Appeal No. UKEAT/0276/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 July 2018
Judgment handed down on 22 August 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR R A SAAD — APPELLANT

SOUTHAMPTON UNIVERSITY HOSPITALS NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS REBECCA TUCK (of Counsel) Bar Pro Bono Scheme
For the Respondent	MR DESHPAL PANESAR (of Counsel) Instructed by: DAC Beachcroft LLP Portwall Place Portwall Lane Bristol BS1 9HS

SUMMARY

VICTIMISATION DISCRIMINATION - Other forms of victimisation

Victimisation - section 27(3) ***Equality Act 2010***

In 2011, when facing the likelihood that he would fail the assessment required to qualify as a Consultant Cardiothoracic Surgeon, the Claimant raised a grievance regarding a (race) discriminatory remark alleged to have been made some four years previously. Although the ET held there were no reasonable grounds for his believing the allegation to be true (relevant to the Claimant's protected disclosure claim), it accepted that he had subjectively believed that it was. In raising this matter as a grievance, however, the ET found that the Claimant had intended this would mean the assessment - which he knew would go badly for him - would be postponed. This, the ET concluded, meant he had not raised the allegation in good faith, as was then a requirement for the purposes of a protected disclosure claim. The ET duly dismissed the Claimant's whistleblowing complaints in this regard. Turning to the complaint of victimisation, in which the Claimant relied on the same allegation as a protected act for the purposes of section 27 **Equality Act 2010**, the ET concluded that its earlier findings in respect of the protected disclosure claim also meant the victimisation claim failed. Specifically, it was fatal that it had found that the Claimant's belief was unreasonable and that he had an ulterior motive, which meant he had not made the allegation in good faith. Those findings, the ET ruled, meant that the Claimant had acted in bad faith for the purposes of subsection 27(3) **EqA**.

The Claimant appealed, arguing the ET had erred in reading across from its findings in respect of the protected disclosure claim when determining the complaint of victimisation. Moreover, as the ET had found he had subjectively believed the truth of the allegation, it was not made in bad faith, regardless whether he had an ulterior motive.

Held: *allowing the appeal*

The ET had erred in law in reading across from its finding of absence of good faith for the purposes of the Claimant's protected disclosure claim to its determination of bad faith under section 27(3) **EqA**. The two statutory contexts were different and the ET had failed to engage with the specific questions raised by subsection 27(3) **EqA**. It had made no express finding as to whether the allegation was false (although that was probably implicit) and, more significantly, it had failed to tackle the specific question raised by the bad faith requirement under subsection 27(3) which, absent other context, had a core meaning of dishonesty (observations of Auld LJ at paragraph 41 **Street v Derbyshire Unemployed Workers' Centre** [2005] ICR 97 CA, applied). Motivation could be part of the relevant context but, in determining bad faith for the purposes of subsection 27(3) **EqA**, the primary focus was the question of the employee's honesty.

Although the assessment of bad faith was for the ET, in the present case the finding that the Claimant subjectively believed the allegation to be true was sufficient to counter the suggestion that he had acted in bad faith. On the ET's other findings, that meant the claim of victimisation in this regard must be upheld.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal concerns the definition of "bad faith" for the purposes of subsection 27(3) **Equality Act 2010** ("the EqA"); specifically, whether the Employment Tribunal ("ET") erred in answering this question by reading across from its approach to the (former) "good faith" requirement relevant to a protected disclosure claim under the **Employment Rights Act 1996** ("the ERA").

2. In giving this Judgment I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal against the Reserved Judgment of the Southampton ET (Employment Judge Bridges, sitting with members Mrs Date and Mr Evans between 24 April to 4 May 2017, with a further four days in chambers for deliberations), sent to the parties on 8 June 2017. The Claimant appeared in person below but, at an Appellant-only Preliminary Hearing and at this Full Hearing, has had the benefit of representation by Ms Tuck of counsel (initially acting through the Employment Law Appeal Advice Scheme; today instructed by the Bar Pro Bono Unit). The Respondent was represented before the ET by Mr Panesar of counsel, as it is today. By its Judgment the ET dismissed all but one claim pursued by the Claimant. At this stage I am only directly concerned with its dismissal of the Claimant's complaint of victimisation, brought under section 27 **EqA**, but it is relevant to note that the ET also dismissed the Claimant's protected disclosure claims, brought under the **ERA**.

3. The Claimant's appeal as initially drafted included numerous grounds which were all rejected by Mr John Cavanagh QC (sitting as a Deputy High Court Judge) at the earlier Preliminary Hearing. With Ms Tuck's assistance one point was, however, identified and

permitted to proceed, raising the following question of law: whether the ET erred in law by using the test for whether a public interest disclosure has been made in "good faith", to consider whether what would otherwise be a "protected act" has been made in "bad faith" for the purposes of section 27(3) **EqA**.

