Appeal No. UKEAT/0180/20/RN

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 21st January 2021

Before

JUDGE J KEITH

(SITTING ALONE)

ST MUNGO'S COMMUNITY HOUSING ASSOCIATION — APPELLANT

MS LEIGH ANDREWS — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	MR DANIEL TATTON-BROWN (One of Her Majesty's Counsel) Instructed by: Ashfords LLP 1 New Fetter Lane London EC4A 1AN
For the Respondent	MS BETSAN CRIDDLE (Of Counsel) Instructed by: Pattinson & Brewer Solicitors Mermaid House 2 Puddle Dock London EC4V 3DB

SUMMARY

Procedure/victimisation

The Employment Tribunal erred in making findings, and upholding a victimisation claim, on the basis of a protected act that had never been pleaded: **Chapman v Simon [1994] IRLR 124 CA** applied. The Employment Tribunal further erred, on the specific circumstances of this case, in making adverse credibility findings of a witness, from which it was only possible to impute that the witness had been dishonest in his evidence before the Tribunal, when he had not had the opportunity to respond to any criticism of his honesty. In this case, the principle in **Vogon International Ltd v The Serious Fraud Office [2004] EWCA Civ 104** applied, namely that before an ET made serious imputations or findings, the person against whom such imputations or findings might be made should have been given the proper opportunity to respond, particularly where as here, it was never clear that part of the Claimant's case was that the witness was not being truthful.

JUDGE J KEITH

1. I refer to the parties as they were before the Employment Tribunal, ('ET') as Claimant and Respondent. The Respondent appeals against the decision of the ET, sitting at East London on 7th June 2019, that the Claimant's claim of victimisation succeeds.

2. The scope of the Claimant's claim, prior to the ET's decision, appears to have been clearly defined and limited in its scope. The Claim Form and grounds of complaint received on 6th November 2018, at page [55] of the 'Core bundle' ('CB'), had summarised the claim, at paragraph [13], as follows:

> **"13) The Claimant claims a victimisation pursuant to s39(3)(c) and s 27(1)(a) of the Equality Act 2010 ("EqA 2010") in that:**
>
> **a) The sending of an equal pay questionnaire as detailed in paragraph 2 is a 'protected act' in accordance with s 27(1)(c) & (d) EqA 2020;**
>
> **b) The Claimant has suffered detrimental treatment as a result in that the Respondent withdrew an offer of work from the Claimant as detailed in paragraph 7."**

3. The notes of the closed Preliminary Hearing held on 25th January 2019, at which both partis were legally represented, referred, at paragraph [4] (page [68] CB), to the same protected act:

> **"Ms Andrews relies upon the sending of an equal pay questionnaire in 2004 as a protected act."**

4. The Claimant's document, "Position statement and chronology", prepared for, and before the ET (paragraph [2], page [105] CB) identified the same protected act:

> **" It is agreed that the Claimant submitted an equal pay questionnaire to her employer in 2004 and that the respondent, via Helen Giles had knowledge of this ([a reference to Howard Sinclair is struck out, in manuscript]). The Claimant alleges that because she had submitted an equal pay questionnaire**

in the past the Respondent withdrew its conditional offer of locum work to her on 8 June 2018. The Claimant alleges that the withdrawal of the offer of locum work caused her detriment including loss of opportunity and loss of earnings set out in her schedule of loss…"

5. Having identified the protected act relied on, there was similar consistency in relation to the alleged perpetrator. In the grounds of complaint at paragraphs [11] and [12], (page 54 CB), the Claimant stated:

"11) The Claimant made a data subject access request and was sent a number of emails showing that Helen Giles had personally involved herself in the decision to withdraw the offer of work from the Claimant.

12) The Claimant is aware of a number of published articles written by Ms Giles that are hostile to employees seeking legal redress for employment issues.… The Claimant is further aware that Ms Giles told her husband at a work event in 2010 that the Claimant would never be employed again by Broadway because she had taken 'legal action' in respect of a potential equal pay claim. The Claimant avers that this is the real reason for the withdrawal of the job offer."

