JB

THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Mr J Reid		**Cognita Schools Limited**

Held at **London South**
On **16 – 20 April 2018**

BEFORE: **Employment Judge J Nash**
Members: **Ms Y Walsh**
Ms T Williams

Representation

For the Claimant: **Mr G Anderson, Counsel**
For the Respondent: **Mr T Coughlin, QC**

JUDGMENT

The Judgment of the Employment Tribunal is: -

The Respondent did not discriminate against the Claimant because of his sex.

REASONS

1. This was a claim for post-termination victimisation in respect of disability discrimination.

2. The Claim Form was presented on 16 December 2016 and the Response was presented on 6 February 2017. Issues were clarified at a telephone case management

hearing on 10.2.18, where the parties were represented by the same counsel as appeared at the final merits hearing.

3. At this hearing in respect of witnesses, the Tribunal heard from the Claimant and from Mr Alan Hickman Owner Director of Burr IST. From the Respondent it heard from Mr Andrew Moorhouse, at the material time its Director of Operations Europe, and from Mr Rob Birkett, at the material time the Group CIO. The Tribunal had sight of a joint bundle to 314 pages and all references are to this bundle unless otherwise stated.

The Claim

4. The sole claim before the Tribunal was for victimisation under Section 27 of the Equality Act 2010 in respect of disability. All references are to this Act unless otherwise stated. Previous claims for direct disability and discrimination arising from disability were dismissed upon withdrawal on 16 June 2017.

The Issues

5. There was an updated agreed list of issues dated 8 April 2018 at page 41 as follows: -

1 The act of detriment relied on is R's refusal on 26 July 2016 to permit C to access parts of its network to which he needed access in order to enable him to perform the role set out in his job offer with BurrIST, and its subsequent failure to reconsider or rescind or otherwise modify that decision ("the Refusal").

2 C relies on the following protected acts:

2.1 the first two sentences quoted at paragraph 4 of the ET1 (page 18), from a document dated 25 April 2016, entitled "Representations relating to ongoing redundancy consultation" (page 67, 3rd paragraph). R admits that this amounts to a protected act;

2.2 the final sentence similarly quoted (albeit, as making R think that C would do a protected act). R denies that this amounts to a protected act;

2.3 C's complaint in the same document that his workload was unmanageable in 2012 following his injury (page 64, 7th paragraph). R denies that this amounts to a protect act;

2.4 C's complaint in the same document that promises to alleviate the position with his workload were broken (page 64, 7th paragraph). R denies that this amounts to a protected act.

2.5 a complaint about a requirement in April 2014 that C attend a meeting to discuss his workload which required him to undertake a very long journey (page 64, 1st paragraph). R denies that this amounts to a protected act.

2.6 C's representation and warranty in the 22 June 2016 Settlement Agreement that he may have claims for unfair dismissal and disability discrimination (page 99 at paragraph 4.1(c)). R admits that this amounts to a protected act.

3 Do the matters denied by R to amount to protected acts, in fact amount to protected acts within the meaning of the relevant subsection of s27(2) EqA?

4 Was the reason for the Refusal that C had done a protected act?

6. Disability was agreed; the Claimant suffered from severe and chronic pain due to sciatic nerve damage.

7. There was a preliminary issue at the hearing. The Claimant applied for the Tribunal to hear the liability and remedy evidence heard together, as this would assist him as a disabled person to participate in the hearing. The Claimant stated that he preferred to start his evidence in the morning and there were difficulties in the afternoon; further he was deliberately staying off his medications in order to be able to give the best evidence possible. The Respondent cited some concerns of practicalities but did not object.

8. The Tribunal considered the application. It had some concerns that the morning issue might not be alleviated by the Claimant giving evidence on liability and remedy all in one day as he would probably be questioned in the afternoon; however, the Claimant confirmed that he would be able to give evidence for one whole day.

9. The Tribunal considered timetabling and was of the view that hearing the evidence together was less likely to result in the case going part-heard. The Tribunal was mindful of the overriding objective, on the requirement on Employment Tribunals not to discriminate contrary to the Equality Act, and of its duties under Article 6 of the Human Rights Convention. As there was no objection from the Respondent, the

Tribunal granted the Claimant's application to hear evidence on liability and remedy together.

10. The Claimant also applied to be permitted to give evidence from the prone position, that is lying on the floor, as this was the least painful for him. There was no objection and the Tribunal granted this application. The Claimant assured the Tribunal he was able to access the bundle in this position. The Tribunal discussed the matter with the Claimant and his representative at the start of the hearing and advised that they should request breaks - whether regularly or immediately - if this would assist the giving of evidence. In the event the Claimant gave evidence on the second day with some breaks and was finished by the early afternoon.