4. The Respondent resists the appeal, essentially relying on the ET's reasoning.

The Background Facts

5. The Claimant was a Specialist Registrar, who was training to become a Cardiothoracic Consultant. He had been allocated a national training number ("NTN") in June 2002 and had transferred to the Respondent's Cardiothoracic Unit ("the CTU") in December 2003.

6. The training programme for Specialist Registrars involves continuous and rigorous assessment through a series of training placements, on fixed term contracts, in training hospitals in the National Health Service. The training is overseen by Health Education England ("the HEE") - usually referred to as "the Deanery" - and is normally expected to take six years, following two years of core surgical training. The Respondent's CTU came under the HEE's Wessex Deanery.

7. The Claimant's training programme with the Respondent saw him undertake a series of rotations with various Consultants employed in the CTU. It did not proceed entirely smoothly and, in December 2006, one of the Respondent's Cardiothoracic Surgeons (the then Training Programme Director for the CTU), Mr Tsang, referred the Claimant to the Professional Support Unit ("PSU") within the HEE because he was not making sufficient progress. The Claimant was assigned a PSU case manager, Ms Lusznat, who provided him with confidential support

and accompanied him to his next Record of In Training Assessment ("RITA"). Although the Claimant spoke to Ms Lusznat about what he perceived to be unfair treatment towards him within the CTU, he made clear he did not want to take any action at that stage.

8. From February 2008 to July 2009, the Claimant undertook 'out of programme' experience in a different Deanery. Upon returning to the Respondent, he progressed sufficiently well to be signed off to sit the FRCS CTh examination, and in July 2010 he passed part 1 of the exam, coming top nationally and going on to pass part 2 in October 2010.

9. The Claimant's last rotation took place in Adult Cardiac Surgery, from January to June 2011. By this time, the CTU Training Programme Director was another Consultant, Mr Ohri.

10. On 19 April 2011, the Claimant met again with Ms Lusznat and told her he felt bullied by Mr Tsang, although he did not want to pursue a complaint. He further recounted how he felt he was being treated unfairly and wanted an independent review of his progress; in particular, he said he had overheard a conversation between Mr Ohri and Mr Tsang suggesting he would not complete his training. Ms Lusznat advised the Claimant to think carefully about the detrimental impact of a grievance; she felt he should focus on completing his training, although she made clear it was for the Claimant to make his own decision.

11. On 19 July 2011, Mr Ohri wrote to the Claimant with his Final Report for his RITA due on 22 July 2011; he stated he did not feel able to recommend the Claimant for an award of a RITA G (a pass) but only a RITA E, which would mean the Claimant had failed his training.

12. When subsequently considering his complaints, the ET recorded that the Claimant was aware that he had made some serious mistakes while operating during his training (see as detailed by the ET at paragraph 84 of its Reasons). It was also satisfied that, over a period of some three months, Mr Ohri had provided balanced feedback to the Claimant in an attempt to help him reach the required standard; the feedback forms completed by Mr Ohri had detailed incidents when the Claimant had failed to reach a satisfactory standard, or had made errors (including one critical incident), but had also provided positive feedback when the Claimant had dealt with matters well (see the ET at paragraph 85). The Final Report had, moreover, been written in the context of the Claimant having undergone his last six months' rotation with Mr Ohri, who had thus been able to assess the Claimant's skills first-hand. By this stage, the Claimant had been in training for approximately nine years (rather than the standard six-year period) and the ET accepted that Mr Ohri was concerned about the Claimant's lack of consistency at this stage of his training as regards his operating skills and performance.

13. On 21 July 2011, the Claimant raised a grievance with Dr Simon Plint, the Post Graduate Dean at HEE Wessex. He made various complaints, including specific allegations of bullying and insulting behaviour on the part of Mr Tsang. One allegation related back to an incident said to have occurred on 13 July 2007, when the Claimant contended Mr Tsang, while operating in front of others, had made jokes about the Claimant's ethnic background (he is from a Sudanese background), describing him as "*... a terrorist looking person*"; more specifically, the Claimant alleged that Mr Tsang had likened him "*... to the doctors who carried out the terrorist attack in Glasgow airport in 2007*". The Claimant also complained about Mr Ohri's Final Report and requested an external independent investigation of his complaints. In the meantime, he did not feel able carry out his clinical duties while the investigation was on-going

A and he subsequently went on sick leave. In August 2011, the Claimant was diagnosed with work related stress; he never returned to work with the Respondent.

B 14. On 6 September 2011, the Claimant met with Dr Plint and Professor Shearman (Head of the School of Surgery) and said he would be prepared to withdraw his complaints if he was placed elsewhere. Dr Plint explained, however, that the Deanery had a duty to investigate the complaints, although it was agreed the Claimant would not return to the Respondent and the C Deanery would investigate whether it was possible for him to transfer elsewhere.

15. On 13 October 2011 the Claimant presented his first ET1, complaining of race D discrimination and protected disclosure detriment.