6. The instigator of the victimisation was reconfirmed in the Preliminary Hearing notes as Ms Giles, at paragraph [6], page [69] CB:

"Ms Andrews says that this [the detriment] was at the instigation of the Respondent's HR Director, Ms Helen Giles and was because she had submitted an equal pay questionnaire in 2004."

7. The Respondent was equally clear in its position that the decision to withdraw a provisional offer of locum work was that of the Chief Executive, Mr Sinclair, at paragraph [1.16] of the grounds of resistance, page [65] CB); and that he was unaware at the time of his decision of the historic equal pay disputes that the Claimant had raised in around 2004 (paragraph [1.18], page [65] CB).

The ET's decision

8. In its Judgment at paragraph [2], page [1] CB, the ET referred the parties being professionally represented and them agreeing the narrowness of the issues, in the context of reducing the Hearing duration from two days to one. At paragraphs [5] and [6], the ET continued:

> **"5) The respondent accepts that the Claimant did a protected act by lodging an equal pay questionnaire and an equal pay claim in August 2004. The detriment relied on is the withdrawal by the Respondent of an offer of bank locum work on 8 June 2018. There is no dispute that this happened, nor that it was a protected act.**
>
> **6) The issues for determination were as follows.**
>
> **6.1) who made the decision to revoke the offer to join the Respondent's locum bank? Was it Ms Giles, Mr Sinclair or both?**
>
> **6.2) What was the reason for the decision?"**

9. At Paragraph [23], (page [4] CB), the ET found that the Claimant,

> **"instructed solicitors to send an equal pay questionnaire to the Respondent and lodged ET proceedings. The Respondent replied to the questionnaire and the Claimant elected not to continue with the proceedings."**

10. The ET continued, at paragraph [48.3] (page [11] CB):

> **"48.3 It is not in dispute that, during the period the Respondent is relying on to ground its reason for the withdrawal, the Claimant had brought a claim for equal pay and issued an equal pay questionnaire. Ms Giles accepted that she remembered it."**

11. At paragraph [54] (page [12] CB), the ET noted that part of the Respondent's defence related to the issue of causation: its case was that the person who made the decision (Mr Sinclair) knew nothing about the protected act, while the person who knew about the protected act was Ms Giles, who did not make the decision. Therefore, there could be no causal link between a protected act and the detriment.

12. At paragraph [56] (page [12] CB) the ET found:

> **"For a small organisation of roughly a 100 staff, an equal pay claim is, in the Tribunal's experience, an 'unusual issue'. It seems to us highly unlikely that a Chief Executive of such an organisation would not be informed that a claim of that sort had been brought or consulted about what steps the organisation should take to resolve it. Further it is difficult to reconcile with Mr Sinclair's oral evidence to the Tribunal that he was not surprised when Ms Giles phoned him to consult about the re-employment of the Claimant because 'no one is autonomous. Ms Giles has freedom to act, but if there were issues of concern, I would expect her to report to me."**

13. At paragraph [57], the ET concluded that not only did Mr Sinclair know about the 'proceedings' in 2004, but that he recalled (or was reminded of them) when the Claimant's name was mentioned in 2018 by Ms Giles. The Tribunal regarded the account given by Mr Sinclair and Ms Giles of their telephone conversation as both

> "**unreliable and inherently implausible**".

The respondent's appeal

14. The Respondent's Grounds of Appeal were received by this Tribunal on 26th July 2019 and considered by Heather Williams QC, sitting as a Deputy Judge of the High Court in Chambers, who ordered the ET to provide answers to various questions (page [77] CB). In response, the ET provided answers in a document entitled "Further Reasons", on 23rd December 2019 (pages [72] to [76] CB).