The Facts

11. The Respondent's business is that it runs a network of fee paying schools. It has a head office in Milton Keynes and a number of schools, 35 in 2010, around the United Kingdom and abroad. It failed to state how many employees it has, and the Tribunal accordingly proceeded on the basis that it was a well-resourced organisation.

12. The Claimant started work on 17 March 2004 as an IT worker at the Sackville School. The Respondent brought the school in 2007 and the Claimant accordingly became the Respondent's employee. By the time of the redundancy he was a IT Support Manager based out of the Respondent's head office in Milton Keynes, although he worked from home.

The Background

13. It was not disputed that the Claimant was a disabled person for the purposes of the Equality Act 2010.

14. In the Claimant's witness statement and in his ET1, he stated that he suffered a life-changing accident at the "school", presumably Sackville School, in March 2011. This resulted in serious disability, being chronic back pain and sciatic nerve damage. This was also the case put forward in submissions. However, in cross examination before the Tribunal he stated that this was not the impression he sought to give.

15. The medical evidence showed the Claimant had a long-standing back condition pre-existing before 2011 and there was very little reference in the Claimant's medical evidence to the March 2011 accident or it having any significant impact on his condition and how it presented. The only reference was in GP's notes, dated several

months after the event. There was no reference to the accident in the pain management records or surgery records, as a cause of the Claimant's condition or an important event in its development.

16. According to the medical records, the Claimant underwent a microdiscectomy in 2004 and a repeat in 2008. According to a letter from his chronic pain service in August 2011, he was complaining of worsening symptoms at that time but not to the accident as a factor.

17. The Tribunal found that the Claimant suffered from a long-standing back condition from at least 2004. It was unclear to the Tribunal how much the Claimant disability affected him prior to 2012, as his statement did not cover this. Whatever the situation in respect of the medical evidence, it was not in dispute that by late 2011 and 2012 the Claimant's condition was having a serious adverse effect on him at work.

18. The Claimant also suffered from a long-standing vulnerability to depression, which was exacerbated by his physical disability.

19. By 2010 the Claimant's job had expanded to have responsibility for twelve sites, so he was no longer working for Sackville alone. From 2012 he raised issues with Mr Andy Savin, his then line manager, and others, that he was not coping with his workload and was having problems with his back condition and the associated pain. He stated that he had continued to ask for help but was not satisfied as to the Respondent's response; further, the promises it did make to help were not honoured.

20. In 2013 his role was altered to concentrate only on SIMS, the schools database for the Respondent's entire operation. There was a further discussion in 2014 as to a change of role, that led to the Claimant being invited to a meeting with his then line manager Mr Jamie Bateman at the Head Office in Milton Keynes. By this time the Claimant was experiencing difficulties in travelling and he was vulnerable to being caught in traffic which - by reason of the delay - considerably exacerbated his symptoms. Despite this he was kept waiting, without explanation, for three hours by Mr Bateman. As a result, he was caught in traffic after he left which exacerbated his condition. He was signed off with stress and pain for over a month.

21. Upon his return it was agreed his role would be changed to becoming one of three IT support managers. When Mr Bateman was replaced by Mr Joe Warren in about September 2014 this plan fell into abeyance. Finally, there was a February 2015 discussion with Mr Warren which led to the implemental of reasonable adjustments

for the Claimant including limited travel, working from home and altered duties. By this point the Claimant's role was IT Support Manager for SIMS.

22. There was one further matter by way of background. In March 2015 the Respondent's administrator chased a health declaration form and a CV from the Claimant in preparation for a forthcoming inspection. Five months later in September she chased him very politely and asked him to make an updated application for a DBS Certificate, which could not be traced. The Claimant replied in an email at page 62, "*I am sick of being harassed for more information you already have or to make applications I have already done".*

23. The Claimant accepted that he had not behaved well on this occasion, but this was out of character. He was not normally confrontational and aggressive, although he did have a tendency to sarcasm.

24. We now turn to the termination of the Claimant's employment. Mr Moorhouse was transferred in as Director of Operations Europe on 1 December 2016. He met the Claimant on his first day and recalled the Claimant discussing his back problems.

25. Mr Moorhouse launched a redundancy process in the IT Department. The Claimant was sent correspondence on 9 March 2016 in respect of a reorganisation. He was invited to a without prejudice meeting with Mr Andy Savin by way of an email on 9 March 2016, which was later cancelled. The Claimant was then sent but did not receive an at-risk letter dated 8 April 2016 on the basis that his role could be integrated into the Head Office ITT. The Tribunal found that the Respondent had originally intended to have what is known as a "protected conversation" with the Claimant and had then changed its mind and went down the route of an on the record redundancy exercise.

