Appeal No: EATS/0008/17/JW

At the Tribunal
On 8 December 2017
At 10:30am

EMPLOYMENT APPEAL TRIBUNAL
52 MELVILLE STREET, EDINBURGH, EH3 7HF

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

THE SCOTTISH TRADES UNION CONGRESS APPELLANT

MR ZAFFIR HAKIM RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant

Mr Richard Stubbs, Counsel
Thompsons, Solicitors
Berkeley House
285 Bath Street
GLASGOW
G2 4HQ

For the Respondent

Julius Komorowski, Advocate
Instructed by
EHCR Scotland
Legal
151 West George Street
GLASGOW
G2 2JJ

SUMMARY

DISMISSAL : VICTIMISATION : EQUALITY ACT 2010, section 27

Claims of unfair dismissal, and victimisation brought by the claimant against the respondent employer succeeded after a hearing before the Tribunal but a related claim of race discrimination was dismissed. The claimant had been dismissed against a background of his having earlier raised a claim in the Employment Tribunal against the respondent. In upholding his section 27 claim the Employment Tribunal held that he had been dismissed because of that protected act. The respondent appealed only the decision on victimisation. Four grounds were advanced. On these;-

1) **The Tribunal had understood that dismissal was the primary detriment complained of but was entitled to consider the whole period of what the claimant had described as " continuing victimisation " and so the complaint of the plural " detriments" did not arise from any impermissible decision on a claim of which the respondent had no proper notice.**
2) **The tribunal had correctly identified and applied the " because of" test in section 27 to the facts of the case and had addressed adequately the relationship between the protected act and the detriment of dismissal**
3) **The Tribunal's different conclusions on the race discrimination and victimisation claims were not inconsistent and so perverse ; the claimant had established sufficient primary facts form which an inference could be drawn on the latter but not the former, and**
4) **There was ample basis in the evidence for Tribunal's conclusions on the souring of the relationship between the claimants and his manager, including for the finding that the said manager was "frustrated" by the impact of what the claimant had done. Adequate reasons had been given.**

Appeal dismissed.

THE HONOURABLE LADY WISE

Introduction

1. The claimant was employed by the respondent, which is the representative organisation for Trade Unions in Scotland, between 13 November 2003 and 31 March 2015 when he was dismissed. Mr Hakim then raised claims of unfair dismissal, direct discrimination in terms of the Equality Act 2010 on the ground of his protected characteristic of race and a victimisation claim in terms of section 27 of that legislation. Following a full tribunal hearing on the merits presided over by Employment Judge Claire McManus a judgment was sent to parties on 18 November 2016 recording the unanimous decision of the tribunal that the claims of unfair dismissal and victimisation were successful but that the claim of race discrimination was unsuccessful and so dismissed. The respondent has appealed, but only in respect of the victimisation finding.

2. Before the tribunal the claimant was ably represented by Mr Haria who was not legally qualified. On appeal he was represented by Mr Julius Komorowski, Advocate. The respondent was represented before the tribunal by Mr O'Donnell, Solicitor and on appeal by Mr Richard Stubbs of Counsel. I will refer to the parties as claimant and respondent as they were in the tribunal below.

Findings in fact relevant to the appeal

3. The Tribunal's judgment runs to fifty seven pages and deals comprehensively with each of the issues raised. The findings in fact are contained in paragraph 12 which includes twenty six sub-paragraphs. Those of direct relevance to the issues raised at this appeal are the following:

“12. (b) **The respondent has approx. 38 employees. The nature of the work carried out by the respondent is that many of its employees are employed to carry out work under a particular project. As at March 2015, of the respondent’s 38 employees, 17 worked on externally funded projects. This external funding is normally provided for a fixed term. Such employees are employed under fixed term contracts. The period of these fixed term contracts is linked to the period of funding for the particular project on which they work. The areas of project work are identified from discussions at Scottish Trade Union Congress on areas of concern. The respondent’s General Council then decides on its priorities and seeks to identify funding sources to take the issues forward.**

(c) **In recent years, funding for the respondent’s project work has predominantly been obtained from the Scottish Government and from lottery funding. Normally the respondent is successful in obtaining additional funding for projects or is able to offer alternative employment to employees working on a project for which funding had ended. There have been circumstances affecting individuals other than the claimant where funding for a project has come to an end, additional funding has not been obtained, no alternative employment opportunity has been identified and the individual’s employment has been terminated by reason of redundancy.**

(d) **The claimant is of Pakistani origin. The claimant was employed by the respondent on a series of fixed term contracts from 13 November 2003 until 31 March 2015. From the commencement of his employment with the respondent, the claimant was employed as Development Officer on the One Workplace Equal Rights (“OWER”) Project. This OWER project was funded by the Scottish Government. The purpose of this project was to support, promote and advise trade unions in promoting equality, particularly race equality, and in tackling discrimination in the workplace.**

(e) **The letters from Margaret Reid sent to the claimant in January 2012 at 109 – 109A are examples of the letters normally sent to employees working on a project where the funding period is coming to an end.**

(f) **The issue of such letters was commonplace within the respondent’s organisation. Margaret Reid normally handled the issue of such letters to affected employees in a ‘jocular manner’, using words such as ‘here’s one of these letters again …’**

(g) **In 2012 funding for the OWER project was obtained from the Scottish Government for the period until 31st March 2015. In 2013, as a result of a declining level of funding from the Scottish Government, the claimant was encouraged by Mr Smith to seek funding for a project aimed to encourage equality activities in the workplace. A funding application was made to the Big Lottery for the Equality Mentoring Work Shadowing project (‘EMWS’). The application was successful and the Big Lottery provided funding for this EMWS project. The funding for that project was initially in place until 31st March 2015. The role of Development Officer – Equality Mentoring and Work Shadowing Project was created. Following interviews, an external candidate, Allan White was appointed as Development Officer on the EMWS project. The salary for the Development Officer role on the EMWS project was £5,000 lower than the salary for the Development Officer role on the OWER project. Kirsten McTigue was appointed as an Admin Officer. She then provided administrative support to. both the EMWS and the OWER projects. Part of the Big Lottery funding was for a sum which represented 20% of the claimant’s salary. This funding (‘the 20% funding’) was identified in the EMWS bid as being for a Project Manager role. The initial intention was that the claimant would carry out some work as Project Manager, ensuring that the work carried out on the EMWR project and the OWER project were consistent. As things transpired, no such Project Manager post was created and the claimant did not actually carry out work on the EMWR project. Both the EMWR project and the OWER project were promoted by the respondent under the brand of ‘One Workplace’. The claimant, Allan White and Kirsten McTigue worked in the One Workplace Team (‘the OWP’).**

(h) **In May 2014 the claimant raised a claim in the Employment Tribunal bringing proceedings against the respondent under s13 of the Equality Act 2010. The claimant's action in raising that claim was a 'protected act' in terms of section 27(2)(a) of the Equality Act 2010. The basis of that claim was that the claimant was unhappy that he had not been appointed to a Project Manager post or re-graded as a Project Manager in the One Workplace team, following the funding for the EMWR project being obtained from the Big Lottery.**

(i) **The claimant's actions in making the protected act in May 2014 led to difficulties in relationships within the respondent's organisation, in particular between the claimant and others in the 'One Workplace' team, who believed that the claimant had accused them of race discrimination and were concerned at the possibility of them being required to give evidence as witnesses in the case. The claimant's position was that he had not accused those individuals of discriminating against him. There was, in Mr Smith's words 'a lot of tension' within the OWER team. That tension was because the claimant had done the protected act. As at October 2014, Mr Smith was concerned about the impact of that tension on the respondent's ability to bring forward the objectives of the OWER project. Mr Smith was also concerned about seeking external funding for assistance in tackling race discrimination in circumstances where the respondent was itself being accused of race discrimination. Mr Smith did not believe that it had been necessary for the claimant to have raised the claim (i.e. done the protected act). It was a provision in the funding agreement between the respondent and the Big Lottery that the funder required to be advised if the respondent was the subject of any litigation. It is the respondent's policy to encourage the Scottish Government not to fund any organisation found to operate a discriminatory policy. The Respondent's own policy is not to support the public funding of a body which has unlawfully discriminated. By his own admission, for these reasons Mr Smith was 'frustrated' that the claimant had raised his May 2014 Tribunal claim (i.e. done the protected act), by the workplace tensions which had arisen as result of the claimant having done the protected act and by the difficulties that protected act may give to the respondent in terms of external funding. The claimant having done the protected act soured the relationship between the claimant and Mr Smith.**

