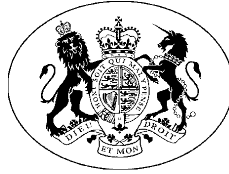

EMPLOYMENT TRIBUNALS

Claimant: Mr M Keenan

Respondent: Department for Work and Pensions

Heard at: Leeds **On:** 8 & 9 September 2020

Before: Employment Judge Maidment
Members: Mr R Webb
Mr G Corbett

Representation
Claimant: In person
Respondent: Mr A Serr, Counsel

JUDGMENT having been sent to the parties on 10 September and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. The claimant's complaint in these proceedings is of unlawful victimisation. The claimant brought Employment Tribunal proceedings against the respondent in 2013 alleging disability discrimination and a further claim on 30 July 2015 of victimisation in the provision by the respondent of employment references. This latter complaint of victimisation succeeded in respect of a form of reference given to him by the respondent dated 21 May 2015. A different form of reference provided to him dated 27 April 2015 did also amount to detrimental treatment, but this was not found to have been provided because of a protected act.

2. The factual background of this earlier victimisation complaint is relevant to the current complaint in terms of how the tribunal found that the respondent dealt with the issue of the provision of references in respect of former employees and the difference when an employee had subsequently brought successful Employment Tribunal proceedings. The judgment and reasons were included within the agreed bundle of documents for this case and the tribunal was referred to the findings therein.

3. There was no dispute that the above mentioned earlier Employment Tribunal proceedings amounted to protected acts.

4. The claimant's claim now is that he was subjected to detrimental treatment in the provision/non-provision of references to several prospective employers. He complains about the reference provided to Academies Enterprise Trust in June 2017, to a (now agreed) failure by the respondent to provide a reference to Kerr Mackie Primary School in October 2017, and then about the references supplied to Pudsey School in January 2018, to WEA on 18 March 2018 and to Horsforth New Laithes Primary School in October 2018.

5. In respect of Academies Enterprise Trust, Pudsey School and Horsforth New Laithes Primary School, the respondent denies that any reference was sent at all. It accepts that a reference was sent to WEA on 18 March 2018, which was not in the form previously agreed with the claimant.

Evidence

6. The Tribunal had before it an agreed bundle of documents numbering some 276 pages.

7. The tribunal heard evidence from the claimant. The respondent elected not to call any witness evidence.

8. Submissions were then heard from both parties, the claimant providing his submissions in writing and supplementing them in an oral submission.

9. Having considered all relevant evidence, the tribunal makes the following factual findings.

Facts

10. The claimant was employed by the respondent until 17 October 2014. He commenced Employment Tribunal proceedings against it in 2013 which led to a judgment upholding certain claims of disability discrimination and of unfair dismissal. The claimant brought further Employment Tribunal proceedings in July 2015 claiming victimisation in respect of references issued by the respondent to prospective employers. Two forms of

detrimental reference were issued. One dated 27 April 2015 referred to the claimant's dismissal as being for unsatisfactory attendance and detailed the number of days of sickness absence. A second, dated 21 May 2015, omitted the reason for the termination of the claimant's employment but made no positive comments regarding the claimant performance whilst working for the Respondent. Only the second of the two references was found to have been issued because of a protected act. His complaint of victimisation in respect of that reference, therefore succeeded.

11. The respondent, in these proceedings, accepts that the earlier Employment Tribunal proceedings brought by the claimant constitute protected acts.

12. Prior to the 2015 victimisation claim being heard by the tribunal, the claimant did correspond further with the respondent regarding the appropriate form of any reference to be given to prospective employers and a form of reference was agreed which gave the dates of the claimant's employment and commented positively on the claimant's performance and conduct without specifying the reason for the claimant leaving the respondent's employment.