26. Mr Moorhouse met with the Claimant on 18 April 2016. The Claimant insisted on recording the meeting, although there was a note taker present and Mr Moorhouse in terms did not consent. The Claimant confirmed in oral evidence that he did this because he did not trust the Respondent. The meeting minutes are at page 70 and were not disputed in any way as inaccurate. At this meeting Mr Moorhouse learned that the Claimant had not received the at-risk letter. He informed the Claimant that his job was at risk. There was discussion about the validity of the redundancy programme and the Claimant's position in the Head Office Team. Mr Moorhouse said he was not aware that the Claimant was part of the Head Office IT team. This led to the Claimant having grave concerns about the redundancy process.

27. The Claimant sent a letter titled "redundancy representations" on 26 April, dated 25 April, drafted with the help of his lawyer. These contained the following. The letter stated that there had been an accident in 2011 which was the cause of his condition. The letter then set out his account of working with a disability for the Respondent. The letter stated in terms that the redundancy process was flawed and made a subject access request under the Data Protection Act in respect of the redundancy procedure.

28. The letter contained paragraphs which were relied on as protected acts as follows:

    a. *"There followed a very stressful period during 2012 when I continued to express my concerns … that my workload was unmanageable. This culminated in November 2012 in me leaving the workplace having suffered a breakdown due to the stress. On my return to work, promises were made that I would see a change in workload and receive more assistance, but such promises were not seen through. There were numerous emails between me, Andy Savin and Jamie Bateman regarding this matter.*

    b. *"I was invited to a meeting on my return journey from Huddersfield to my home in Kent. In view of my disability this long journey in Friday traffic was extremely difficult for me and the situation was exacerbated by the fact that when I arrived I had to wait for 3 hours until Jamie Bateman was available to meet.*

    c. *"It appears to me that the reason that Cognita had treated me as a pool of one is because I am not physically present in the Head Office and based predominately at home. This is as a result of my disability. If the company is seeking to distinguish me from the other members of the IT Support Team for the purposes of this redundancy procedure, then I will robustly assert that this is discrimination by way of my disability."*

29. The redundancy consultation then morphed into a settlement negotiation. The Claimant's solicitors negotiated on his behalf with Ms Brenda Williams of the Respondent's HR. The Tribunal did not have sight of all the negotiation documents but there appeared to have been something of a breakthrough on 19 May 2016 when the Claimant's solicitor set out in an email what the Claimant would be prepared to accept.

30. By 8 June 2016, the parties had an agreement in principle with the minor matter of holiday pay outstanding. By way of settlement the Claimant was to receive £37,685 as

ex gratia payment, £5,988 as redundancy payment, £10,980.25 as notice pay and £7,000 for training. This came to nearly £60,000.

31. The parties then sought to agree the annual leave. Firstly, the Respondent incorrectly contended that the Claimant's holiday entitlement was 25 days a year. The Claimant asked his manager Mr Warren to remind HR that he was entitled to 30 days. This was accepted, and he was asked not to involve others in settlement negotiations. The Claimant's solicitor and Ms Williams then negotiated about the number of days due. All negotiations were professional and courteous. By 9 June, the parties were in effect 1.5 days apart, that is 9 ½ v 11 days. The Claimant had not been party to these email exchanges which were sent on to him by his solicitor. On 10 June he emailed Ms Williams a lengthy and detailed email. The Claimant readily accepted that this was an angry email and that his use of capital letters in the email denoted shouting. A few minutes later he sent a much shorter second email to Ms Williams stating, "*I do not invite, except nor want a counter proposal to this, a very simple yes or no is all that is called for, agree or don't". Both emails were signed off "Kindest regards."*

32. The first email including the following:

> *"as such please feel free to consider your comments to be very VERY prejudiced. I will indeed be including to the Tribunal as evidence as a sign of your unwillingness to abide by reasonable adjustments but evidence of the repeated abuse I have had over my existing contract, specifically the number of annual leave days it contains. Contract - that legally binding thing you are supposed to abide by … It was not ABOUT nor had it mentioned negotiations until YOU chose to reply to my email by sending a response to my solicitor … I would have thought that we were more than capable of agreeing my leave without YOU engaging the services and therefore costs of my solicitor. Thanks for that!*
>
> *"Do you ever even read the evidence you stand by or do you just expect employees to give in when you shove it down their throat?*
>
> *"Until I have the gall to mention I have 30 days leave, you made no mention of pro rata.*
>
> *"Only now you can be churlish over it, do I get clarity funnily enough in Cognita's favour funny that!*

> *"Your comments and behaviour of the past few days has created considerable mental anguish and physical pain over and above that already engendered by the illegal actions of in your defence of Cognita, I just want it to end."*

33. Nevertheless, on 22 June a settlement agreement was agreed in a standard format which included a mutual non-derogatory comments clause. The settlement included a clause that, "*the employee represents and warrants that … having had legal advice from the advisor he may have statutory claims of unfair dismissal and disability discrimination*." The agreement also included a positive reference from Mr Savin.