(j) **On 6 October 2014 the respondent's then legal representative sent an email to the claimant's then representative (110). That email was sent on the instructions of Mr Smith. Mr Smith knew that the claimant had raised the claim of race discrimination against the respondent and was concerned about the possible consequences of this for the respondent in terms of its ability to obtain funding from external sources. The email is headed 'without prejudice'. The email contains the following paragraph :**

> **'My client is required to ask the Big Lottery before the end of this week for permission to reallocate underspend from the first year of the EMWS project into the second year, including permission to extend the employment contracts of those working on the project by 3 months, that is, until June 2015. This will include asking permission for funding to be allocated for a further three months for the 1 day per week spent working on this project by your client. My client is not inclined to seek such permission or to apply for a further funding for the One Workplace project while this litigation is ongoing.'**

(n) **The funding for a number of projects run by the respondent was due to end on 31 March 2015. This included the OWER project (on which the claimant was the Development Officer) and the EMWS project (on which Allan White was the Development Officer). Seventeen of the respondent's employees were employed on fixed term contract working on projects whose funding was due to end on 31st March 2015. In December 2014, Mr Smith spoke in general terms to John Steven (the Trade Union representative based in the respondent's office) about the funding for these projects being due to come to an end. At that time it was envisaged that funding for the projects would continue and the affected employees' fixed term contracts would be extended in line with the continued funding. The only step taken by the respondent to avoid**

redundancies arising from the expiry of these fixed term contracts was to apply for continued funding for the projects.

(o) The bid (application) for renewed funding for the OWER project had to be submitted by 5pm on 19 December 2014. That bid was drafted by the claimant and sent to Helen Martin and Mr Smith before submission. This same process had been followed when the claimant had drafted the previously successful applications to the Scottish Government for renewal of funding for the OWER project. The claimant's draft bid was sent by him to Ms Martin on 18 December 2015. Ms Martin considered that this draft bid had 'big weaknesses'. Mr Smith considered that the bid was not of sufficient quality to be successful. Ms Martin telephoned a representative of the Scottish Government to seek an extension of time for the bid to be submitted. She was told that the bid had to be submitted by 5pm on 19th December, but as the respondent was experiencing server issues, an extension of time was allowed in respect of the budget proposals only.

(q) As at 19 December 2014, the relationship between the claimant and Mr Smith remained soured as a result of the claimant having done the protected act. Mr Smith wished the claimant to withdraw his claim before the Employment Tribunal. Mr Smith was also frustrated at the quality of the bid which had been drafted by the claimant for renewed funding of the OWER project. There were discussions between the claimant and Mr Smith on 19 December 2014. There were no minutes taken of any meeting between the claimant and Mr Smith or any other representative of the respondent on that date. The claimant did not receive written notification to attend any meeting to discuss the possible termination of his employment by reason of redundancy. The claimant was not advised that he could bring a trade union representative or work place colleague with him to any meeting with Mr Smith on 19 December and was not given the opportunity to do so. There was no redundancy consultation meeting with the claimant on 19 December 2014. The focus of discussions between the claimant and Mr Smith on that date was twofold: the withdrawal of the claimant's claim before the Employment Tribunal application and the claimant's draft bid for renewed funding of the OWER project. The extent of the discussions about a possible redundancy situation affecting the claimant was that the claimant was told by Mr Smith that his fixed term contract would come to an end if the funding was not extended beyond 31 March 2015. There was no discussion on any redundancy pool for selection. There was no discussion on any measures to avoid or mitigate the redundancy situation other than the submission of the extended funding application for the OWER project.

(r) On 19 December 2014, and as a result of his discussions with Mr Smith on that date, the claimant sent an e-mail to his then representative instructing them to withdraw his Employment Tribunal application.

(t) On 22 January 2015 Margaret Reid wrote to the claimant. That letter is at 113 and states:-

> **'As you are aware, further funding for the One Workplace/Equal Rights project beyond 31 March 2015 is currently being considered by the Scottish Government.**
>
> **In the meantime though, as verbally advised on 19 December 2014, and in order to comply with the STUC Redundancy and Redeployment Policy, we require to give you notice of our intention to terminate your current fixed term contract o 31 March 2015.'**

(u) The letter at 113 is not a record of discussions took place between the claimant and Mr Smith on 19th December 2014. Ms Reid was not given any information by Mr Smith to enable her to confirm the content of the meeting between the claimant and Mr Smith on 19th December. The respondent did not send a similar letter to Allan White in January 2015 because Allan White at that time had less than 2 years service with the respondent and therefore was not treated under the terms of their Redundancy and Redeployment Policy.

(v) From August 2014 Mr Smith had been in discussions with the Big Lottery about extending their funding for the EMWS project. By the end of January 2015 Mr Smith had received notification that the Big Lottery would extend their funding of that EMWS project until end June 2015. This was related to an underspend on the project. Mr Smith notified Mr White and the claimant of this extension. In January 2015 all three individuals working within the 'One Workplace' team, being the claimant, Mr White and Ms McTigue were facing a possible redundancy situation because of project funding coming to an end on 31 March 2015. Once notification of an extension of funding from the Big Lottery for the EMWS project was received, Mr Smith took the decision to extend the EMWS project until 30 June 2015 and to extend Mr White's and Ms McTigue's fixed term contracts to 30 June 2015, in line with that extended funding period.

(w) Until 20 March 2015 the claimant was proceeding on the basis that finding for the OWER project would be renewed, and his employment would then be continued beyond 31 March 2015. The claimant did not pay particular attention to any forthcoming vacancies, on the basis that he believed that the OWER project would continue to be funded and he would then continue to be employed with by the respondent in his role as Development Officer of the OWER project.

(x) On 19 March 2015 the respondent received notification from a representative of the Scottish Government that the funding application for the continuance of the OWER project was not successful.

(z) Ms Reid met with the claimant on 20 March 2015. The claimant was not notified in writing of this meeting. The claimant was not advised that he could be accompanied to this meeting by a trade union representative or workplace colleague to such a meeting. No minutes were taken of this meeting. The meeting proceeded on the basis that Scottish Government funding for the OWER project would cease on 31 March 2015, therefore the claimant's position was redundant. Ms Reid showed the claimant the calculation of his redundancy payment. There was no discussion with the claimant on any available vacancies, on the decision which had been made that none of these vacancies were suitable for him or on any alternatives to mitigate the effect of the redundancy situation on him. Ms Reid sent a letter to the claimant on 23 March (115). This letter confirmed that funding for the OWER project would not be continued and that the claimant's fixed term contract would end on 31 March 2015. The claimant was advised of the sum he would receive in respect of statutory redundancy payment. Arrangements in respect of holidays, expenses and return of property were set out.

(aa) **Mr Smith met the claimant on 24 March 2015 to discuss the termination of his employment and the handover of the respondent's property. The claimant was not notified in writing of this meeting. The claimant was not advised that he could be accompanied to this meeting by a trade union representative or workplace colleague. There was no discussion that the claimant had not applied for any of the available vacancies. There was no discussion about any use of the 20% funding from the Big Lottery as a means of continuing the claimant's employment, even in a 20% capacity.**

(bb) The claimant left the respondent's offices after his meeting with Mr Smith on 24 March and had no further discussions with the respondent after that date. The claimant's employment with the respondent terminated by reason of redundancy on 31 March 2015. Mr Smith made the decision to dismiss the claimant. The claimant was not notified of his right to appeal the decision to terminate his employment, via the Grievance Procedure or otherwise.

(cc) Fiona Roberts was employed by the respondent to work on the 'Close the Gap' project. The funding for that project came to an end on 31 March 2015 and Fiona Roberts' employment with the respondent terminated on that day, by reason of redundancy and as a result of that funding ceasing. Fiona Roberts' ethnicity is white.

(dd) Mr Smith did not consider placing the claimant in a redundancy selection pool with Mr White. Where an employee worked on a fixed term contract linked to external funding,

the decision to extend that person's contract was based on the funding period for the project on which they worked.