13. The respondent outsources, to a large extent, responsibility for the provision of references for former employees to a third-party company known as SSCL which operates from offices in Newcastle. It appears that, at all material times in these complaints, SSCL also maintained an offshore operation based in India. The tribunal has seen references to matters being passed onshore by a group of call and reference handlers with non-British origin names. Whilst the tribunal has heard no evidence on the point, it is unlikely that a reference to moving a matter "onshore" was a reference to a referral to the respondent in circumstances where the term "client" or "business partner" would have been much more likely to have been used. The terms "onshore" and "offshore" denote changes in physical location.

14. In any event, the claimant had an agreed form of reference which in the respondent's own terminology was labelled a "compromise agreement" reference. The respondent's practice was to flag up in the case of relevant individual former employees that, if a reference request was made in respect of them, a compromise agreement reference was to be provided. This was to ensure that an operative of SSCL did not simply raise a standard form of reference, but instead ensured ultimately that the agreed form of reference was issued following a still required approval by one of the respondent's managers.

15. The respondent and SSCL had shared access to an electronic system where reference requests were logged as well as actions taken in response to them. Any particular requirements in respect of an individual's reference

could and were logged within that system and appropriate forms of reference could and were stored in a document folder.

16. An entry on the system from a Mr Renton on 11 July 2016 relating to the claimant recorded that "if this officer contacts us for a compromise agreement reference we need to make Nina Ballantyne in CCSA aware first." Ms Ballantyne was an HR consultant in the respondent.

17. In November 2016, the respondent received a reference request from the Elland Academy. On 17 November the respondent replied to the Academy stating that reference could only be provided with the claimant's written consent and enclosing a consent form. A letter of the same date was also issued asking, for security/identity checking reasons, for 2 out of the following: the claimant's date of birth, national insurance number and his former staff number with the respondent.

18. It is noted that the respondent appears to have reacted to a further reference request from the Elland Academy by sending correspondence in identical form to Jane Jones of Elland Academy dated 28 November 2016.

19. The respondent then issued a reference addressed to Delta Academies Trust dated 25 November. It is accepted that this related to same position in respect of which the Elland Academy had requested a reference – Elland Academy was part of the Delta Academies Trust. This was in the form previously agreed with the claimant – a "compromise agreement" form of reference.

20. The claimant position is that the agreed reference was only sent because he had to chase it up and the respondent understood that the claimant was requesting a copy. The respondent's systems include a note of 30 November 2016 by Mr Renton that a reference request had been received from Delta and checked with Ms Ballantyne first, to see if the template they were going to use was acceptable. She had confirmed that it was, so that the reference was posted to Jane Jones. A further note on the system by Mr Renton of the same date is to the effect that the claimant had requested a copy of the reference "we issued". This was noted as having been posted on 30 November 2016.

21. The claimant was successful in obtaining the position with Delta, which was on a temporary contract.

22. The claimant applied for a job around June 2017 at Swallow Hill Community College, part of the Academies Enterprise Trust. On 11 June the claimant was invited to an interview, which took place on 15 June. The claimant was unsuccessful in this application, of which he learned a few days after the

interview. His belief (on the basis of a later discovery referred to below) is that it was because an adverse reference had been issued by respondent. The claimant's evidence was that, in the education sector, employers request references before interviews. He said that on the application form there was a question asking for the candidate's agreement to that.

23. On 17 June 2019 the claimant asked the Academies Enterprise Trust for a copy of the reference the respondent issued to it in 2017. The response he received was that the Trust only held data which it had a statutory duty to retain or which it was actively using. That did not include references in relation unsuccessful candidates which, it said, were disposed of immediately following the conclusion of the appointment process.

24. The tribunal cannot agree with the claimant that this response disclosed or inferred that any reference for him had actually been received from the respondent. It is a generic and general response regarding the retention of a category of data. There is no evidence of a reference request having been made from the Trust to the respondent or the respondent issuing any consent or security information forms, as was, the tribunal finds its normal practice. The respondent's electronic systems do not log any request or action taken in respect of this position.