34. The Claimant worked until 30 June. After he left he was paid the money owed under the settlement agreement.

35. The Claimant then received a job offer from a friend, Mr Alan Hickman. Since 2009 at the Claimant's instigation and with his help, Mr Hickman's one-man business - Burr IST - and the Respondent assistance had developed IT systems together. Burr IST had thus become a long-term provider of IT services to the Respondent. Mr Hickman was looking to expand and took advantage of the Claimant being on the job market to offer him work. The intention was that the Claimant would take over the Respondent's work for Burr IST allowing Mr Hickman to grow the business.

36. At page 111, the Tribunal had sight of an offer of employment dated 15 May 2018, which after a short negotiation was accepted. Mr Hickman duly contacted Roy Palmer, of the Respondent's IT to ask for login details for the Respondent's system to permit the Claimant to start work. Burr IST worked primarily on school data at central office on a company wide basis on what was known as the Cube. The Respondent viewed this data as very important commercially. It seemed to be agreed that access would in theory permit the Claimant to alter this data temporarily and - it is presumed - purloin it, but not to corrupt it permanently.

37. Mr Palmer took the request to Mr Moorhouse, who spoke to Ms Williams and others in HR. Mr Birkett who was relatively newly appointed was then brought in to the loop. Mr Hickman chased the Respondent on the 22 July.

38. The Tribunal had sight of the Respondent's internal emails as follows. Julie Pearce of IT emailed Sandra O'Brien of HR, copying in Mr Birkett, setting up a call to discuss this matter. On 26 July, Mr Birkett asked HR if they had managed to speak to Sharon Frost of HR who was in Spain. A reply was passed on from Ms Frost as follows, "*She felt the company had a good defence in suggesting a conflict of interest. Justin would recognise names, know the details of someone's role and even relate on a personal*

level .. that is not always a negative but he has had less that positive relationship with members of the team and may very well have negative impact on this occasion. Nevertheless, he has just received ... a "redundancy" payment and he should not attract any tax concerns about his working relationship with the previous employer." HR emailed Mr Birkett, "*I have asked for further clarity from Sharon to triple check that we would not infringing upon any employment laws by requesting that Justin have no involvement with Cognita*." There was then a further email from Sharon Frost, "*we don't have to give a reason (for requesting that Justin has no involvement with Cognita in any way) but it is good practice to do so especially if "discrimination" could be cited. I think conflict of interest is both fair and reasonable. It seems from this that we are within our rights to request that Justin does not work on our "account" regardless of the outcome for him*."

39. Mr Moorhouse stated that he had spoken to Ms Williams and Mr Palmer and made the decision which was then cleared with Mr Birkett, who agreed. They told Mr Hickman that they would not grant the Claimant access due to a conflict of interest. Mr Hickman was accordingly unable to offer the Claimant employment. The Claimant became extremely upset and sent a very angry email to the personal email addresses of former colleagues. These former colleagues sympathised and said they had given their opinion when soundings were taken. The Claimant also used a very offensive term about another former colleague.

40. The Claimant's solicitors and the Respondent corresponded on this matter, including allegations of defamation by the Claimant's solicitors.

The Applicable Law

41. The applicable law is found at Section 27 of the Employment Rights Act 2010 as follows: -

Victimisation

1 A person A victimises another person B, if A subjects B to a detriment because: -
   (a) B does a protected act;
   (b) A believes that B has done or may do a protected act.

2 Each of the following is a protected act: -
   (a) bringing proceedings under this Act;
   (b) giving evidence or information in connection with proceedings under this Act
   (c) doing any other thing for the purposes of or in connection with this Act;

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

Submissions

42. The Tribunal had sight of very helpful written submissions by both counsel together with brief oral submissions from each.

Applying the law to the facts

43. The first issue for the Tribunal was to identify the protected acts. We adopt the numbering at paragraph 4 of these reasons. It was agreed that numbers 2.1 and 2.6 were protected acts for the purposes of s27(1)(b). However, it was not agreed that numbers 2.2, 2.3, 2.4 and 2.5 ("the disputed protected acts") were capable of being protected acts under the Act. The protected acts were set out in the ET1 and had been adopted into the agreed list of issues. The Respondent's case was that the disputed protected acts were all pleaded under s27(2)(d) and not s27(2)(c).

44. There was only a reference to section 27 in the list of issues, not to any sub-section. There was no application to amend the ET1, after the discussion of this point at the Hearing. Accordingly, the Tribunal had to ascertain from the ET1 under which sub section (if any) the disputed acts had been pleaded. The difficulty was that the pleadings, although drafted by (a different) counsel, did not state which sub section was relied upon, although there was some if irregular reference to the statutory language, and it was difficult to work out how the Claimant's case was put. It was therefore necessary to interpret the pleadings and the wording of the redundancy representations in some detail. All the disputed protected acts were contained in the Claimant's 25.4.16 redundancy representations as set out at paragraph 32.