16. Subsequently (after an investigation and four separate hearings), by letter of 2 E September 2012, the Claimant was informed that his grievance was not upheld, albeit certain recommendations were made for improvements in training.

17. On 25 September 2012, the Claimant was notified that his current fixed term contract F would expire on 30 September 2012 and would not be renewed.

18. On 9 November 2012, the Claimant presented his second ET1, claiming unfair dismissal G and disability discrimination.

19. Also in November 2012, the Respondent's CTU Consultants unanimously decided against the Claimant returning to work at the CTU. Further, on 13 December 2013, the RITA H panel - the panel that had been due to take place in July 2011 but had been postponed pending

the outcome of the Claimant's grievance - was reconvened; it determined that the Claimant had failed and should be removed from the training programme and should have his NTN withdrawn. The consequence of this was that the Claimant could not qualify as a Consultant Cardiothoracic Surgeon in the United Kingdom. The Claimant exercised his right of appeal against this decision but was unsuccessful; that decision being confirmed in an outcome letter of 12 August 2014.

20. At a case management hearing before the ET on 30 November 2016, the Claimant clarified that his claims included a complaint of victimisation under the **EqA**, largely overlapping with his complaints of protected disclosure detriments; he did not, however, rely on his dismissal by the Respondent as an act of victimisation.

The Victimisation Claim: the ET's Decision and Reasoning

21. The Claimant had relied on the comment allegedly made by Mr Tsang (as particularised in his grievance letter of 21 July 2011), likening him to the Glasgow Airport terrorist, as an incident of racial and/or religious abuse and discrimination; he relied on his grievance in this regard as both a protected disclosure and a protected act. The Respondent did not dispute that this was a disclosure of information (relevant for the Claimant's protected disclosure claim) and agreed that it was a protected act, for the purpose of his victimisation complaint, "*subject to the good faith issue*".

22. The ET considered the evidence as to what had actually been said on 21 July 2011, recording as follows:

> **"79. In the claimant's testimony he told us that this incident was witnessed by Dr Ahmed and Mr Ooi who were both Specialist Registrars in training and present in the operating theatre with Mr Tsang. The claimant was not present when the alleged comment by Mr Tsang was made and had left the operating theatre. The evidence was not clear as to the circumstances in which the claimant was first informed of this allegation, including by whom and when. Although the claimant's testimony appeared to suggest that it was Mr Ahmed who told the**

> **claimant about this incident, at the grievance hearing before Dr Waller the claimant stated that it was about Mr Ooi who was in theatre at the time of the alleged comments and who told the claimant about the remarks and encouraged him to complain about them (1210). However, when Mr Ooi sent a statement of 16 April 2012 to Dr Stubbing as part of the investigation Mr Ooi confirmed that he did not witness any such alleged remarks of racial discrimination and that Mr Tsang's comment was misinterpreted (1210 and 949). In Mr Ahmed's statement during the investigation (260) he confirmed that in July 2007 he was assisting Mr Tsang and that Mr Ooi was present. Mr Ahmed confirmed in his statement that, after the claimant had left the theatre, Mr Tsang stated that the claimant resembled one of the terrorists involved in the Glasgow Airport bombing and then made a joke about Mr Saad's CRB fitness and then asked Mr Ahmed if he had had a recent CRB check. Mr Tsang was the only live witness we heard testimony from in relation to this incident and he denied making these comments."**

23. The ET accepted that the Claimant had subjectively believed that Mr Tsang had made the comment in issue but found that his belief had not been reasonable, reasoning as follows:

> **"80. The test of what is a "reasonable belief" involves an objective standard and whether that belief was reasonable. However, a person may satisfy this objective test even if that belief turns out to be wrong. We found that, on the balance of probabilities, the claimant did not have a reasonable belief in this allegation. The claimant first raised this matter as a complaint approximately four years later in this grievance letter of 21 July 2011. Moreover, during the investigation and/or grievance hearing the claimant stated it was Mr Ooi who told him about the remarks and encouraged him to complain. However, the statement by Mr Ooi during the investigation contradicted the claimant's evidence. In these circumstances we found that, although the claimant subjectively believed that Mr Tsang had made this comment, the claimant has not shown that he had a reasonable belief applying the objective standard."**

24. The ET then turned to the issue of good faith, so far as that was relevant for the Claimant's protected disclosure claim. It reminded itself that the burden of proof was on the Respondent to show that the disclosure had not been made in good faith, but considered the burden had been discharged in this case as the predominant purpose of the Claimant's grievance of 21 July 2011 was his own personal interest in delaying the RITA assessment on 22 July 2011, seeking to obtain a transfer out of the Wessex Deanery and thus to rescue his career prospects as a Consultant Cardiothoracic Surgeon (see the ET's reasoning at paragraphs 82 to 87).