(ff) Although funding for the OWER project ceased on 31 March 2015, some work required to be done after that date to complete outstanding work for which funding had been obtained as part of that project.

(hh) The respondent continued to use the 'One Workplace Equal Rights' brand after 31 March 2015. A dispute arose as to the respondent's use of this brand. Issue was taken at the description of Alan White in the Agenda and Secretarial Report to the STUC Black Workers' Committee of 4 September 2015. This report is at 163 – 165. Alan White is described in this report as 'One Workplace Equal Rights, Development Officer'. This had been the claimant's former role. Mr White did not work in the claimant's former role. The respondent subsequently ceased using the 'One Workplace Equal Rights' brand.

(ii) At the time of the termination of the claimant's contract on 31 March 2015 there were 3 vacancies within the respondent's organisation. These were Director of Scottish Union Learning (Job Description at 182 – 183; Person Specification at 184 – 185); Scottish Union Learning Funding and Policy Officer (Job Description at 185 – 186; Person Specification at 187) and Policy Assistant on the 'Women and Work' (Advert at 188; Person Specification at 189). Mr Smith did not discuss any of the vacancies with the claimant. Mr Smith determined that none of these vacancies available within the respondent's organisation in March 2015 were suitable for the claimant. Mr Smith made this decision without any discussions with the claimant about these opportunities or his suitability for them. There was no discussion at any time with the claimant that a decision had been made that none of the available vacancies were suitable for him. He did not consider offering any of the vacancies to the claimant for a trial period. Mr Smith took the decision not to offer any of these vacancies to the claimant. He did not discuss with the claimant that he had taken the decision that none of those roles were suitable for him, or the reasons for that decision. There are no notes recording any considerations made by Mr Smith in concluding that none of these vacancies were suitable to be offered to the claimant. Mr Smith did not seek to ensure that he was aware of the claimant's relevant skills, experience and qualifications before taking his decision on suitability. The 20% funding from the Big Lottery remained in place after 31 March 2015. There was no consideration at any time of utilising the 20% funding from the Big Lottery to continue the claimant's employment with the respondent to any extent. It was not proposed to Mr Smith at the time of the termination of the claimant's contract that the claimant's contract should be extended in line with the Big Lottery funding for the EMWS project, which had been extended to 30 June 2015.

The Tribunal's reasoning

4. The Tribunal dealt with a number of disputes in the evidence and made credibility and reliability findings. In particular the Tribunal found the claimant to be a more credible and reliable witness than the respondent's General Manager, Mr Smith and other than where specifically highlighted in their judgement the evidence of the claimant was preferred to that of Mr Smith (paragraph 20).

Having explained why the claimant's unfair dismissal claim succeeded the tribunal turned to the victimisation claim and expressed its decision and reasons as follows:

“43. **The Tribunal approached its considerations of the claimant’s claims under the Equality Act in terms of the Burden of Proof provisions as set out in s136 of Equality Act 2010 and the Barton Guidelines as modified by the Court of Appeal in *Igen Ltd. (formerly Leeds Careers Guidance) and ors. –v- Wong and others 2005* ICR 931, CA (as approved by the Supreme Court in *Hewage –v- Grampian Health Board* [2012] IRLR 870). The Tribunal found, on the balance of probabilities, facts from which the Tribunal concluded, in the absence of an adequate explanation, that the respondent had subjected the claimant to detriments because the claimant had done the protected act. The Tribunal took into account the evidence, the credibility and reliability of witnesses and the parties’ representatives’ submissions on the findings in fact that should be made. There were primary facts from which the Tribunal could draw an inference. These primary facts were:**

(1) The claimant had done the protected act of raising a claim of race discrimination against the respondent with the Employment Tribunal;

(2) Mr Smith knew that the claimant had done the protected act;

(3) The terms of the email of 3 October, which had been sent on Mr Smith’s instructions;

(4) There was tension in the workplace as a result of the claimant having done the protected act;

(5) Mr Smith was frustrated by the workplace tensions which had arisen as result of the claimant having done the protected act and by the difficulties that protected act would have for the respondent in terms of obtaining external funding;

(6) The claimant having done the protected act soured the relationship between the claimant and Mr Smith;

(7) There were vacancies within the respondent’s organisation as at March 2015;

(8) There was no discussion with the claimant on his suitability for any of the available vacancies, before or after notification of the cessation of the funding for the OWER project had been given;

(9) There was no discussion with the claimant that a decision had been taken that none of the available vacancies were suitable for him;

(10) There was no discussion with the claimant on any options for alternative employment with the respondent, before or after notification of the cessation of the funding for the OWER project had been given;

(11) Mr Smith decided that the alternative employment opportunities were not suitable for the claimant without any discussions with the claimant about these opportunities or his suitability for them;

(12) Mr Smith did not seek to ensure that he was aware of the claimant’s relevant skills, experience and qualifications before taking his decision the suitability of the alternative employment opportunities;

(13) The respondent’s funding from the Big Lottery for the EMWS project included funding for a Project Manager work, funded at 20% of the claimant’s salary;

(14) It had been intended that the claimant carry out that Project Manager work, but that had not occurred. That situation was the reason for the claimant having done the protected act;

(15) The funding from the Big Lottery was extended and remained in place after 31 March 2015;

(16) **There was no consideration of utilising any funding in place from the Big Lottery to continue the claimant's employment with the respondent, to any extent;**

(17) **There was no discussion with the claimant in January 2015 of extending the claimant's contract, or any element of it, in line with the extended Big Lottery funding;**

(18) **There continued to be work which required to be carried out to complete OWER project work for a period after 31 March 2015 and work was carried out to finalise the OWER project work after 31 March 2015;**

(19) **There were no formal redundancy consultation meetings with the claimant in terms of a minuted meeting, to which the claimant had been invited to attend with a colleague or Trade Union representative;**

(20) **There were other employment opportunities within the respondent's organisation which were not discussed with the claimant;**

(21) **The claimant was advised on 20 March 2015 that his post would not be renewed and that he was being dismissed by reason of redundancy with no other options discussed;**

(22) **The claimant left the respondent's offices after his meeting with Mr Smith on 24 March and had no further discussions with the respondent after that date;**

(23) **Mr Smith made the decision to dismiss the claimant;**

(24) **The claimant was not notified of any right to appeal the decision to terminate his employment by reason of redundancy.**

"44. **The Tribunal accepted the respondent's submissions to apply the modified Barton Guidelines to the victimisation claim as well as the direct discrimination claim. The Tribunal assumed that there was no adequate explanation for those primary facts. The claimant had proved facts from which an inference could be drawn that the respondent had subjected the claimant to a detriment because the claimant had done the protected act. The burden of proof moved to the respondent. It was then for the respondent to prove that he was not to be treated as having committed that act. To discharge that burden of proof, it was necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the claimant having done the protected act. The Tribunal required to assess whether the respondent had proved an explanation for the primary facts adequate to discharge the burden of proof, on the balance of probabilities, that victimisation was not a ground for the treatment in question**