45. The Tribunal considered the status of the disputed protected act at 2.2,

> *"the final sentence similarly quoted (albeit, as making R think that C would do a protected act)*."

46. The Tribunal considered how 2.2 had been pleaded in the ET1. It was pleaded at the final sentence of paragraph 5 of the grounds of complaint and did not refer to a Sub Section or - in contrast to the earlier protected acts in that paragraph (number 2.1) - refer to any statutory language. Number 2.2 was not particularised in the ET1 as to s27(2) but was clearly particularised as to s27(1). Therefore, the pleading was best interpreted as referring to section 29(2) in toto, which accordingly included s27(2)(c),

that is doing anything for the purpose of or in connection with the Act; sometimes referred to as the "sweep up" provision. The Tribunal found that a threat to complain of disability discrimination if one is dismissed is manifestly doing something in connection with the Act.

47. Therefore, number 2.2 was a protected act. For the avoidance of doubt, the Tribunal would not think that number 2.2 would be covered by s27(2)(d) as it was a future conditional allegation, not a past allegation.

48. The Tribunal considered numbers 2.3 and 2.4 together:

> *2.3 C's complaint in the same document that his workload was unmanageable in 2012 following his injury (page 64, 7th paragraph redundancy representations).*
>
> *2.4 C's complaint in the same document that promises to alleviate the position with his workload were broken (page 64, 7th paragraph redundancy representations).*

49. These were pleaded at paragraph 6 of the Grounds of Complaint in the ET1. Paragraph 6 stated, *"these were allegations that the Respondent had failed to make reasonable adjustments to alleviate the substantial disadvantage he faced as a result of the Respondent's practices because he was a disabled person*". This was, in terms, an allegation under (2)(d) not (2)(c), and thus could only be considered under s27(2)(d).

50. The Tribunal noted that according to Benevist v Kingston EAT 039/05 to be a protected act under (2)(d), it must be "in some sense an allegation". Tribunals were warned against a "generous" interpretation of (2)(d) in Waters v Commissioner of Police of the Metropolis [1997] ICR 1073. Cases as to what is and what is not a protected act tend to be, of necessity, fact- specific. Nevertheless, the Tribunal applied the case law in Durrani v London Borough of Ealing EAT 0454/12 and Fullah v Medical Research Council and anor EAT 0586/12 that a Tribunal should consider the context of the statement relied upon as a protected act. According to Fullah at paragraph 23: -

> *That approach [the rejection of a generous interpretation of s27(2)(d) in Waters] was followed and expanded by Langstaff P in Durrani v London Borough of Ealing UKEAT/0454/2013, … What Langstaff P was asked to consider was whether it is necessary to use the words race discrimination. He decided it was not, so long as the context made it clear… He accepted that it was not necessary that a complainant should refer to race using the very word, but went on to say this:*

"[…] I would accept that it is not necessary that the complaint referred to race using that very word. But there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies"

51. The Tribunal accordingly considered the context in which the statements at number 2.3 and 2.4 were made. The difficulty for the Claimant was that there was no contention that he had, either in or at the time of the redundancy representations in 2016, raised suggestions of disability discrimination in respect of past workload, still less that he had done so to Mr Moorhouse. The context in which these the 2016 representations were made was that of redundancy. Further, the Claimant went on later in the representations to refer specifically to discrimination – he said that if he were selected for redundancy it would be viewed as an act of disability discrimination. In respect of the workload he did not say - in contrast - that past conduct was an act of discrimination. The material paragraph of the redundancy representations did not mention disability or discrimination. It was, the Tribunal found, not an allegation of disability discrimination. There was reference to a long-term condition and workload but there was not a link between them. The other relevant context was that the Claimant was articulate and specific in his representations. Accordingly, numbers 2.3 and 2.4 were not protected acts.

52. Finally, the Tribunal considered protected act number 2.5: -

> *2.5 a complaint about a requirement in April 2014 that C attend a meeting to discuss his workload which required him to undertake a very long journey (page 64, 1st paragraph).*

53. This was pleaded at paragraph 6 of the Grounds of Complaint in the ET1. This was pleaded as a failure to make a reasonable adjustment, albeit in a round-about way; (it referred to the earlier part of paragraph 6 where there was discussion of the Respondent failing to provide reasonable adjustments). The Tribunal found that it was therefore pleaded under s27(2)(d) only. The Tribunal found that it was a protected act for the following reasons.

54. Number 2.5 is "in some sense an allegation". According to the caselaw, depending on the context, it is not a requirement to use the words, disability discrimination. The Claimant did include the word, disability, but he did not, discrimination. However, the context made it clear. The respondent would understand the Claimant to be saying, in effect - the thing you made me do (waiting) put me at a substantial disadvantage compared to a non- disabled person; he went on to particularise that disadvantage. It was a complaint to which the act potentially applies and thus it was a protected act.