25. The tribunal cannot simply accept that because the Trust, as a matter of its expressed ordinary practice, asked for references before an interview, it asked in this case and received one from the respondent. The fact that an interview took place is not confirmatory of the fact that a reference had been received. It is indeed possible that the interview went ahead despite the lack of any reference receipt and that a reference was not followed up in circumstances where the claimant was unsuccessful in any event. The tribunal does not know. However certainly it cannot conclude on the evidence that any reference was provided by the respondent and, if so, what form that reference might have been in.

26. Around October 2017 the claimant applied for a position with the Kerr Mackie Primary School. The claimant now accepts, as a matter of fact, that no reference was ever sent by the respondent to that school. The failure to provide any reference at all amounted to a separate detriment, he says.

27. On 12 October 2017 the claimant emailed the respondent's HR Director General asking for an alternative reference request email address as specified addresses had appeared to be no longer active. The claimant said that Ms Begum of the School had received bounce back emails when requesting references from the respondent. The claimant received a response on 13 October asking if the claimant was a current or former employee and the type of reference sought. He replied on 16 October saying that he was a former employee but asking Ms Alder of the

respondent to be careful "as I should have a compromise employment reference on my file due to my successful Employment Tribunal claims…" A response shortly afterwards on that morning provided the claimant with an alternative email to be used in requesting references. It noted also that Ms Alder had just received a reference request from Ms Begum. The claimant was also advised that he could call a number to give verbal permission for SSCL to release the claimant's personal information. The claimant responded to that point saying that was not correct.

28. The respondent issued Ms Begum on 18 October 2017 with the standard letter the tribunal has already referred to asking for personal security information. There is no evidence that this was fabricated. The claimant doubts that this letter was sent and notes that no one from the school has ever made reference to it. There is, however, no basis for the tribunal concluding that this was fabricated. The claimant's position is that he had already given consent to the production of a reference and that there was no reason why Ms Begum would not have replied to the security information requested such that a reference ought to have been generated. The claimant agreed that Ms Begum had not sought any personal security information from him, but said that she didn't need to, as the information was on his job application form already, at least his date of birth and national insurance number. There is no record, however, of a reply from Ms Begum to the respondent.

29. The claimant's evidence is that he was interviewed but was unsuccessful in his application. He did not ask for any feedback. His conclusion now was that he had not been successful because no reference had been received.

30. The claimant made a subject access request of the School in May 2019. He received a response of 7 May from the School's data protection officer, Mr Lewis-Ogden which said that he had no authority to release any reference without the consent of the referee. He went on that the school had no desire to be obstructive and had attempted to obtain consent from the referee but without success as the individual was no longer employed by the relevant organisation. The claimant had assumed that Mr Lewis-Ogden was talking about the respondent as referee.

31. The School was further contacted by the respondent during the disclosure exercise in these proceedings. On 19 February 2020 Mr Lewis-Ogden advised that the School had only received one reference in respect of the claimant. from Delta Academies Trust. It was an individual at that organisation who had left employment, thus preventing the School from obtaining consent to the release of the reference. He went on that he did not believe that the school had received any reference from or on behalf of the respondent. The School's Business Manager, Heather Proctor, confirmed to Mr Lewis-Ogden that the DWP reference was not the one

received and from memory she believed all the correspondence was bounce back emails. She went on: "Mr Keenan was updated by yourself and I to this effect at the time." Mr Lewis-Ogden reverted to the Government Legal Department on 24 February relaying that information. There has been debate as to when "at the time" referred to, the suggestion being made that the claimant had been aware at the time of his application to the School that no reference had been sent by the respondent. That is possible, but it is more likely that the only interaction the claimant had with Mr Lewis-Ogden, given his position as a data protection officer, was when he made the subject access request at a later stage.