45. **The respondent did not present cogent evidence to discharge the burden of proof. The Tribunal did not accept the respondent's explanation that the claimant's dismissal arose simply because external funding for the OWER project had come to an end. That external decision led to a redundancy situation affecting the claimant. In the circumstances it did not necessarily lead to his dismissal. The Tribunal accepted the respondent's representative's submissions to make a finding in fact that the claimant was advised on 20 March 2015 that his post would not be renewed and that he was being dismissed by reason of redundancy. The respondent dismissed the claimant on the expiration of his fixed term contract which was linked to the cessation of external funding. That cessation of funding did not necessarily result in a decision to dismiss the claimant. Alternative employment opportunities could have been explored with the claimant, which could have resulted in his employment continuing. There was no explanation for Mr Smith's failure to take any steps to ensure that he was aware of the claimant's relevant skills, experience and qualifications before taking his decision on the suitability of the alternative employment opportunities. There was no explanation for the failure to discuss the alternative employment opportunities, even once the respondent were notified on 20 March 2015 that the funding**

for the OWER project would cease on 31 March 2015. There was no explanation for the lack of any discussion with the claimant on the decision which had been made that none of these vacancies were suitable for him. Mr Smith relied on the claimant not having applied for any of the vacancies but there had been no discussion with the claimant on the fact that the claimant had not applied for any of the available vacancies or on his reasons for not having done so. There were no contemporaneous notes recording any considerations made by Mr Smith in concluding that none of the vacancies were suitable to be offered to the claimant. There were no contemporaneous notes showing the considerations said to have been made throughout the consultation. There was no evidence of the considerations made by Mr Smith in his determination that none of the alternative employment opportunities within the respondent's organisation as at 31 March 2015 were suitable for the claimant. There were no minutes of meetings between the claimant and Mr Smith. There was no explanation given in evidence for there having been no consideration of utilising the 20% funding from the Big Lottery as a means of continuing the claimant's employment with the respondent at least to the extent of that funding. The respondent's representative's submissions were that an argument that the claimant was part-funded by the Big Lottery funding (or that he could have done the work of Mr White or *vice-versa*) was not enough to take the decision to have a redundancy selection pool of one outwith the band of reasonable responses. There was no explanation given in the respondent's representative's submissions for the failure to consider the 20% funding from the Big Lottery as a means of continuing the claimant's employment with the respondent to any extent. There was no explanation given for the failure to notify the claimant of any right to appeal the decision to terminate his employment by reason of redundancy. There was no evidence before the Tribunal of any steps taken by the respondent to seek to resolve the tensions in the workplace which had arisen as a result of the claimant having done the protected act. There was no evidence before the Tribunal of any steps taken by the respondent to seek to resolve the difficulties which had arisen between the claimant and Mr Smith as a result of the claimant having done the protected act.

46. **On the application of the Barton guidelines, the Tribunal concluded that Mr Smith's actions were in part influenced by the funding application which had been made by the claimant, including that the claimant had sought an unauthorised increased budget in that funding application. Mr Smith's decision to dismiss the claimant was also in part influenced by the claimant having done the protected act and the tensions in the workplace and souring of the relationship between the claimant and Mr Smith which occurred because of that protected act having been done. The Tribunal did not accept as a sufficient explanation the respondent's representative's submissions that the respondent had genuine and reasonable concerns about the impact of a continuing race discrimination claim on their ability to apply for and obtain funding for the project.**

47. **The Tribunal concluded that the fact that the claimant had done the protected act was not a trivial part of the background which led to his dismissal. The fact that the claimant had done the protected act was an influence which was more than trivial on Mr Smith's decision making. The fact that the claimant had done the protected act was of 'significant influence' to the primary facts and to the detriments suffered by the claimant. The detriments suffered by the claimant were the lack of proper consultation, the failure to consider alternative employment opportunities (including in particular any option of continuing the claimant's employment in line with the 20% funding which remained in place from the Big Lottery) and his dismissal. The Tribunal applied the principle of significant influence as indicated by Lord Nicholls in *Nagarajan –v- London Regional Transport* 1999 ICR 877, HL, and applied by the EAT in *Villalba –v- Merrill Lynch & Co. Inc. and ors* 2007 ICR 469, EAT and in *Garrett –v- Lidl Ltd* EAT 0541/08. The Tribunal noted the requirement that the detriment be 'because of the protected act and found that there were multiple causes for the detriments suffered by the claimant. The reasons, or multiple causes, of these detriments were that the Scottish Government funding for the OWER project had ceased; that there were issues with the claimant's bid application to the Scottish Government for extended funding of the OWER project; that the claimant had done the protected act, that there were tensions among some of the respondent's employees as a result of the claimant having done the protected act and that there had been perceived by Mr Smith to be issues in respect of obtaining further external funding as a result of the claimant having done the protected act. The fact of the claimant having done the protected**

act. The fact of the claimant having done the protected act was not a trivial part of the background

48. **Following *Nagarajan*, it was not necessary for the Tribunal to distinguish between 'conscious' and 'subconscious' motivation when determining whether the claimant had been victimised. It may be that Mr Smith subconsciously permitted the protected act to determine or influence his treatment of the claimant. What has been concluded from the primary facts is an inference that the claimant having done the protected act was a significant influence to the detriments suffered by him. It is not necessary for Mr Smith to have consciously realised that he was subjecting the claimant to a detriment because of him having done the protected act. Following Lord Nicholls in *Nagarajan*, the victimisation was 'not negative by the discriminator's motive or reason or purpose.' Lord Nicholls position in *Nagarajan* was that 'Although victimisation has a ring of conscious targeting, this is an insufficient basis for excluding cases of unrecognised prejudice … Such an exclusion would partially undermine the protection section 2 [Race Relations Act 1976] seeks to give. The Tribunal did not find that Mr Smith consciously discriminated against the claimant on the grounds of his race or victimised the claimant. The Tribunal did conclude, on the balance of probabilities, that the claimant having done the protected act was a significant influence on Mr Smith's decision to dismiss the claimant. The Tribunal found on the balance of probabilities that the respondent had subjected the claimant to detriments because the claimant had done the protected act, contrary to the provisions of section 27 of the Equality Act 2010. The claimant's claim of victimisation succeeds.**

49. **There were facts before the Tribunal which went against an inference of victimisation. There was evidence before the Tribunal that there were others within the respondent's organisation whose fixed term contract came to an end and who were also dismissed by reason of redundancy. Fiona Roberts was dismissed by reason of redundancy on 31 March 2015 because of the expiration of funding for the Close the Gap project. The Tribunal did not hear how those individuals were treated in terms of consultation, any discussion of alternative employment opportunities, or the offer of any appeal. The Tribunal did not hear evidence that any of those others had also made a projected act. The Tribunal did not hear evidence that there was an element of funding for any of those individuals obtained for work intended to be carried out by them which was in place as at the date of their termination of employment by reason of redundancy.**

50. **The respondent's representative's submissions were that following *HM Prison Service –v-Ibimidun* [2008] IRLR 940 the Tribunal is required to determine**

(a) **Whether the claimant has done a protected act**

(b) **Whether he was treated less favourably than others who did not do the protected act**

(c) **Whether he was subject to a detriment because he did the protected act.**

It was not in dispute that the claimant had done the protected act. The claimant was treated less favourably than others who did not do the protected act. Alan White was not dismissed, although he was not a direct comparator in all material circumstances. The Tribunal drew an inference from the primary facts that the claimant had been subjected to a detriment because the claimant had done the protected act. The Tribunal did not accept the respondent's representative's submissions that the victimisation claim requires only a consideration of the claimant's treatment against a comparator who is an appropriate comparator in terms of there being no material differences. The respondent's representative's submissions on the victimisation claim were based on there being material differences between the claimant's circumstances and those of Mr White. The respondent's representative also relied on Fiona Roberts having not made a protected act and being dismissed in ' … the same circumstances …' as the claimant. The Tribunal invited the parties' representatives' submissions on the three points raised by the Tribunal at the first members meeting. The Tribunal accepted in part the respondent's submissions that there is a distinction between cases where the alleged detriment has a connection to the protected act but is not 'because' of it from those cases where the detriment is directly because of the

protected act. The respondent's representative relied on *Chief Constable of West Yorkshire Police –v- Khan* [2001] IRLR 830.

51. The respondent's representative's submissions were that in circumstances where there is, on the fact of it, a non-discriminatory reason for the claimant's dismissal (that is, that he was redundant given the ending of the funding of the project on which he was employed) then there requires to be very strong evidence that the protected act or his race had any influence at all on the claimant's dismissal, let alone 'significant' influence, or that there had been any form of unconscious discrimination. The Tribunal did not accept the respondent's representative's submissions that the issues of significant influence and unconscious discrimination should not be addressed on the basis that the case advanced by the claimant was that the respondent and specifically Mr Smith had consciously and deliberately discriminated against and/or victimised the claimant. The Tribunal concluded that there were primary facts from which an inference of victimisation could be drawn and has set out these primary facts."