55. *Waters* is also authority that, if a Tribunal would have no jurisdiction were the allegation of discrimination not made out (for instance because the employer was not vicariously liable), then it could not be a protected act. However, this was not the case on these facts, as the Tribunal would have had jurisdiction if claims under 2.2 and 2.5 had been brought in time.

56. Therefore, all the acts in the list of issues were protected acts save for numbers 2.3 and 2.4 of paragraph 4.

57. The next issue for the Tribunal was who made the material decisions. The Tribunal found that the decision was made by Mr Birkett and Mr Moorhouse jointly, and rejected the respondent's submission that it was Mr Birkett alone. In his statement, Mr Moorhouse gave considerable detail of his thinking and his reasons for making the decision, "*I remember saying to Rob (Mr Birkett) that I was not happy to sit in front of the CEO and explain my decision if there was a data breach*". In oral evidence, Mr Moorhouse first stated that it was a joint decision. He then said that it was Mr Birkett's decision alone, although he agreed that he acted as advisor. He also said in his statement it was, "*then Rob (Mr Birkett) who communicated the decision to Alan Hickman*". Mr Birkett described it as being his decision but set out Mr Moorhouse's input. The Tribunal found that Mr Birkett had the final sign-off, but Mr Moorhouse had a very significant input. In practice it was a decision they made together. Therefore, pursuant to Reynolds v CIFIS (UK) Limited 2015 ICR 1010, the Tribunal's relevant enquiry was into the thought process of those two joint decision makers.

58. There was no dispute as to the existence of the detriment, the issue in this case was causation. The Tribunal reminded itself of the test for causation in a victimisation claim under section 27 as follows.

59. Paragraph 9.10 of the ECHR Code states that the protected act need not be the only reason for detrimental treatment for victimisation to be established. The leading case is Nagarajan v London Regional Transport [1999] ICR 877; the House of Lords held in this race complaint, that if the protected act had a "*significant influence*" on the employer's decision-making, then discrimination would be made out. Nagarajan was considered by the Court of Appeal in Igen Limited and Others v Wang and Others [2005] ICR 931, a sex discrimination case. In Igen Lord Justice Peter Wilson clarified that for an influence to be significant, it does not have to be of great importance; a significant influence is rather an influence which is more than trivial, "*we find it hard to believe that the principle of equal treatment would be breached by the merely trivial*." Further guidance can be found in the EAT case of Villaba v Merrill Lynch & Co

Inc [2007] ICR 469, as follows '*we recognise that the concept of "significant" can have different shades of meaning, but we do not think that it could be said here that the tribunal thought that any relevant influence had to be important… If in relation to any particular decision a discriminatory influence is not a material influence or factor, then in our view it is trivial*.' Finally, the EAT stated in Patan v South London Islamic Centre EAT/0312/13 that it is not necessary that the protected act is the primary cause for the detriment, so long as it is a significant factor.

60. The Tribunal also reminded itself that, following Nagarajan, that it is not necessary for a Tribunal to distinguish between conscious and subconscious motivation when determining whether a complainant has been victimised. The House of Lords ruled that victimisation may be by reason of an earlier protected act if the discrimination subconsciously permitted that act to determine or influence their treatment of the complainant. Racial discrimination, in the words of Lord Nichols, is not negatived by the discriminator's motive or intention.

61. There were no specific submissions *on Martin v Devonshires Solicitors [2011] ICR 352* EAT, but the Tribunal thought it useful to remind itself of the case, and the consequent line of authority. Essentially, Martin established that if an employer does something (dismissal or detriment) in response to the doing of a protected act, but where the employer could say the reason for the dismissal was not the complaint as such but some other feature of it, which could probably be treated as separable, such as the manner in which the complaint was made, then it might be possible to avoid finding a discrimination.

62. Different divisions of the EAT then reached different decisions in the case of Woodhouse v West North London West Homes Leeds Limited [2013] IRLR 773 and Panayioutou v Chief Constable Hampshire Police [2014] IRLR 500 as to whether or not the Martin reasoning would only apply in exceptional circumstances.

63. The Tribunal also reminded itself of the caution in Igen v Wong against the Tribunal too readily referring discrimination merely for an unreasonable conduct where there is no other evidence of discriminatory behaviour. This was reiterated by the EAT in Kent Police v Bowler [2017] UKEAT 0214 – 16 – 2203. The Tribunal also reminded itself of the guidance from the Court of Appeal in Lindsay **v** *London School of Economics & Political Science* [2013] EWCA Civ 1650 that such things as unreasonable behaviour, uncharacteristic conduct, or a failure to follow procedures may be evidence of discrimination.