32. In any event, whilst it can be concluded that no reference was provided by the respondent, there is no evidence that the respondent received a response to its request for security information. If that information was not provided to the respondent then no reference would have been issued. The respondent would not have chased it. Without evidence that the information was provided, the tribunal cannot conclude that there was a deliberate failure to provide the reference. The tribunal does not agree with the claimant that, since Ms Begum had been chasing a reference, a suggestion that Ms Begum did not respond to the respondent's request was absurd.

33. The claimant next applied for a position with Pudsey School in January 2018. The claimant has sought disclosure of the reference he believes the respondent issued in respect of this position, but received a response from Kate Spence, Business Manager of the School that documents for an unsuccessful candidate were only retained for six months. The claimant sought confirmation that as part of the shortlisting process, the reference would have been requested. The response from Ms Spence was that if the claimant had a particular referee listed on his application form then "we would have approached them for a reference as we do with all applicants."

34. There is no evidence of any communications between the School and the respondent in either direction. It is not possible for the tribunal on the evidence to conclude that any reference was sent by the respondent. The respondent's systems do not indicate the issue of any reference. Ms Spence's response to the claimant was an explanation of the School's general practice, not confirmation that the respondent had been asked for a reference.

35. It is noted that the claimant was unsuccessful in this application.

36. The claimant next applied for a position with WEA in early February 2018. The claimant was successful at interview. He took with him to his interview a copy of the reference which the respondent had previously issued to him addressed to Delta Academies Trust. He disclosed this to WEA.

37. Nevertheless, WEA wished to have a form of reference directly from the respondent. The claimant emailed SSCL on 5 March 2018 saying that WEA had requested a reference over two weeks previously but had not received a response. He asked that the reference be provided as soon as possible and that he be given a copy "as previously agreed within my compromise reference".

38. Internal correspondence within SSCL requested a postal address for WEA and that security information be requested. The claimant provided security information in response to this communication being forwarded to him. A further internal email within SSCL stated: "we can send the reference letter through email however we require the postal address to be updated on the reference letter."

39. On 12 March 2018 a reference went out to WEA which gave the dates of the claimant's employment, but which also referred to the termination of his employment following "dismissal due to unsatisfactory attendance" with no positive comments made regarding the claimant's performance or conduct. The system log notes the receipt of a reference request from WEA on 12 March 2018 with security and consent received. A further entry also made by an SSCL employee called Haokip records that the reference letter had been issued stating: "employment reference letter prepared and sent to onshore for printing and posting." The tribunal does not agree with the claimant that this ought to be taken to mean that it was sent to a DWP manager for approval.

40. The claimant maintains that the aforementioned internal communication regarding updating the postal address is evidence that this (non-compromise agreement) reference was already on the respondent's systems and had therefore been provided already to other prospective employers. This communication is not proof of that or that this is what had occurred. There would always be a need to insert or update a postal address in any reference and there is, again, no evidence that the form of reference which was issued to WEA was issued to any other prospective employer.

41. Having received this reference, WEA did not raise it or what it said with the claimant. His employment continued. Whilst the claimant said that there could have been conversations between the respondent and WEA, this was raised by him as a possibility. He has no evidence of any such conversations or their content.

42. The claimant discovered that this form of reference had been issued to WEA following a subject access request he made of WEA on 3 April 2019.

43. He then wrote to the respondent asking for employment references sent in respect of him since November 2016. Mr Chris Francis of SSCL asked internally for copies of any references sent in respect of the claimant since November 2016. He also asked for confirmation if there was a compromise agreement in place. A colleague, Piyush Singh, responded on 17 May 2019 saying that "the officer is in compromise agreement record" but that no reference letter had been issued for him from November 2016 until now. The tribunal notes that in fact a reference, as already mentioned, was sent to Delta Academy on 17 November 2016 and there was of course also the reference sent to WEA.

44. The claimant's position is that this statement was a lie. In particular, the respondent was dishonest in not admitting that the agreed reference had been sent to Delta. If it had been truthful, he said, then that would have disclosed a reference letter which could easily subsequently have been updated and sent to other prospective employers in circumstances where in fact adverse references had instead been sent.