5. In relation to the race discrimination claim and insofar as the Tribunal's reasoning has relevance to this appeal it is in the following terms:

"There were no facts from which the Tribunal could conclude that there was direct discrimination against the claimant because of his race. There was no evidence on which the tribunal could conclude that if the claimant had been of a different race then he would have been treated differently. The Tribunal accepts the respondent's representative's submissions that the claimant has led no evidence from which the Tribunal could conclude that the difference in treatment was on the grounds of race. Other employees, who did not share the claimant's protected characteristic, were treated similarly by being dismissed on the expiration of their fixed term contracts. If all the circumstances had been the same for an actual or hypothetical comparator (including that they had made a protected act) then there would have been the same outcome of dismissal. The Tribunal accepted the respondent's representative's submissions that Mr White was not a suitable comparator in terms of the Equality Act 2010 section 23 as there were material differences between him and the claimant. Mr White was not a direct comparator because Mr White had not made a protected act. It was the respondent's representative's submissions that had the funding for 'Mr White's project' (the EMWS project) not been renewed, then he would also have been dismissed. An employee of a different race to the claimant (Fiona Roberts) was also dismissed by reason of redundancy on 31 March 2015 on the expiration of the funding for the project on which she worked. The Tribunal accepts the respondent's submissions that there requires to be evidence from which the Tribunal could draw an inference that race was the reason for the difference in treatment *(Madarassy –v- Nomura International* [2007] IRLR 246. There was no evidence from which the Tribunal could draw an inference that the claimant's race was the reason for different treatment. There was no evidence on which the Tribunal could draw an inference of unconscious or subconscious direct discrimination. The claim of race discrimination is separate from the claim of victimisation for having done the protected act. The claimant was not subjected to any detriment on the grounds of his race. The claim of race discrimination does not succeed and is dismissed."

The respondent's arguments on appeal

6. Mr Stubbs for the respondent advanced four grounds of appeal in written and oral argument. The first related to whether the Tribunal had erred in finding that the claimant was subjected to more than one detriment. On that ground Counsel argued that Tribunal had erred in law in finding that a lack of proper consultation and a failure to consider alternative employment opportunities were detriments to which the claimant was subjected as they had not been put before the Employment Tribunal as in the category of alleged detriments by the

claimant. Mr Stubbs referred to *Tarbuck v Sainbury's Supermarket Limited* [2006] IRLR 664 at paragraphs 56, 58, 62 and 64 as authority for the proposition that each side to a litigation requires to know what the case of the other side is. Accordingly, the Tribunal was only seized of the claim and responses made in the pleadings. In *Tarbuck*, under reference to the case of *Chapman v Simon* [1994] IRLR 124, the EAT had confirmed that if the specific act of which a complaint is made is found to be not proven the tribunal cannot then find another act of which complaint has not been made and give a remedy in respect of that other act. To do so would be a breach of natural justice. Mr Stubbs narrated some of the history of the pleadings and earlier preliminary hearings to illustrate that the detriment on which the claimant had relied throughout the case in support of the section 27 claim was dismissal. He contended that had the respondent been put on notice that the detriments alleged by the claimant included the lack of consultation and consideration of alternative employment other evidence would have been adduced in relation to the other relevant employees on those issues. That would have included information and evidence about whether Fiona Roberts, a proposed comparator, had also suffered from a lack of consultation and consideration of alternative employment. The respondent does not seek to appeal the unfair dismissal finding which was contentious at the earlier hearing. However, while the lack of consultation and search for alternative employment were facts that could be used to justify the unfair dismissal claim they could not be part of the detriments claimed to support victimisation in the absence of earlier notice. In contrast with the case of *Tarbuck –v- Sainsbury's Supermarkets Limited* this was not a situation where no other evidence would have been adduced. There had been no opportunity (unlike the subconscious influence issue to which ground 4 relates) for either side to address the tribunal on the notion that the claimant had suffered detriments additional to that of dismissal. The respondent would, in addition to having led evidence, have made submissions on the point had they been permitted to do so.

7. The second ground of appeal advanced for the respondent was that the Employment Tribunal had erred in law in its approach to a *prima facie* case of victimisation having been made out and its application of section 136 of the Equality Act 2010. It was accepted that, following the introduction of section 27 of the 2010 Act, there was no need to show that the claimant was treated less favourably than others who had not performed the protected act. However, the decisions of *Igen v Walls* [2005] ICR 931 (at paragraphs 28 – 29) and *Madarassy v Nonura International plc* [2007] ICR 867 (at paragraphs 69 – 79) were still apt to support the proposition that a claimant must establish a *prima facie* case not only of the relevant fact of (in this case) a protected act and (in this case) a detriment, he must also establish a *prima facie* case of the detriment being "because of" the protected act and that an Employment Tribunal can and should take into account relevant evidence of the respondent in this analysis. Any suggestion that the way in which the initial burden of proof operated was not as set out in those two decisions has been firmly rejected by the Court of Appeal in the recent decision of *Ayodele –v- City Link Limited in Napier* [2017] EWCA Civ 1913.

8. In the judgement at paragraph 50 the tribunal brings in a comparator (Alan White) in relation to the victimisation claim in order to draw an inference for the "because of" aspect of the test in section 27. However, at paragraph 52 the tribunal records that Mr White was not of the same race as the claimant and so it was difficult to see why he could be used as support for the victimisation claim given that a comparator is necessary. It could only be to try to get over the evidential burden on the claimant. As Mr White was kept on in employment by the respondent because of continued funding, not because he had not carried out a protected act, then he was not a relevant comparator. The issue was that where other employees of the respondent had been dismissed at the end of their fixed term contracts, like the claimant, then the claimant had to show something more to prove victimisation where there was a non-discriminatory reason for his dismissal on the primary facts of the case. At paragraph 46 of the

judgment the tribunal attempts to resolve this difficulty by finding that Mr Smith's actions were influenced partly by the funding application and partly by the protected act and the souring of relationships. The tribunal goes on to find that there were multiple causes of the claimant's dismissal but that the fact that he had carried out a protected act was not a trivial part of the background. It is clear from the tribunal's findings at paragraphs 47 and 48 that only subconscious victimisation was found. It was clear from the authoritative decision in *Chief Constable of the West Yorkshire Police –v- Khan* [2001] ICR 1065 that what the Tribunal required to do was find the real reason for the dismissal. In the case of *Nagarajan –v- London Regional Transport* [1998] IRLR 73, which predated *Khan*, the Court of Appeal had also confirmed that the requirement was to look for the real reason but simply added that one could not exclude the subconscious in ascertaining what that real reason was. In the circumstances of this case all of the evidence pointed against there having been victimisation. The claimant would have been dismissed regardless of whether he had performed the protected act. Where the tribunal had erred was in failing to assess the primary facts from which it drew an inference as listed in paragraph 43 of the Judgement against the primary fact evidence of Fiona Roberts and other employees who had been dismissed as redundant when funding for their posts ceased.

9. Turning to ground 3, Mr Stubbs contended that the Tribunal's different approach to the section 13 and section 27 claims was perverse. It had erred in the approach to the evidence of whether others employed by the respondents had carried out a protected act. The only relevant comparison would have been a person who had made no complaint at all. In other words, only positive evidence that Fiona Roberts and Alan White had not made a protected act might have helped the claimant's victimisation claim and even then, only the evidence in relation to Fiona Roberts was strictly speaking relevant in this respect. The main thrust of Mr Stubb's argument on this ground was the comparison of the way in which the tribunal approached the same evidence in respect of the two claims of victimisation and direct discrimination on grounds of

race. This involved a comparison of paragraphs 44 and 45 on the one hand and paragraph 52 on the other. In its analysis of the direct discrimination claim at paragraph 55 the evidence of Fiona Roberts having also been dismissed by reason of redundancy and the expiration of the funding for the project on which she worked was used as one of the reasons for dismissal of that claim. Logically that evidence should have been used in the victimisation claim as well, yet the tribunal had ignored it for the purpose of finding whether victimisation was established. In light of the evidence that Fiona Roberts had not carried out a protected act, together with the circumstances of her dismissal, the Employment Tribunal's findings at paragraphs 49 and 50 were inconsistent and perverse. In circumstances where the tribunal had found no more than subconscious victimisation the comparator evidence was relevant because it showed that others who did not perform protected acts were treated in the same way as the claimant. Once that was appreciated then there simply was not enough in law to get the claimant into the territory of subconscious victimisation. All of the circumstances pointed to a requirement to treat the claims of victimisation and race discrimination in the same way. Had it done so, the tribunal would have realised that the claimant could not overcome the evidential burden upon him. In *Alexander-Lloyd v Chief Constable of North Hamptonshire Police* [2013] EqLR 1209 it was recognised that more favourable treatment of a comparator could provide evidence suggesting victimisation. The contrary proposition was also true such that it was perverse to find that the same treatment of the other employees indicated that there was no *prima facie* case of direct discrimination while using the same facts to reach a different conclusion in relation to the victimisation claim.