64. The Tribunal then applied these legal principles to the facts. Why did the Respondent refuse access to the Claimant?

65. The Tribunal considered what information the decision makers, Mr Moorhouse and Mr Birkett, had when they refused the Claimant access. Mr Moorhouse had considerable information from his own knowledge. He was central to the negotiations of the Claimant's settlement agreement, as can be seen from his witness statement which sets out how he met with the Claimant at the "at risk" meeting; he was then involved as the primary contact and decision-maker, because the Claimant's line manager (who would normally be responsible) was conflicted out. In his statement Mr Moorhouse recorded very strong views on the Claimant's, as he saw it, aggressive and unreasonable conduct during these negotiations. However, his statement relied on the emails from the Claimant as set out in these reasons when, in oral evidence, he stated that he had not seen these emails when he made the decision. Mr Birkett had far less, if any, personal experience of the Claimant and it was unchallenged that he too had not seen the emails when the decision was made.

66. The other source of information for the decision-makers was the views of other people about the Claimant. The documents in the bundle showed that they had information from HR - at least from Ms Williams and Sharon Frost - and from Roy Palmer in IT. There was an indication that they had spoken to or taken soundings from Karen Taylor and Judy Pierce in IT.

67. The Tribunal found that soundings were taken, but that the primary information came from Mr Moorhouse's and Ms Williams's own knowledge of the Claimant. The Tribunal found that the soundings were of limited importance because Mr Moorhouse and Mr Birkett were noticeably vague about these soundings; further, in light of the very robust criticism of the Claimant in Mr Moorhouse's statement, it was more likely that the decision was made primarily on the basis of Mr Moorhouse's and Ms Williams's own views and knowledge. Everything else was, in effect, their checking their decision. Mr Birkett's involvement was more to oversee and confirm Mr Moorhouse's decision.

68. Based on this information in the minds of the decision-makers at the material time, what were the reasons for the decision and to what, if any, extent did the protected acts influence it?

69. The Tribunal found that Mr Moorhouse and Ms Williams were bruised and alienated by the negotiations with the Claimant, in particular his email of 10 June 2016. The Tribunal found it highly plausible that Mr Moorhouse and Ms Williams found the

negotiations around the annual leave petty and disproportionately burdensome. The negotiations would be of far less personal import to them than to the Claimant and accordingly, what might appear vital to him, was likely to appear far less so to them. The email contained personal attacks on Ms Williams and was, to put it simply, abusive. Contrary to the suggestion made to the Claimant in cross examination, the Tribunal did not accept that he signed off his email "Kindest regards" in any sense sarcastically; he simply did not think about it. However, it was credible that the respondent would view this signing off in an openly sarcastic email (from a Claimant who accepted he was sometimes sarcastic) as added sarcasm.

70. Whilst Mr Moorhouse and Mr Birkitt did not see the 10 June email at the time (notwithstanding the implications in Mr Moorhouse's statement to the contrary), we accept that Mr Moorhouse and Ms Williams were working very closely together on this matter. Ms Williams, we found on the basis of the detail in Mr Moorhouse's evidence, would not have taken any significant decisions without his agreement. Accordingly, on the balance of probabilities, we found that Mr Moorhouse was aware of the contents and tone of the email, if not the email itself.

71. The Tribunal also found that the annual leave dispute had a particular impact because it came when the parties had reached an agreement in principle for the Respondent to terminate the Claimant with a payment of about £60,000. Just as the end was in sight, there was a bitter and personal outburst about a minor matter which, in terms, threatened to overturn the entire agreement. The Tribunal recognised that the annual leave dispute was the fault of Ms Williams (or whoever advised her): the Claimant was correct about his annual leave entitlement. However, when considering the factors working in the minds of the decision-makers, the issue is not the correctness or otherwise of Ms Williams position on annual leave but the effect on her and Mr Moorhouse of the Claimant's conduct. Mr Moorhouse's statement that by his conduct the Claimant had "burnt his bridges" appeared credible to the Tribunal. The Tribunal was bolstered in this view by the fact that it was not long between the Claimant's departure on 30 June and the receipt of the request from Mr Hickman sometime between the 15 and 22 July (according to the documents). The Respondent received a request that the Claimant, in effect, could return, only about 2 or 3 weeks after his acrimonious departure. There was little time feelings to subside.

72. The Tribunal found that the reason there was a settlement agreement - and hence negotiations - was the Respondent's concern at the Claimant's bringing a possible Employment Tribunal claim for disability discrimination and unfair redundancy. Accordingly, it was important to view all the negotiations between the Claimant and the Respondent in this context. However, the 10 June email had nothing to do with

the Claimant's disability or redundancy (save a passing reference to reasonable adjustments in the past) and dealt at length and in considerable detail with annual leave. The Tribunal accepted that the Claimant may well have poured all of his frustration and intense sense of injustice about his wider situation into this email; however, the email was a particularised outburst about annual leave entitlement. Further, the email was more striking as the Claimant had retained a lawyer who was dealing with the negotiations and making progress. The Claimant made an active decision to get involved. This would have focussed the Respondent's mind on the Claimant as an individual with a strong sense of grievance against it.