45. Mr Francis responded to Piyush Singh saying that, according to the system notes, a reference had been issued on 12 March 2018 (the WEA reference) and asking for a copy. In subsequent internal correspondence, Mr Francis noted that the reference had been issued in March 2018 without the full compromise agreement wording and he needed to share what had been sent with claimant as well as what should be sent. A response from Michael Renton of 22 May apologised saying that he should have seen this note also in the call centre and he set out the form of compromise agreement reference which should have been used. He said that he had saved a revised template in his folder, that this must be used and that Nina Ballantyne needed to see the reference before it was issued. Mr Francis then advised internally (attaching the wording which had to be used) that this had to be included in the compromise agreement folder for claimant and asking that the reference be drafted and sent to Mr Francis as they needed to get the respondent's approval before it was sent out to the claimant.

46. It is clear that some investigation then took place as to how WEA had been issued with the incorrect form of reference. The response on 30 May of Vincent Geevarghese to Mr Francis advised that this should not have been sent by the team as the request consisted of compromise agreement wording. The processor should have sent it onshore for the team to include that wording. Feedback had been sent to the processor and it was stated that they would ensure that these instances were not repeated.

47. The claimant received a letter of 5 June 2019 from Mr Francis in response to a request for a copy of the investigation report. Mr Francis stated that the conclusion was that the reference had been issued as a result of human error. The processor, it was said, should have checked to see if there was

any agreed compromise agreement wording before compiling the letter. The letter had been generated without such a check.

48. The claimant accepted that none of the individuals referred to as involved with the reference processing were people known to him. Whilst the claimant was adamant that the WEA reference must have already gone to Nina Ballantyne for approval, in circumstances where this is what the procedure provided for, there was no evidence that it had done.

49. The claimant applied for a further position with Horsforth New Laithes Primary School in October 2018. The claimant says that he was shortlisted on 10 October and understood that the respondent would be contacting his referees. He was interviewed shortly afterwards, wasn't successful in the application and did not seek feedback. The tribunal accepts that the school requested a reference. The tribunal accepts that on 11 October 2018 the respondent replied with the standard two letters seeking firstly consent and secondly security information. Again, the claimant's understanding from the School was simply that any documentation had been destroyed. There was no evidence that a reference had ever been received or that the School had responded to the requests for information. The tribunal cannot conclude on the evidence that a reference was ever sent.

50. The claimant subsequently applied for a position with Broadgates Primary School. A reference was requested. The respondent wrote on 28 May with the consent form and separate request for security information. The claimant, however, withdrew from the application process, he said, because of the effect of medication he had taken to assist with his anxiety attacks.

Applicable law

51. Pursuant to section 27 of the Equality Act 2010:

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

(a) B does a protected act; ….

Sub-paragraph (2) of this section provides:

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

(b) bringing proceedings under this Act; …

52. In this case there is no dispute that the Claimant indeed did a protected act by his bringing of Employment Tribunal proceedings alleging unlawful discrimination and victimisation respectively. It is also accepted on behalf of the Respondent that acts of post-employment victimisation are covered by the wording of section 27(1).

53. As regards the meaning of "detriment" the Tribunal refers to the case of **Chief Constable of West Yorkshire Police –v- Khan [2001] 1 WLR** where it was said that the term has been given a wide meaning by the Courts and quoting the case of **Ministry of Defence –v- Jeremiah [1980] QB 87** where is was said that *"a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment".*

54. To succeed in a complaint of victimisation, the detriment must be "because" of the protected act. This requires knowledge of the protected act.

