "*It is certainly a case where we can envisage, as in **London Borough of Hackney v Adams**, significant injury to feelings, although it will not necessarily follow in each individual case*". In my judgment there is nothing in this point. The observation was made in the overall context of whether there could be any basis for an award in respect of this type of detriment; and the ET made clear that any award would depend on the facts of the particular case. I see no basis of pre-judgment in these remarks.

70. For all these reasons the appeal must be dismissed.