25. Having rejected the Claimant's protected disclosure claims, the ET addressed the claim of victimisation. It accepted that the allegation made against Mr Tsang in the Claimant's grievance was potentially a protected act within the meaning of subsection 27(2)(d) **EqA**, but

observed that subsection 27(3) provided that the making of a false allegation would not be a protected act if made in bad faith. Noting that subsection 27(3) used different language to that used for protected disclosures (sections 43C and 43F **ERA** referring to a qualifying disclosure being protected if made in accordance with those sections and "… *in good faith*"; subsection 27(3) **EqA** stating that the making of a false allegation would not be a protected act if made in "*bad faith*"), the ET considered whether there was another position - between good faith and bad faith - that would reflect its finding that the Claimant had subjectively believed that Mr Tsang had made the comment in issue, albeit that the Claimant's predominant purpose in raising the matter had been his personal interest. Ultimately, however, the ET concluded that its earlier findings in respect of Claimant's protected disclosure claims were also fatal for his victimisation complaint: the finding that the Claimant's belief in the allegation had not been a reasonable belief and was not made in good faith (the relevant findings in respect of the protected disclosure claims) meant that it was a false allegation made in bad faith for the purposes of the victimisation complaint:

> **"92. … we considered whether there was another position in between good faith and bad faith to reflect our finding that the claimant did subjectively believe that Mr Tsang had made the racial comment, albeit that the predominant purpose was his personal interest. We concluded that our earlier finding, that the disclosure of information of the racial comment in the claimant's grievance letter was not made in the reasonable belief of the claimant and was not made in good faith for the purposes of the protected disclosures complaint, meant that it was a false allegation made in bad faith for the purposes of the victimisation complaint."**

26. If that conclusion was wrong, the ET explained that it would have found that the burden had shifted to the Respondent on this point, but that it had failed to show that the Claimant's grievance was not a significant influence on the decision to refuse to permit the Claimant back to work in the Wessex Cardiac Surgery Unit (see the ET at paragraphs 103 to104).

The Relevant Statutory Provisions and Guidance from Case Law

27. At the heart of this appeal is the protection against victimisation provided by section 27 **EqA**:

> **"27. *Victimisation***
>
> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because -**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act -**
>
> **…**
>
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.**
>
> **…"**

28. The Claimant takes issue with the ET's approach to the "bad faith" defence to a victimisation claim, as provided by subsection 27(3). He complains that the ET's approach was erroneously informed by its findings on his whistleblowing claims, brought under the protections afforded by the **ERA** for protected disclosures, which are the subject of separate provision under Part IVA of the **ERA**.

29. A protected disclosure is defined by section 43A **ERA** as:

> **"… a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."**

30. At the relevant time, section 43B **ERA** provided as follows:

> **"(1) In this Part "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following -**
>
> **…**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
>
> **…"**

From 25 June 2013, section 43B **ERA** has been amended (see, also, below) so that the words "*is made in the public interest and*" are inserted after "*the worker making the disclosure*"; that, however, is not a requirement that impacts upon the present case, which concerned a disclosure made prior to the date of the amendment.

31. For a qualifying disclosure to be protected, it must be made in accordance with any of sections 43C to 43H **ERA**. In the present case, reliance was placed on section 43C (disclosure to the Claimant's employer or other relevant person) and section 43F (disclosure to a prescribed person). At the relevant time, the relevant statutory provisions in either respect included a "good faith" requirement, as follows:

> **"(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith -**
>
> **..."**

That requirement has since been repealed (by section 18 of the **Enterprise and Regulatory Reform Act 2013**) in respect of qualifying disclosures made from 25 June 2013; the "good faith" requirement was still, however, relevant for the Claimant's claim.

32. It is common ground that, for the purposes of the Claimant's public interest disclosure claim, there had thus to be *both* good faith - with the burden on the employer to show its absence, if alleged - *and* a reasonable belief in the specified matters.

33. Guidance in respect of the "good faith" requirement in this context was provided by the Court of Appeal in **Street v Derbyshire Unemployed Workers' Centre** [2005] ICR 97. In **Street**, the Court of Appeal was concerned with a case in which the employee had reasonably believed in the substantial truth of the disclosures she made but, as the ET found, had been

motivated to make those disclosures by her personal antagonism towards the manager to whom they related. In these circumstances, the ET had dismissed the Claimant's whistleblowing claim, finding that the disclosures were not made "*in good faith*". Both the EAT and the Court of Appeal upheld that decision. Specifically, the Court of Appeal concluded that the ET had been entitled to find the complainant's disclosures were not made in good faith because, although she reasonably believed the allegations she was making were true, her dominant (if not her sole) motive was her personal antagonism towards the manager involved; "in good faith" did not only mean "honestly" in this context (see the lead Judgment given by Auld LJ at paragraphs 41 to 58). Agreeing with Auld LJ's reasoning (as did Jacob LJ), Wall LJ added the following observations:

> **"68. For all the reasons given by Auld LJ, I am unable to accept this argument in the context of section 43G of the 1996 Act. In my judgment it is manifest that a person may reasonably believe that the information disclosed and any allegation contained in it are substantially true, and still not make the disclosure in good faith. If "good faith" in section 43G meant simply a reasonable belief in the truth of the information disclosed, the inclusion of good faith in the check-list of factors contained in section 43G(1)(a) to (e) would be otiose. Moreover, good faith is a question of motivation, and as a matter of general human experience, a person may well honestly believe something to be true, but, as in the instant case, be motivated by personal antagonism when disclosing it to somebody else.**
>
> **69. If, however, good faith is not to be equated with honest belief in the truth of the disclosure, how is it to defined? …**
>
> **71. Part IVA of the 1996 Act protects the disclosure of information relating to the issues identified in section 43B. The primary purpose for the disclosure of such information by an employee must, I think, be to remedy the wrong which is occurring or has occurred; or, at the very least, to bring the section 43B information to the attention of a third party in an attempt to ensure that steps are taken to remedy the wrong. The employee making the disclosure for this purpose needs to be protected against being victimised for doing so; and that is the protection the statute provides.**
>
> **72. Motivation, however, is a complex concept, and self-evidently a person making a protected disclosure may have mixed motives. He or she is hardly likely to have warm feelings for the person about whom (or the activity about which) disclosure is made. It will, of course, be for the tribunal to identify those different motives, and nothing in this judgment should derogate from the proposition that the question for the tribunal at the end of the day as to whether a person was acting in good faith will not be: did the applicant have mixed motives? It will always be: was the complainant acting in good faith?**
>
> **73. In answering this question, however, it seems to me that tribunals must be free, when examining an applicant's motivation, to conclude on a given set of facts that he or she had mixed motives, and was not acting in good faith. If that is correct, how is it to be done? I can see no more satisfactory way of reaching such a conclusion than by finding that the applicant was not acting in good faith because his or her predominant motivation for disclosing information was not directed to remedying the wrongs identified in section 43B, but was an ulterior motive unrelated to the statutory objectives.**
>
> **…**
>
> **75. In these circumstances, … it should be open to tribunals when looking at the question of good faith under the 1996 Act Part IVA to conclude that an applicant was not acting in good**

> **faith if his or her predominant motivation was not to achieve the primary objective which I have identified in para 71 of this judgment. In my judgment, this provides sufficient protection for whistleblowers, and does not undermine the protection given by the Act. It recognises that human beings have mixed motives. It will, I hope, enable tribunals to make assessments on a straightforward analysis of the evidence."**

34. For the purpose of the pre-25 June 2013 whistleblowing protection under the **ERA**, the existence of an ulterior motive was thus understood to support a finding that there was an absence of good faith (see **Korashi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4 EAT (HHJ McMullen QC presiding) at paragraph 72).

35. Although **Street** concerned the public interest disclosure protections of the **ERA**, Auld LJ also reflected upon the (not dissimilar) language then used to define victimisation for the purpose of the anti-discrimination statutes (specifically, subsection 4(2) of the **Sex Discrimination Act 1975**, subsection 2(2) of the **Race Relations Act 1976** and subsection 55(4) of the **Disability Discrimination Act 1995**). Doing so, Auld LJ rejected the suggestion that the requirement of "good faith" (the words used in the pre-**EqA** legislation) should construed in a uniform way across the different protections:

> **"41. Shorn of context, the words "in good faith" have a core meaning of honesty. Introduce context, and it calls for further elaboration. Thus in the context of a claim or representation, the sole issue as to honesty may just turn on its truth. But even where the content of the statement is true or reasonably believed by its maker to be true, an issue of honesty may still creep in according to whether it is made with sincerity of intention for which the Act provides protection or for an ulterior and, say, malicious, purpose. The term is to be found in many statutory and common-law contexts, and, because they are necessarily conditioned by their context, it is dangerous to apply judicial attempts at definition in one context to that of another. This is so even in closely related legislation such as the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995, in which sections 4(2), 2(2) and 55(4) prevent as being discriminatory for the relevant purpose treatment prompted by an allegation that is "false and not made in good faith". In such a formulation which is concerned with the stark difference between truth or falsity, not, as here "reasonable belief in … [its substantial truth]", the notion of "good faith" is the only vehicle for considering the honesty or dishonesty of the allegation. …"**

36. Returning then to the protection against victimisation under the **EqA**, the potential relevance of an allegation being made in this context for some ulterior motive was considered in **GMB v Fenton** UKEAT/0484/04 (Burton P presiding). That case had been brought under

A the protection then afforded by section 4 **Sex Discrimination Act 1975** ("the SDA"); at subsection 4(2) it was provided that the protection would not apply:

> **"(2) … to [the] treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith."**