55. For guidance, the Tribunal directs itself to the statement of Lord Nicholls in **Nagarajan –v- London Regional Transport [1999] IRLR 572** where he stated at paragraphs 18 and 19:

> *"Thus far I have been considering the position under s.1(1)(a). I can see no reason to apply a different approach to s.2. "On [racial] grounds" in s.1(1)(a) and "by reason that" in s.2(1) are interchangeable expressions in this context. The key question under s.2 is the same as under s.1(1)(a): Why did the complainant receive less favourable treatment? The considerations mentioned above regarding direct discrimination under s.1(1)(a) are correspondingly appropriate under s.2. If the answer to this question is that the discriminator treated the person victimised less favourably by reason of his having done one of the acts ("protected acts") listed in s.2(1), the case falls within the section. It does so even if the discriminator did not consciously realise that, for example, he was prejudiced because the job applicant had previously brought claims against him under the Act…. Although victimisation has a ring of conscious targeting this is an insufficient basis for excluding cases of unrecognised prejudice from the scope of s.2. Such an exclusion would partially undermine the protection s.2 seeks to give those who have sought to rely on the Act or been involved in the operation of the Act in other ways.*
>
> *Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome discrimination is made out. Read in context, that was the industrial tribunal's finding in the present case. The tribunal found that the interviewers were "consciously or subconsciously influenced by the fact that the applicant had previously brought tribunal proceedings against the respondent"."*

56. It is further clear from authorities, including that of **Igen Limited –v- Wong [2005] ICR 931**, 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."*

57. In the **Khan** case Lord Nicholls put forward that the "by reason that" element *"does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach. For the reasons I sought to explain in **Nagarajan –v- London Regional Transport**, a causation exercise of this type is not required either by section 1(1)(a) or section 2. The phrases "on racial grounds" and "by reason that" denote a different exercise: Why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."*

58. The Act deals with the burden of proof at Section 136 as follows:

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provisions".*

59. In **Igen** guidance was given on the operation of the burden of proof provisions in the preceding discrimination legislation albeit with the caveat that this is not a substitute for the statutory language. The Tribunal also takes notice of the case of **Madarassy v Nomura International Plc [2007] ICR 867**.

60. It is permissible for the Tribunal to consider the explanations of the Respondent at the stage of deciding whether a prima facie case is made out (see also **Laing v Manchester CC IRLR 748**). Langstaff J in **Birmingham CC v Millwood 2012 EqLR 910** commented that unaccepted explanations may be sufficient to cause the shifting of the burden of proof. At this second stage the employer must show on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of the protected characteristic. At this stage the Tribunal is simply concerned with the reason the employer acted as it did. The burden imposed on the

employer will depend on the strength of the prima facie case – see **Network Rail Infrastructure Limited v Griffiths-Henry 2006 IRLR 865**.

61. Applying the aforementioned legal principles to the facts as found, the Tribunal reaches the following conclusions.

Conclusions

62. As regards the claimant's applications for employment with the Academies Enterprise Trust, Pudsey School and Horsforth New Laithes school, the tribunal has not been able, on the balance of probabilities, to make any finding that an adverse form of reference in respect of the claimant was sent to them.

63. The claimant's detriment complaints - complaints that a non-compromise agreement form of reference was sent - in respect of those job applications must therefore fail.

64. As regards the application to the Kerr Mackie school, the claimant's initial case in respect of the School and indeed all of the other schools was that the respondent deliberately issued an unfavourable reference.

65. It has since been accepted in respect of the Kerr Mackie School, that no reference was issued at all.

66. A refusal to provide an employment reference, particularly where there is an agreement to provide an agreed form of reference in respect of an employee, would certainly amount to an act of detriment.

67. However, on the evidence, the tribunal has only been able to conclude that no reference was provided – not that there had been a refusal on the respondent's part. An innocent failure is not what the claimant contends for as that would not have the necessary connection with the protected acts.

68. The respondent required the School to provide security information as a standard precondition to it then providing a reference. The tribunal could not conclude that that security information was ever provided to the respondent. There was in the circumstances therefore not the detrimental treatment contended for by the claimant.