10. The final ground of appeal advanced for the respondent was that the tribunal's conclusion that the relationship between Mr Smith and the claimant had soured together with its use of the reference to Mr Smith being "frustrated" was perverse. Alternatively, the tribunal had not given any proper reason for reaching that conclusion. Mr Stubbs referred to the

relevant findings for this argument which are to be found at paragraphs 12(i), 12(q) and 30. The employment judge's notes in relation to this issue having been secured, Mr Stubbs sought to use those to contend that the evidence given at the time did not support the conclusion of the tribunal that the relationship had soured. In particular, Mr Smith's evidence was that he was not annoyed or irritated by the first claim but was simply frustrated that it was lodged because it dragged the respondent into the claimant's dispute with his union. Further the claimant had given evidence that his relationship between the others in his team (Mr White and Miss McTigue) was strained because of the First Tribunal case (the protected act) as those colleagues were not happy and did not see that it had anything to do with them. The claimant had also stated that his relationship with another employee Margaret Reid was good and that in fact the relationship with everyone other than his immediate colleagues White and McTigue was good. Helen Martin had given evidence only that she was aware of tensions in the team and there was no cross-examination or case put on the basis of the relationship between the claimant and Mr Smith in particular having soured or there had been tensions between them. In the absence of any clear evidence to support the tribunal's conclusion that relations between the claimant and Mr Smith had soured that finding was clearly perverse. Mr Smith had been anxious to resolve the tension in the team but that tension related to the claimant and others not the claimant and Mr Smith. Standing the evidential burden on the claimant, if the tribunal's finding of a soured relationship between the claimant and Mr Smith was removed from the equation it would be even harder for the claimant to establish a *prima facia* case. The basis for the finding was in any event unexplained.

11. In all the circumstances Counsel submitted that the appeal should be allowed and a decision substituting dismissal of the victimisation claim made.

<u>The claimant's response</u>

12. Mr Komorowski submitted that in relation to ground 1 there was some doubt as to what the nature of the respondent's complaint truly was. On the one hand it appeared that it was a rather technical point about the way in which the detriments had been described by the tribunal such that they had characterised the detriment as being in the plural. On the other hand, the submissions appeared to have gone so far as to suggest that it was inappropriate to look at any evidence or acts leading up to the dismissal in deciding whether the dismissal itself was an act of victimisation. Ground 1 could only have force if the respondent could go so far as to say that no consideration ought to have been given to the factors leading up to dismissal at all.

13. Mr Komorowski submitted that the Employment Tribunal was entitled to list the surrounding circumstances as primary facts. What led up to the dismissal was part and parcel of the dismissal itself. The overall finding was one of victimisation and the primary facts had all been established. In any event the respondent had been put on notice by the claimant's ET1. The claimant had alleged that there had been lack of consultation or consideration of his employment in other roles. That was a fact he offered to prove. He also alleged that he had "suffered from continuing victimisation flowing from the protected act of raising an employment claim". It was clear that the claimant was contending that the process that had led to and culminated in his dismissal was an act of victimisation. The respondent had notice of that and should have realised that in order to assess the outcome of the victimisation (dismissal) the tribunal would have to consider the surrounding facts and circumstances. The detailed narrative in the claimant's ET1 was sufficient to avoid any prejudice to the respondent in this respect. There would have to have been something unequivocal limiting the evidence that could be led in relation to the victimisation claim before the respondent could argue that it could not be included. The judges who had heard the preliminary hearings had given very brief summaries of what the case was about but there was nothing recorded that would allow the

respondent to conclude that the broad claim of victimisation had been narrowed down. It would be unlikely that the claimant would seek to do that given the restrictions it would place on his case.

14. Turning to ground 2, Mr Komorowski approached this as an argument by the respondent about how the tribunal had considered the evidence of any comparators. He submitted that the approach of the respondent was one that had failed to look fully and fairly at the Employment Tribunal's judgement. It was important to start with the long list of primary facts found by the tribunal to be sufficient, *prima facie,* to support an inference of victimisation as listed at paragraph 43. These primary facts included the threatening email that had been sent by the respondent's solicitor on the instructions of Mr Smith to the claimant in which it was said that if he did not drop his Employment Tribunal claim the respondent would not be minded to seek continued funding from the Scottish Government for his project. It was also important to note that the tribunal had not included any reference in the primary facts to the position of Mr White. The circumstances of Alan White were not primary facts leading to any inference of victimisation. When the tribunal deals with the argument about Mr White at paragraph 50, it is clearly in the context of the tribunal dealing with the respondent's submission on the comparator point. When, in that paragraph, the tribunal refers to drawing an inference from the primary facts, they cannot be referring to Mr White because he is not included in those primary facts. Even if the circumstances of Alan White were a factor in the tribunal's overall determination, his circumstances were clearly not a determining factor. In essence in relation to the victimisation claim the comparator employee Alan White was of some relevance although not a decisive fact by any means in the tribunal's overall assessment. In contrast, when looking at the race discrimination claim at paragraph 52, the tribunal had recorded unequivocally that Mr White was not a direct comparator because he had not made a protected act. In other words,

in looking at the race discrimination claim, a relevant comparator would be one who did not share the claimant's protected characteristic but who had also made a protected act.

15. So far as Fiona Roberts was concerned Mr Komorowski submitted that the tribunal's words in paragraph 49 in relation to that employee should be read and given their ordinary meaning. The paragraph involved the tribunal giving appropriate weight to evidence that went against an inference of victimisation. Having done that its conclusion was that the evidence that pointed the other way, in support of victimisation, was stronger. Thus the primary facts in this victimisation claim outweighed any strength of the comparator evidence. In contrast, in the race discrimination claim the primary fact did not support an inference of race discrimination and the comparator evidence was one of the reasons for that. So far as the reference in parenthesis in paragraph 52 is concerned that suggests that any actual or hypothetical comparator would also have been dismissed including where they had made a protected act, this was just the tribunal's way of distinguishing the race discrimination claim where the protected act aspect was not relevant. The most significant difference between the victimisation claim and the race discrimination claim was that in the former there was direct evidence of animus by Mr Smith towards the claimant because of the protected act carried out earlier by Mr Hakim. The email sent on Mr Smith's instructions and the evidence that relationships between him and the claimant had been soured were factors that were not present in respect of the race discrimination claim.

16. There was nothing inconsistent in concluding that dismissal of certain employees was because of the cessation in project funding but also that the claimant's dismissal was found to be victimisation. As the tribunal had held that there were multiple causes for the claimant's dismissal it was sufficient for it to go on to find that victimisation was a significant, possibly subconscious, influence on the decision to dismiss. That was the clear difference between the claimant's situation and those of and that of any other employee. So far as the point about

evidence of other employees not having carried out a protected act was concerned, it was accepted that there was evidence that Fiona Roberts had not carried out any protected act and that was consistent with there being no evidence of any other employees having done so. It was submitted that this was not an adminicle of evidence helpful to the respondent. What the tribunal had done in this case was asked itself the correct question, namely whether the claimant was subjected to a detriment because of the protected act. That was in accordance with the approach commended in *Woodhouse v West North West Homes East Limited* [2013] IRLR 773.