B

37. The ET had (at least in part) upheld Mr Fenton's victimisation claim. That was so notwithstanding the fact that it had found he had pursued a misconceived claim for equal pay (the relevant protected act) for collateral purposes: he had - mistakenly but genuinely - considered bringing the claim would enable him to prove he was an employee and thus entitled to join the pension scheme. Before the EAT, the employer argued that the ET's finding as to Mr Fenton's collateral purpose was fatal to his victimisation claim; the ET ought to have dismissed the claim as its finding meant he had not acted in good faith. The EAT disagreed, holding that the ET's finding as to Mr Fenton's motivation for bringing the equal pay claim was not sufficient to demonstrate bad faith for the purpose of subsection 4(2) **SDA**:

C

D

E

> **"30. … the existence of such a collateral motive, of itself, would not be sufficient or at any rate might well not be sufficient. If, in fact, a claimant has a belief that he has a good claim, but perhaps one that is not terribly likely to succeed, and he brings that claim with some collateral purpose, it appears to us that that does not necessarily make the bringing of that claim in bad faith. The issue is not the purpose, but the belief in the claim."**

F 38. Looking more closely at the wording of subsection 4(2), the EAT observed:

> **"41. … the first question is whether the allegation is false, not "made falsely" - that would almost render nugatory the first limb and blend it into the second limb. The simple question is whether the allegation was false. It is wrong to suggest that "false" can mean "purposely untrue"; that again blends the words … from limb one into limb two. It is enough for the Tribunal to have correctly said that "false" means "wrong, erroneous or incorrect". … To suggest that the words "good faith" mean "with sincerity" such that consequently "bad faith" means "not with sincerity" or "treacherous" … is wrong. There may be circumstances … in which "bad faith" may carry many other connotations, but, for the purposes of the narrow issue in this case … [the question for the ET] was a simple one, namely whether the Tribunal was satisfied that Mr Fenton had made a false statement, knowing it to be false. …"**

G

39. In **Fenton**, the issue on appeal focussed down to the latter question the EAT had thus identified: the question whether Mr Fenton had made a statement knowing it to be false. The ET had stated that it "*did not believe he said things which were purposely untrue"* but the EAT

H

A was unable to understand how it had arrived at that conclusion. The matter was therefore remitted for a differently constituted ET to determine:

> **"50. … whether the allegation made by Mr Fenton, being plainly false, was not made in good faith, namely whether it was made by him knowing that it was not true, the allegation being that his exclusion from the pension scheme was on grounds of gender or sex."**

B

40. That is not to say that the motive for making a false allegation has never been found to be relevant for the purpose of determining a complaint of victimisation. In **HM Prison Service v Ibimidun** [2008] IRLR 940, the EAT (HHJ Peter Clark presiding) held that the ET had been wrong to find that Mr Ibimidun's dismissal amounted to victimisation for bringing proceedings alleging race discrimination when he had brought those proceedings to harass HM Prison Service and its employees: as a matter of causation, Mr Ibimidun had not been dismissed for bringing the ET claim but for doing so to harass his employer.

C

D

The Parties' Submissions

E

The Claimant's Case

41. For the Claimant, Ms Tuck accepted it might be open to an ET to interpret bad faith as an absence of good faith (and vice versa), but what might constitute bad faith (or absence of good faith) must be approached in the context of the specific legislation; it was wrong to elide the approach formerly required under the protected disclosure protections of the **ERA** with that provided by subsection 27(3) **EqA**. Specifically, the exclusion of false allegations made in bad faith from the protection otherwise afforded under section 27 was to test the truth or otherwise of the allegation being made; that was not the purpose of the good faith requirement in the context of a public interest disclosure. The ET had thus erred in adopting the same approach to the "bad faith" defence under subsection 27(3) **EqA** to the "reasonable belief" and "good faith" requirement under the protected disclosure provisions of the **ERA**:

F

G

H

(1) The contexts were different (see per Auld LJ in **Street** at paragraph 41). Under the relevant provisions of the **ERA**, for a disclosure to be a qualifying disclosure the person making it must have had a reasonable belief it showed one of the matters listed at section 43B(1); that imported an objective test at the stage of determining whether or not the disclosure was a qualifying disclosure. In the circumstances, the good faith requirement (in the present case, under sections 43C and 43F; in **Street**, under section 43G) must refer to the employee's intention in making the disclosure, not to his or her belief in the truth of its content.

(2) There was no reasonable belief requirement for a protected act under section 27 **EqA**: the evidence, information or allegation in issue did not have to meet any objective test of reasonableness; the requirement was simply that if the evidence, information or allegation was false it would not be a protected act if made in bad faith.

(3) The protection under section 27 thus allows for the making of an allegation that is unreasonably believed by the employee, provided they are not making the allegation in bad faith; that is, provided they do genuinely believe it to be the case. The requirement not to act in bad faith thus refers to the belief in the evidence, information or allegation in issue. To construe section 27 **EqA** differently would be to place an impermissible gloss on the statutory wording.

(4) This approach was, moreover, consistent with how earlier victimisation protection under the legacy Acts had been interpreted (see **GMB v Fenton** and **HMPS v Ibimidun**).