69. Alternatively, the best evidence is that after the respondent requested the security information the paper trail goes cold such that, on the available evidence, the reference was not provided due to the lack of follow up by the School with the security information. This detriment complaint must therefore fail.

70. It is accepted by Mr Serr that the reference provided to WEA was capable of amounting to a detriment. That is both in the sense that it provided negative information whilst omitting positive comments and in that it was not the form of reference the respondent had been agreed would be provided to prospective employers.

71. It is sensibly accepted also by Mr Serr that, if this claim was not brought within the applicable time limit, it would be just and equitable to extend time in circumstances where the claimant was only aware of the reference when he made a subject access request of WEA in April 2019 and where he submitted his tribunal complaint within three months of that discovery, allowing for extensions of time as a result of the mandatory ACAS Early Conciliation procedure.

72. Has then the claimant shown facts from which the tribunal might reasonably conclude that the issuing of the detrimental reference was because of his earlier Employment Tribunal proceedings?

73. Mr Serr understandably and with appropriate force refers to the fact that the respondent had already in the past issued a favourable reference to Delta Academies Trust noting the care with which that reference had been provided. He queried why the respondent would wish then to have done the claimant down in respect of his application to WEA. He refers to the lack of proximity of the WEA reference to the protected acts. He says there is no evidence that anyone involved knew the claimant or about his litigation. Whilst that is correct, those processing the request could have found out about this, including by and after being alerted to the possibility of previous proceedings by the reference on the system to there being a compromise agreement reference in place. It is said that the references were produced by a large processing centre dealing with information relating thousands of DWP personnel. The tribunal can accept that the ordinary process for generating references for the respondent could be described as remote and impersonal, but it has no idea of the prevalence of former DWP employees with compromise agreement reference requirements. The issue of the reference appears, Mr Serr says, to have been an administrative error. The tribunal does not disagree that this is a very possible explanation.

74. However, systems were in place so that the correct references would be supplied. The respondent's procedures envisaged that the need for any compromise agreement reference would be flagged up and then generated to be checked by Ms Ballantyne, who was of course aware of the claimant's protected acts.

75. Various alerts were on the system with the claimant's reference history and steps which needed to be taken. The individual processor may have failed

to notice these, but we do not know how he or she can have failed in that manner given the number and prominence of the alerts on the system.

76. The reference then produced is not in fact in the same form as the previous references produced and which were the subject matter of the claimant's earlier Tribunal claim. This is new reference wording. The tribunal has no idea how it came to be drafted and why in this form.

77. The respondent has provided inconsistent explanations in that the processor, it is said, should have sent the reference request "onshore" and then, in the communication the claimant received from Mr Francis, ought to have processed it, him or herself after checking for any agreed wording.

78. On the claimant raising the question of how many references had been sent, the respondent did not accurately inform the claimant that 2 references had been supplied from November 2016. The system log, however, clearly disclosed the references which had been issued.

79. The claimant has suffered unlawful victimisation previously in the provision of a reference by the respondent.

80. The tribunal's findings and aforementioned factors, viewed as a whole, cause the tribunal to look to the respondent to provide an explanation that the issuing of the reference to WEA was in no sense whatsoever related to the claimant's protected acts. The claimant has successfully shifted the burden of proof.

81. The respondent's difficulty is then that the tribunal has no evidence or explanation from it or any potential witnesses. The tribunal has before it submissions based on documents, but where the tribunal is left having to consider unevidenced possibilities. The tribunal does not know why any of the 5 or 6 witnesses, which it was said at the first preliminary hearing would be giving evidence, have not done so. Mr Serr can tell us what could have happened or might have been in the minds of the reference processors, but he cannot tell us what did happen or what they did know or think.

82. The respondent has in all circumstances failed to discharge the evidential burden now upon it, such that the claimant's detriment claim in respect of the WEA reference must succeed.

Employment Judge Maidment

Date 2 October 2020