73. Further, the two examples before the Tribunal of the Claimant's anger or frustration (the 2015 and the 10 June 2016 emails) were, with one small exception, not directly to do with disability, but a DBS check and annual leave.

74. The Respondent sought to paint a picture of the Claimant as generally difficult and antagonistic; it referred to his 2015 DBS email to this effect. The Tribunal accepted the Claimant's submissions that it was telling that this was the single objectional email that the Respondent was able to find, when the Claimant had worked remotely for several years; the Tribunal had no doubt that he had sent thousands of work emails. Nevertheless, the 2015 email did suggest that the termination negotiations were probably not the first occasion that HR had found the Claimant somewhat difficult to deal with.

75. The Tribunal did not accept the Claimant's submission that the provision of a positive reference indicated that it had no issues with the Claimant's performance. In a negotiated settlement, positive references are a common feature. The Tribunal viewed this as a neutral factor.

76. The timeframe of the negotiations was not entirely clear from the evidence. However, the Tribunal accepted that the negotiations took up a good deal of management time and energy; just when it seemed to be over, the Claimant threatened to withdraw completely.

77. The Tribunal found that Ms Williams and Mr Moorhouse believed that the Claimant was, at the time of the termination, in an emotional and not a rational state. The Claimant described himself as being in a "*sour place*". It was therefore unsurprising that Mr Moorhouse and Ms Williams picked up on this. It was not in dispute that the negotiations were far from easy. There had been very personal abuse of Ms Williams by the Claimant.

78. The Tribunal was of the view that, as the Respondent found the Claimant to be disproportionally exercised about annual leave, it would fear that there was a risk in allowing him to stay in the business, even as a contractor.

79. The Tribunal accepted that the Respondent had a genuine, if not reasonable, concern about allowing the Claimant access to data, in light of the recent acrimony. The Tribunal did not find the Respondent's account of what the Claimant might be able to do to adversely affect its data - and hence its business – to be either consistent or convincing. If Mr Moorhouse had been an IT specialist, the fact that his concerns over IT security were not well thought through or even logical, would be a significant factor; however, he was not. The Tribunal found his rationale in oral evidence that, when making his decision about data risk, he made a distinction between the likelihood of a data breach and a severity of its consequences, to be credible. Mr Moorhouse's concern was the severity of consequences; rather than the likelihood of the risk; or to put it another way – it was not the likelihood of the Claimant mis-using data, but the consequences if he did, which was the greater worry.

80. The Tribunal did not accept the Claimant's submission that the Respondent's permitting the Claimant to work until 30 June indicated that it had no real concerns about his having access to data. It accepted the Respondent's evidence that the Respondent felt secure because it had yet to pay the Claimant the £60,000 under the settlement agreement until after termination.

81. The Tribunal did not accept that the Respondent's stated concerns over tax had any influence. Such concerns were notably vague and unparticularised, even under direct questioning. Ms Frost of HR had said in terms that this was not a problem. The Tribunal's view was that this was a make-weight added to an already existing decision.

82. The Tribunal considered the Claimant's submission that HR's reference to discrimination in the email of 26 June 2016 was telling. The Tribunal did not find that was evidence that the Claimant's allegations were a significant or a material factor in the decision. Nevertheless, it found that discrimination was an issue which the Respondent associated with the Claimant; he had made allegations of disability discrimination in the recent past and the Respondent had reached a settlement with him. The Tribunal found that this was a small factor – the decision-makers could not stop themselves having knowledge of the disability issue - but it was by no means significant. In the view of the Tribunal, HR were concerned that, having made the decision for non-discriminatory (if not necessarily admirable and defensible) reasons, there might be unjustified or inconvenient allegations of discrimination. Therefore, it was advisable for the Respondent to be very careful with its wording. The use of

inverted commas for “discrimination” was consistent with this. Further, the Respondent was required under the settlement agreement to make no derogatory statements about the Claimant, so it had to tread carefully.

83. It is important to remember that the question for the Tribunal was not whether the Tribunal itself would have permitted the Claimant to have access in the circumstances. It was not the Tribunal’s task to decide if the Respondent made the correct judgment call, whatever the Tribunal’s view of the matter. The question was, were the protected acts a significant or material, but not necessary important or primary, factor in the decision. The Tribunal found on the balance of probabilities that the reasons why the Respondent refused access and failed to change its mind were the acrimonious settlement negotiations and, as a result and to a lesser extent, its concerns over data security. The protected acts had a small influence but not a significant or material influence.

_____

Employment Judge Nash

Date: 30 April 2018