42. By eliding the test under subsection 27(3) **EqA** with that applicable to a protected disclosure, the ET had failed to focus on the requirement that the allegation must be both false

and made in bad faith. It made no clear finding of fact that the allegation relating to Mr Tsang's comments on 13 July 2007 was false, let alone that it was known to be such by the Claimant; on the contrary, the ET had found that the Claimant had "subjectively believed" that Mr Tsang had made the comments in question. The authorities relating to bad faith under the equalities legislation did not support the view that having some kind of collateral motive was sufficient for subsection 27(3) purposes (see **GMB v Fenton** and contrast with the approach adopted in respect of the good faith requirement for a protected disclosure, see **Street** and **Korashi**). Given that the ET accepted that the Claimant had a subjective belief in the content of what he had said, the only permissible conclusion was that he had not made the allegation in bad faith.

The Respondent's Case

43. For the Respondent, Mr Panesar contends that the ET made no error in its approach.

(1) The ET's formulation at paragraph 92 - bad faith means a disclosure that was not made in good faith - was correct and reflected the approach taken by the jurisprudence relating to the determination of good faith (where matters that are not made in good faith are routinely referred to as being in bad faith, see **Street**, for example per Auld LJ at paragraph 51 and Wall LJ at paragraph 74); there was no magic in the term bad faith, it simply denoted the absence of good faith.

(2) It was, moreover, impossible to list all instances that could constitute bad faith; the determination of bad faith was for the ET on the facts of each individual case (**Street**, per Wall LJ at paragraph 72). An ulterior motive might, however, be an example of bad faith.

(3) Bad faith was not qualified in subsection 27(3) **EqA**; it was a broad concept and an ET's assessment that an allegation might have been made absent reasonable belief in its truth might well indicate bad faith (**Street**, per Auld LJ at paragraph 49). In

the circumstances, the ET here was plainly entitled to find the Claimant's allegation had been made in bad faith.

44. Ultimately the assessment of bad faith was for the ET. In the present case, the ET had found that the Claimant did not have a reasonable belief in the allegation in question. It had further found that he had an ulterior motive in making the allegation (to deflect criticism); indeed, it was part of a pattern of conduct by the Claimant of making an allegation against a Consultant, or challenging the motive of the Consultant training him, as a defence if his professional work and conduct was criticised and if the Claimant did not agree with the Consultant's professional assessment of him (see the ET at paragraph 66). Both the finding of no reasonable belief and that of ulterior motive were capable of supporting a conclusion of bad faith for the purposes of subsection 27(3) **EqA**, and the ET had not erred in thus holding that the allegation made by the Appellant was false and made in bad faith (see the ET at paragraph 92).

Discussion and Conclusions

45. When considering the Claimant's claim of victimisation, and the requirement that the allegation had not been made in bad faith (subsection 27(3) **EqA**), the ET explicitly drew upon the approach it had adopted - and the conclusions it reached - in respect of the Claimant's protected disclosure claim; specifically, in relation to to the requirement of reasonable belief (section 43B **ERA**) and that of good faith (sections 43C and 43H). That was wrong. By succumbing to the temptation of reading across from a finding of absence of good faith in the one context, to the question whether the allegation had been made in bad faith in the other, the ET lost sight of the statutory test it was bound to apply. Although acting without good faith might equate to acting in bad faith, the good faith requirement for the purposes of the

Claimant's protected disclosure claim had to be construed in one context and the bad faith exception to the victimisation protection in another.

46. The distinction between the two statutory contexts was identified by Auld LJ in **Street**. The good faith then required for a protected disclosure claim related to a statement that the maker reasonably believed to be true. Thus, the prior finding that the worker (reasonably) believed in the content of what they were saying made clear that the further requirement - that the disclosure was made in good faith - had to add something more. The Court of Appeal concluded that this might mean a worker was not acting in good faith if their predominant motivation was other than to achieve the primary objective intended by the whistleblowing protections under the **ERA** (to enable a worker to disclose information, so as to remedy the wrong they reasonably believed had occurred). As Auld LJ observed, however, the context was not the same when considering the requirement of good faith for the purposes of the protection against victimisation under the anti-discrimination legislation.

47. Turning specifically to subsection 27(3) **EqA**, the language is now different from that formerly used in the whistleblowing protections under the **ERA**, in that the **EqA** now uses the term "bad faith" rather than "not made in good faith", as appeared in the legacy legislation considered in **Street**. It is not suggested that this is a material distinction. What is significant, however, is the fact that subsection 27(3) **EqA** (as was also the case in the legacy statutes) has no prior stage where the ET has first to determine whether the employee believes in what they are saying (the evidence or information they are giving or the allegation they have made). The ET is simply required to find whether that evidence, information or allegation is true or false; if false, it must then determine whether it was given or made by the employee in bad faith. And that must mean that it has to determine whether the employee has given the evidence or

information or made the allegation honestly: to paraphrase Auld LJ in **Street** (see paragraph 41), absent other context, bad faith has a core meaning of dishonesty. In this context (and, again, as Auld LJ observed in **Street**), it has to be at the bad faith stage that the ET turns its attention to the question whether the employee has made the allegation honestly or not. Unlike the good faith formerly required for a qualifying disclosure to be protected, whether the employee has an honest belief in what they have said will not have been tested at any prior stage; that is a question that will arise only when the ET determines the issue of bad faith under subsection 27(3) **EqA**.