17. Turning to ground 4, Mr Komorowski submitted that there were general difficulties with the respondent's approach to this argument. There had been a failure to acknowledge that as an appeal to the Employment Appeal Tribunal can only be made on a point of law, arguments about what inferences should have been drawn from the evidence could not properly be made. Only where there was no evidence to support a conclusion made by the tribunal of first instance could an appeal succeed on this point. Secondly, as with all appeals, it should not be overlooked that this tribunal heard and saw all of the witnesses and assessed how they gave their evidence, what their demeanour was, and how they treated and responded to certain adminicles of evidence such as the threatening emails sent on Mr Smith's instructions. The "piecing together" of all that evidence was a matter for the fact-finding tribunal. Accordingly, there was no legal basis on which the respondent could say that the tribunal could not find that relations had soured between the claimant and Mr Smith. There were passages in the evidence that allowed them to reach that conclusion. Reference was made, for example, to parts of the judge's notes in which the threatening email is recorded, where there was evidence about the respondent encouraging the Scottish Government not to fund any organisation found to have a discriminatory policy, and evidence of Mr Smith saying that he wanted to ensure the claimant knew there would be consequences if the employment tribunal case continued. Further, there was clear evidence of tension in the team and Mr Smith as General Manager was of course in

charge of that team. It was perfectly appropriately for the Employment Tribunal to understand the evidence as meaning that the relationship problems included the Line Manager. In relation to the issue of whether the evidence went beyond Mr Smith being frustrated, when it was put to him that he was annoyed and irritated he denied that but said that he was frustrated. The tribunal records that he had gone so far as to admit frustration but it is clear from the judgement that the tribunal (which had preferred the claimant's evidence over that of Mr Smith where it differed) had concluded that it was much more than that in terms of his feelings towards the claimant. Accordingly, the Employment Tribunal was entitled to infer that the relationships in the team, strained as they were, had stretched in a negative way to the Line Manager. The claimant himself had talked of being "very isolated" and his references in the evidence to his colleagues could easily include Mr Smith. The tribunal was well entitled to draw the broader influence that the relationship between the employee and his Line Manager had been significantly affected by the protected act.

18. Mr Komorowski submitted that the appeal should be dismissed, although if it was allowed to any extent he suggested that a remit back to the same tribunal was required. For example, if a single finding such as the soured relationships between the claimant and Mr Smith had not been justified then the tribunal could be asked for further reasons on that. Alternatively if any other grounds succeeded the case could be remitted back to the tribunal to see whether they would have reached the same decision or not.

<u>The respondent's reply</u>

19. In a brief reply Mr Stubbs submitted that on ground one it did make a difference if the tribunal elevated facts to a detriment as opposed to simply backgrounds facts because the respondent would then approach the matter differently. The claimant's reference in the ET1 to

the redundancy pool of one or two didn't assist him because that could relate to Mr White. Further, in relation to the October 2014 letter, any submission on that had to be restricted to the particular finding made about that at paragraph 11 rather than the views of another employment judge. Finally, in relation to Fiona Roberts, as it was accepted that she had not made a protected act the significance of that finding was that others were treated in the same way as the claimant without there being any evidence of a protected act or otherwise. Mr Stubbs submitted that if the disposal did not result in a substituted finding of the victimisation claim being dismissed it was likely that any remit to the tribunal would require more evidence, particularly in relation to ground 1.

Discussion

20. All of the respondent's challenges relate to the application of section 27 of the **Equality Act 2010** to the facts of this case. That section, insofar as material to this discussion provides;-

" ..(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 A has done, or may do, a protected act…..".

The respondent's first ground of appeal is essentially a complaint that they had no fair notice of the claimant's reliance on pre dismissal actings on the part of the respondent as " detriments" and that they had relied, in the presentation of their case, on dismissal being the only alleged detriment suffered. Reliance is placed on the decision in **Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664** and in particular the EAT's statement (at para 62) that *"… it is a fundamental principle of natural justice that a party should have the right to make submissions on any issue which is the subject of the dispute and in relation to which adverse findings may be made."* The issue in this case is whether the pre dismissal actings on the part of the employer were something they had notice would be discussed before the tribunal and on which they had the opportunity to make submissions. As a starting point, the claimant's ET1

gave notice of the victimisation claim in the following way; - *"In addition, it is submitted that the claimant has suffered from continuing victimisation flowing from the protected act of raising an Employment Tribunal claim in 2014."* It is not in dispute that the claim in question was raised in May 2014 and the claimant was dismissed on 31 March 2015. Accordingly, the ten month period from the raising of the claim until the date of dismissal was a relevant timeframe for evidence and about which the Tribunal required to make findings. Of course the claimant had described the dismissal as the detriment on which he relied and but for his dismissal there would have been no victimisation claim. However, unlike the **Tarbuck** case, where an adjustment not identified in the original claim was considered by the tribunal without reference to parties, in the present case the claimant had complained from the outset of *" continuing victimisation"* and so the respondent had notice that the background to his dismissal would be explored in evidence.

21. Further, the tribunal clearly understood that dismissal was the primary detriment complained of. In paragraph 47, the very section about which the respondent complains, the tribunal states that " *…. The fact that the claimant had done the protected act was not a trivial part of the background which led to his dismissal"* thus identifying the dismissal as the ultimate culmination of the behaviour complained of. The claimant's points about a lack of consultation or offer of alternative employment and the unfairness of being placed in a redundancy selection pool of one person were all foreshadowed in the claim form as part of the narrative and these were issues that the respondent had an opportunity to contest. In those circumstances, the tribunal's labelling of the pre dismissal acts as detriments, or perhaps more accurately as subsets of the primary detriment of dismissal, resulted in no prejudice to the respondent. The tribunal required to assess all of the evidence led, which included all of the actings of the respondent's witnesses and the claimant during the material ten month period. The overall finding of victimisation was one that had been pled from the outset and which included

consideration of the various ways in which the respondent could have acted to avoid dismissal had the protected act carried out by the claimant not been an influencing factor. In the absence of any objection from the reposndent as to the relevance of that evidence, the tribunal required to make findings on it. Nothing turns on the use of the plural " detriments" in the particaulr circumstances of this case because the additional background factors included as detriments were part of the process (or rather lack of it) leading to dismissal itself. In the particular circumstances of this case as pled the tribunal was entitled to regard the lack of consultation and failure to consider alternative employment opportunities as included within the detriment suffered. The first ground of appeal fails.

22. Turning to the second ground of appeal, there is no dispute about the correct legal approach. The claimant must establish a *prima facie* case of the act that he says led to the detriment (the protected act) and that the detriment resulted from that. Only then does the initial burden of proof shift from him to the respondent. In **Igen v Wong [2005] ICR 931** at paragraph 29, Gibson LJ referred to the facts of alleged racial discrimination in terms of the difference in treatment and that it was done on racial grounds as being *"…facts which the complainant, in our judgment, needs to prove on balance of probabilities…"*. Only once that is done can an inference be drawn. Of course, the respondent might choose to give evidence and in considering whether there is sufficient evidence the tribunal should, as Mummery LJ emphasised in **Madarassy v Nomura International plc [2007] ICR 867** at paragraph 29, have regard to all the evidence, whether given by complainant or respondent, to then see what inferences can be drawn. The argument in the present appeal is that the tribunal went to some lengths to overcome an absence of *prima facie* evidence of victimisation by failing to take account of primary fact evidence pointing away from there having been victimisation and the seemingly inconsistent use of a comparator for this aspect of the claim and the rejection of the same

individual as an appropriate comparator for the unsuccessful race discrimination claim. This requires some assessment of how the tribunal dealt with the evidence on the section 27 claim.

23. The relevant paragraphs of the judgment are 43-51 inclusive and these are set out in full at paragraph 4 hereof. The tribunal listed 24 findings in fact that it concluded were sufficient to draw an inference that the respondent had subjected him to a detriment because the claimant had carried out a protected act. There followed an assessment of whether the respondent had proved any explanation that would discharge the burden that had shifted to show that a different inference should be drawn. As Mr Komorowski pointed out, the primary facts on which the tribunal relied for its conclusion at the first stage included the email sent to the claimant by solicitors on Mr Smith's instructions on 6 October 2014 which stated in terms that the respondent would not be inclined to seek permission to extend certain employment contracts (including that of the claimants) or apply for further funding for the One workplace project while the litigation initiated by the claimant (the protected act) was ongoing. That evidence, in the context of the events that culminated in the claimant's dismissal, clearly went some way to the establishment of a *prima facie* case of victimisation. That there were sufficient facts proved by the claimant to establish victimisation is stated in terms by the tribunal at paragraph 44. The reference to Alan White, in paragraph 50, is made in the context of tribunal recording and then dealing with the respondent's submissions. The tribunal required to deal with those arguments, notwithstanding the conclusion it had already reached on the primary facts. It is clear that paragraph 50 is part of an analysis by the tribunal, which starts at paragraph 49, that acknowledges that there are factors for and against and inference of victimisation. The significance, if any, of the treatment of those who had not carried out a protected act was part of that analysis. The tribunal's view was that Alan White was not a direct comparator in all material circumstances and so the fact that he had not carried out a protected act and was not dismissed did not weigh heavily in the decision. Fiona Roberts had not carried out a protected

act and was dismissed and it is apparent that the tribunal gave that due consideration. The respodnent's argument about Fiona Roberts is recorded in the section were the tribunal acknowledges the distinction between a detriment having a connection to a protected act and where the detriment is " because of" the protected act. Standing the strong evidence about the respondent's threatened actions arising from the claimant's protected act, the tribunal required to consider the evidence carefully and determine whether the clamant had been victimised as a result of the earlier litigation or whether the treatment was not " because of" that earlier act. Consideration of the undisputed fact that Fiona Roberts had also been dismissed was part of that difficult consideration. It cannot be said that the tribunal failed to consider this aspect as it is specifically taken into account. Nothing in the judgment suggests that the tribunal derogated from its responsibility to find the real reason for the dismissal as required by **Chief Constable of the West Yorkshire Police v Khan [2001]ICR 1065.** Accordingly, I do not consider that the second ground of appeal identifies any error of law.