15. In the 'Further Reasons', the ET stated that its understanding that the Respondent had accepted that the Claimant did a protected act by lodging an equal pay claim was based on the witness statements of the Respondent's witnesses' written statements; their oral evidence; and the closing submissions of the Respondent's Counsel at the Hearing. The ET referred to the witness statements of Ms Giles (paragraph [27] of her statement); and Mr Sinclair (paragraphs [14] and [16]) and the oral evidence of Ms Giles. The ET explained that it found that Mr Sinclair knew of both the questionnaire and the claim, noting his replies in cross examination and to Tribunal questions; the size of the charity and his position within it as the Chief Executive; and his and Ms Giles' respective roles. The ET stated at paragraphs [12] and [13], page [74] CB, that it concluded that Mr Sinclair's answers were evasive and lacking in credibility when he denied knowledge of the claim. At paragraph [15] of the Further Reasons, the ET added that it considered as highly unlikely, that receipt of an equal pay questionnaire and/or equal pay claim in a small charity would not have been regarded as an 'issue of concern' and would not have been reported to the Chief Executive.

Grant of permission to appeal

16. The application for grant of permission was initially rejected by the Honourable Mr Justice Lavender on 24th January 2020, but upon a renewed application at a Rule 3(10) Hearing, permission was granted by His Honour Judge Auerbach for amended Grounds of Appeal to proceed, in a decision dated 2nd September 2020.

The amended grounds of appeal

Ground (1)

17. The summary of the first ground (page [21]) CB) was the ET had erred in law in upholding a claim it had no jurisdiction to determine by concluding that the Claimant had been victimised because of a protected act which she had not relied in her professionally drafted grounds of complaint or the agreed list of issues. Further, to the extent that the ET upheld the Claimant's claim based on her pleaded case, the ET had erred in failing to consider the sole protected act relied upon, in isolation ,as opposed to in combination, with another alleged protected act.

Ground (2)

18. The gist of the second ground was that the ET had erred in finding that Mr Sinclair knew of the proceedings in 2004 and recalled or was reminded of them in 2018, without first putting those propositions to him squarely, to afford him the fair opportunity to respond, in circumstances where the ET's later findings amounted to findings of dishonesty or seriously impugned his integrity.

19. In granting permission, HHJ Auerbach noted that this Tribunal would need to have the best picture it can, of the relevant questions and answers. He suggested to the parties that if they were unsure, they should check whether the ET hearing was already recorded or whether a transcript could be obtained. Assuming not, he directed the parties to seek to agree a record of the relevant questions and answers and he allowed an application to request the Judge's notes to be made. The Registrar of this Tribunal issued an order dated 10th December 2020 for the Judge's

notes of the evidence of Mr Sinclair. The Judge's notes of the evidence are at pages [125] to [130] CB.

The Respondent's Answer

20. Permission having been granted, the Claimant served an Answer, a copy of which was at pages [116] to [119] CB. In summary, the Claimant's claim was one of victimisation, the scope of which the ET had not gone beyond. There was evidence from both parties of the act comprising an equal pay questionnaire and the issuing of a claim.

21. In the alternative, the ET would have come to the same conclusion because of the finding that the lodging of the equal pay questionnaire was at least part of the reason for the Respondent revoking the offer of locum bank work (see paragraph [65] of the ET Judgment).

22. In relation to ground (2), while Mr Sinclair disputed being aware of the equal pay questionnaire and the claim, the ET did not accept that account, as it was entitled to do so on the evidence before it and the Respondent's decision to revoke the offer of locum work was found to be a joint decision of Ms Giles and Mr Sinclair (paragraph [65] of the Judgment).

The Respondent's skeleton argument and further oral submissions

23. The relevant issues in dispute, as set out in the pleadings of both parties, were narrow. The protected act was the lodging of a questionnaire, which the Respondent admitted Ms Giles had been aware of in 2004. The Respondent's case (and evidence of Mr Sinclair) had been clear:

A he was unaware of the questionnaire and so it could not have formed any part of his decision to withdraw the provisional offer of locum work.