48. In resisting the appeal in this case, the Respondent has focused on the ET's findings of fact - in particular, its assessment of the Claimant as someone motivated by a desire to deflect criticism. That, the Respondent contends, was obviously relevant to the determination of bad faith under subsection 27(3) **EqA**, even if the ET had not sought to read across from its findings on the protected disclosure claim.

49. I do not rule out that the employee's motivation for making the allegation in issue might be relevant to the ET's determination of bad faith for subsection 27(3) purposes. In **Fenton**, the EAT did not consider the existence of a collateral motive was sufficient to establish an absence of good faith but did not entirely dismiss its possible relevance (see paragraph 30). There are, however, good policy reasons for exercising caution when having regard to the existence of a collateral motive in the context of a claim of unlawful victimisation under the **EqA**. An employee might, for example, feel reluctant to raise a complaint of discrimination, notwithstanding the fact they genuinely believe they have suffered less favourable treatment because of a relevant protected characteristic. That reluctance might recede should they then face a complaint about their own conduct or performance (indeed, they might see the complaint

as simply another example of discrimination). In raising an allegation of discrimination in response to the complaint, the employee might well be seeking to deflect the criticism they face but that does not mean they are acting in bad faith.

50. When determining whether an employee has acted in bad faith for the purposes of subsection 27(3) **EqA**, the primary question is thus whether they have acted honestly in giving the evidence or information or in making the allegation. As Burton J observed in **Fenton**, the issue is not the employee's purpose but their belief. I do not say that the existence of a collateral motive could never lead to a finding of bad faith - not least because it is impossible to foresee all scenarios that might arise - but the focus should be on the question whether the employee was honest when they gave the evidence or information or made the allegation in issue. In answering that question, the ET will already have established that the evidence, information or allegation was false; that does not mean the employee acted in bad faith, although it may be a relevant consideration in determining that question (the more obviously false the allegation, the more an ET might be inclined to find that it was made without honest belief). Similarly, the employee's motive in giving the evidence or information or in making the allegation may also be a relevant part of the context in which the ET assesses bad faith. The ET might, for example, conclude that the employee dishonestly made a false allegation because they wanted to achieve some other result, or that they were wilfully reckless as to whether the allegation was true (and thus had no personal belief in its content) because they had some collateral purpose in making it. Motivation can be part of the relevant context in which the ET assesses bad faith, but the primary focus remains on the question of the employee's honesty.

51. The ET in the present case erred in its approach. By simply reading across from its findings relevant to the protected disclosure claim, it failed to engage with the specific

questions raised by subsection 27(3) **EqA**. It made no express finding as to whether the allegation was false; although, as Mr Panesar contends, that might be taken to be implicit in its finding that the Claimant's belief that the remarks were made was not held on reasonable grounds. More significantly, the ET failed to tackle the specific question raised by the bad faith requirement under subsection 27(3); that is, whether the Claimant had been honest in making the allegation in issue.

52. As Mr Panesar observes, the determination of bad faith is for the ET: it is the ET that hears the evidence of the complainant and is best placed to undertake the necessary assessment. In the normal course it would not be open to the EAT to interfere with a decision reached by the ET in this regard and my initial view was that the determination of this issue would need to be remitted. For the Claimant, however, Ms Tuck says the point has already been answered: the ET's finding that the Claimant subjectively believed the allegation to be true is sufficient; that must amount to a finding of honesty or good faith in the content of what the Claimant was saying. Having further reflected on the issue, I think that is right. It is implicit that the ET considered the allegation to be false and it expressly found that the Claimant's belief was not reasonable but it did not find that he had made the allegation other than in the subjective belief that it was true. By thus finding that the Claimant subjectively believed the allegation to be true, the ET had determined that this was his genuine belief and, although he might have had an ulterior purpose in raising the allegation, he was not making it dishonestly - he genuinely believed it to be true. On the ET's findings, therefore, the Claimant made an allegation that Mr Tsang contravened the **EqA** in the genuine belief that this was in fact true. In these circumstances, I am satisfied that whilst his ulterior purpose might be relevant to any question of remedy it would not be sufficient for a finding of bad faith.

53. I am therefore bound to uphold the appeal and, given the ET's further findings in the alternative (see paragraphs 104 to 105), it follows that I must set aside the dismissal of the Claimant's complaint of victimisation in this respect and substitute a finding that this claim was made out as regards the decision to refuse to let the Claimant return to work in the Respondent's CTU.

54. On that basis, unless the parties are able to reach agreement, the matter must now return to the ET to determine remedy.