24. The third ground of appeal contends that the Tribunal's different approach to the section 13 and section 27 claims was perverse as offending logic. The Tribunal knew that Fiona Roberts had not carried out a protected act and that she too had been dismissed. How then could it could conclude that the claimant had been discriminated against, albeit subconsciously, but Fiona Roberts had not? She had not been treated more favourably than the claimant. While this argument is superficially attractive, I have concluded that Counsel for the claimant was correct to submit that there is no inconsistency in concluding that, when examining the dismissal of two employees, one dismissal was simply because of termination of funding for the project and one was for a number of reasons, including victimisation, which was a significant factor in the decision. In other words, Fiona Roberts and the claimant were not treated the same because the decision to dismiss Ms Roberts was for reasons that could not be challenged and were fair. In contrast, the decision making on the claimant's dismissal was tainted by the subconscious

influence of victimisation. The question is whether the Tribunal asked itself the right question. In **Woodhouse v West North West Homes Leeds Limited [2013] IRLR 773,** the Tribunal's decision to dismiss a claim of victimisation was successfully appealed. One of the reasons for the successful appeal was that *".....the Employment Tribunal had not asked itself the right question, namely whether the dismissal had been because the appellant done (sic) a protected act. Instead it had sought to distinguish how the respondent had reacted to the Appellant by comparison with how it might have reacted to an hypothetical comparator. This…….obscured any analysis of the relative weight to be given to the protected act as a cause of the detriment.."* (HHJ Hand QC at para 59). In contrast in the present case, the Tribunal asked itself whether the claimant had been dismissed "because of" his having carried out a protected act and found that, although that was not the sole reason it was a " more than trivial" one, having regard to the subconscious influence his actings had on Mr Smith's decision making. That was the correct approach. Ultimately, it did not matter that the end result for Fiona Roberts was the same ; she was treated more favourably in that the decisions relating to her employment were untainted by victimisation.

25. In any event, having regard to the fact that the Tribunal's examination of this issue took place against a background of the claimant having established the primary facts and the burden of proof having shifted to the respondent, it is clear that the absence of evidence to negate the inference of victimisation was an important factor. The Tribunal could not be satisfied that Fiona Roberts was treated in the same way as the claimant as the respondent omitted to lead any evidcne of that. The Tribunal's repeated references at paragraph 49 to not having heard evidence on various points are illustrative of the respondent having failed to discharge the shifted burden. It is clear form that passage that the Tribunal was careful to consider the nature and extent of the comparator evidence in this context. The position in relation to the race discrimination claim differed, in that the Tribunal found (at para 52) that there were no facts

from which it could conclude that the claimant was treated differently on the ground of his race. It was accepted that, as the respondent submitted, the claimant had not led sufficient evidence on that matter such that an inference of race discrimination would be drawn unless the respondent led satisfactory evidence to the contrary. That was the critical difference between the two claims and so there was a rational basis for the divergent conclusions on each. The high hurdle for perversity is not met.

26. The fourth and final ground of appeal represents an attack on the way in which the Tribunal dealt with certain evidence. It was said that the evidence did not support a conclusion that the relationship between the claimant and Mr Smith had "soured", nor that Mr Smith was "frustrated". Various passages of evidence were referred to and the Employment Judge's notes had been recovered and were examined. Standing the limitations on the scope of an appeal to this Tribunal, Mr Stubbs again characterised his argument on this point as one of perversity, although there was also a suggestion that the judgment was not **Meek** compliant. In my view, where a judge's notes are recovered these must, in the event of any dispute as to what occurred, take precedence over the notes taken by either side. To the extent that Counsel for the respondent sought to rely on answers given in part of the re-examination of Mr Smith where there was no note by the Employment Judge, I cannot take into account what it is claimed by one side that the witness said, particularly as the Judge has not been asked whether something of that nature could be missing from her notes. Only if notes taken by one side were agreed as accurate and comprehensive by the other side could I rely on them (**Aberdeen Steak Houses Group plc v Ibrahim [1988] ICR** 550).

27. On the matters on which there is recorded evidence, I have concluded that the respondent's argument fails to acknowledge the difference between primary facts and the conclusions drawn from those facts. There was evidence before the Tribunal that supported the conclusions (i) that relations had soured and (ii) that Mr Smith was frustrated. That included

evidence of concerns and tensions, spoke to by Mr Smith, as a result of the claimant's protected act (the raising of Tribunal proceedings). The Tribunal found that the cliamnt's actions had led to difficulties " *..within the respondent's organisation"* not just within the " One Workplace" team. IN any event, as manager, any tensions within the team would be something that he would have to deal with. Against a background of those tensions, the "threatening" email was sent to the claimant on Mr Smith's instructions (ET, Para 12(j)). The judge's notes record that Mr Smith said in evidence that in doing so he had wanted to ensure that the claimant knew that there may be consequences if the case continued. Under cross examination it was put to him that he was annoyed and irritated by the Tribunal (claim) being lodged and he replied " *No. Frustrated, didn't believe necessary. Drawn into dispute with individual".* Accordingly, the judge had made a note that Mr Smith had admitted being frustrated. While he had denied that it went beyond that, the Tribunal was entitled to infer that it did and to conclude that his own relationship with the claimant had been affected. The claimant's own evidence supported that conclusion. Quite apart from the point made by Mr Komorowski that it was for the Tribunal, as first instance fact finder, to draw appropriate inferences from the evidence and the primary facts found, the Tribunal had specifically concluded that Mr Smith was a less credible and reliable witness than the claimant (ET paras 16 and 20). Accordingly, his denial of annoyance with the claimant as something that the Tribunal was entitled to reject, particularly as it did not sit well with his determination to make the claimant aware of what might happen if he did not drop his claim. The claimant had spoken of being very isolated at work and of the effect the email Mr Smith had instructed be sent had on him. He did not distinguish between Mr Smith and colleagues in his team in stating that relationships had been affected by his making a claim. There was ample material on which the conclusions of (i) Mr Smith being frustrated and (ii) the relationship between him and the claimant having deteriorated could be based. The use of the expression "soured" was not an inappropriate one to encapsulate the Tribunal's conclusion on this.

28. On the issue of whether the Tribunal gave adequate reasons for the conclusion that the relationship had soured, that conclusion (at para 12(i)) must be read in the context of the findings that precede and surround it. Subparagraph 12(i) records the difficulties in working relationships within the organisation that resulted from the claimant's protected act, the associated tension, Mr Smith's view that the claimant should not have raised the claim and his perception of the risk to the organisation from the claimant's actions, which resulted in at least "frustration". Those were the primary reasons relied on, but the Tribunal goes on to set out the terms of the email sent to the claimant, which supports a conclusion that Mr Smith's response to the claimant was not to participate in constructive dialogue but to instruct a solicitor's letter. When the Tribunal's conclusion on this issue is read in context, I conclude that it is adequately supported by reasons. The fourth ground of appeal cannot succeed.

Disposal

29. For the reasons given, none of the respondent's four grounds of challenge persuades me that the Tribunal's judgment is illustrative of material error. The appeal will be dismissed.