B 24. At the heart of the ET's consideration of matters (its own words) was whether the Claimant had presented an equal pay claim (and not just whether she lodged a questionnaire).

C 25. This was referred to at the following paragraphs of the Judgment:

25.2 Paragraph [33]: ("whether [the decision to revoke the offer of locum work] related to the fact that the Claimant had previously lodged an equal pay questionnaire and claim."

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25.3 Paragraph [48]: "the reason for the withdrawal was the equal pay proceedings."

E 25.4 Paragraph [49]: the ET could conclude that "the questionnaire and claim were material factors in the decision"

25.5 Paragraph [56]: the implausibility and Mr Sinclair's account was on the basis that for a small organisation, an equal pay claim "was an unusual issue". It

F was highly unlikely that a Chief Executive would not be informed of "a claim of that sort."

25.6 Paragraph [57]: the ET found that Mr Sinclair knew about "the

G proceedings" in 2004.

25.7 Paragraph [65]: the ET found that Ms Giles and Mr Sinclair had discussed " the earlier equal pay proceedings and that this formed at least part of their reason for revoking the offer."

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26. In that context, the ET had erred in deciding a claim which it had no jurisdiction to determine, upon an expanded protected act – see **Chapman v Simon [1994] IRLR 124 CA** and **Scicluna v Zippystitch Ltd [2018] EWCA Civ 1320**. The ET had erroneously regarded the Respondent's case as accepting that the Claimant had lodged an equal pay claim, based on loose language of the Respondent's witnesses, when the grounds of complaint, list of issues and chronology had all referred to a single protected act and the Respondent had defended the claim on that basis – namely the lodging of the questionnaire. The Respondent was never asked whether it accepted that the Claimant issued proceedings. The Respondent certainly did not accept that proceedings had been issued and was never aware of such a claim. There is still no evidence that a claim has ever been presented, despite the Respondent specifically requesting this in correspondence for the purposes of preparing for this appeal.

27. The ET's error was material, as there was a specific finding of victimisation based on equal pay proceedings, which had never been claimed and the ET's findings on the credibility and plausibility of Mr Sinclair's account was based, at least in part, on the plausibility of him being unaware of an equal pay claim, in a small organisation.

28. In relation to ground (2), Mr Sinclair had never had the allegation put to him squarely; and there was literally no evidence to indicate that Mr Sinclair knew of the proceedings in 2004; no documentary evidence; nor any evidence from any witnesses to suggest that he was aware. The ET's finding of what, in essence, amounted to dishonesty, based on the alleged implausibility of his evidence, required it to at least give Mr Sinclair the opportunity to respond, before his honesty or reputation was impugned (see paragraph [29] of **Vogon International Ltd v The Serious Fraud Office [2004] EWCA Civ 104**). The Court had cautioned against speculating

A that cross-examination and re-examination would merely be an empty technicality in **Williams v Solicitors Regulation Authority [2017] EWHC 1478 (Admin).**

B 29. Instead, the Claimant's Counsel had asked Mr Sinclair an open question about whether equal pay came up in his discussions with Ms Giles, and it was put to him that Ms Giles had told him, which he denied, but it was never put him that his reference in his witness statement to not knowing about any equal pay proceedings until the respondent's claim was a lie, or utterly C implausible. This was unsurprising, as the case was instead put on the basis that it was Ms Giles who made the decision to withdraw the offer of locum work and it was common ground that she was aware of the equal pay questionnaire.

D 30. The Claimant's contention that breach of the "**Vogon**" principle did not matter, because it would make no difference, is beside the point. If there was procedural unfairness, it mattered not that the ET might have reached the same conclusion.

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The Respondent's oral submissions

31. Mr Tatton-Brown emphasised that the core of the case before the ET was whether the F provisional offer of locum work had been withdrawn because of previous allegations of bullying against the Claimant and not because of the protected act in 2004. There was no direct documentary evidence on that issue. Instead, the ET had needed to assess the witness evidence G of two senior employees which it had rejected on account of the plausibility of their evidence. Whilst it was permissible to reject an account on the basis of plausibility, it was not necessarily the most reliable basis on which to reject evidence on oath. Alternative reasons might be where, for example, oral evidence was inconsistent with direct contemporaneous documents. Where, as H

here, that was not possible, an assessment of plausibility must clearly identify the relevant evidence and tie it back to the relevant claim.

32. In this case, the ET had before it four key documents:

32.1 the Claim Form at page [54] CB;

32.2 the list of issues identified at the Preliminary Hearing at page [68] CB;

32.3 the Claimant's witness statement (page [86] CB); and

32.4 the Claimant's chronology and skeleton argument for the Tribunal Hearing (page [108] CB).

33. All had focused on a single protected act: the lodging of an equal pay questionnaire. The Claimant herself had expressly stated at paragraph [6] of her witness statement (page [85] CB):

> **"I didn't feel that Broadway's response to the questionnaire was persuasive but I wasn't in a financial position to take the risk of pursuing the matter through the courts."**

34. Put simply, the Claimant herself in her own witness evidence had not suggested that she had presented an ET claim for equal pay. Instead she had advanced unchallenged evidence that she was not in a position to bring such a claim. There is clearly a distinction between serving an equal pay questionnaire; presenting a claim or proceedings; and an aggregation of both service of the questionnaire and issuing proceedings. Because of the way that the claim had been pleaded, the ET should have only focused on the questionnaire alone and not either the issue of proceedings; or the combined act of the proceedings and service of a questionnaire.

35. The materiality of this error was clear, as nowhere in the Judgement did the ET refer solely to the questionnaire; either there were references to the proceedings or a combination of the proceedings and the questionnaire: see paragraphs [23]; [33]; [48]; [48.3]; [49]; [55]; [56]; [57]; and [65] of the Judgment.

36. Moreover, the ET's use of the phrase, "proceedings" clearly referred to the issuing of a claim, because in the Further Reasons (paragraph [4], page [72] CB), the ET had stated:

> **"In his witness statement… Mr Sinclair also referred to the Claimant having 'raised a previous equal pay claim', going on to refer to 'decisions in respect of settlement or withdrawal of those proceedings'. We considered it would be unusual to refer to the 'settlement' of an equal pay questionnaire; we understood that 'proceedings' referred to a Tribunal claim."**

37. This underpins the first ground of appeal, which was the ET's error of law in focusing either on the proceedings or a combination of the proceedings and the questionnaire. The case of **Chapman** was authority for the proposition that the jurisdiction of the ET was limited to deciding the act complained of, and no other. **Chapman** could not be distinguished, as the Claimant was seeking to do, on the basis that it dealt with a direct discrimination claim rather than a victimisation complaint.

38. As noted in the skeleton argument, a complaint of victimisation comprised three components: the protected act; detriment; and the relevant causal connection between the two. It would be wrong to describe the complaint of victimisation solely by reference to the detriment, particularly in professionally drafted pleadings. If more than one protected act were relied upon then all of them had to be considered, but what was not permissible was a roving enquiry. Instead, the ET had focused on a different act or combined acts.

39. In response to the Claimant's suggestion that despite the ET considering the additional protected act, its decision should be upheld because it found that the pleaded protected act was at least in part the reason why the detriment had arisen, this Tribunal should go back to the nature of the evidence and the inherent risk in drawing inferences on grounds of plausibility, particularly when this necessarily resulted in imputations that two senior individuals had given false evidence on oath. As a matter of principle, it was an error of law for the ET to have gone beyond the pleaded grounds; as a practical matter, the reasoning was unsafe.

40. As a practical example, at paragraph [48], page [11] CB, the ET had concluded that there was sufficient material from which it could conclude that the reason of the withdrawal of the locum work was the equal pay proceedings. This was tied in at paragraph [48.3] to the Claimant having brought a claim for equal pay and issuing an equal pay questionnaire; and at paragraph [49], the ET's reasoning that it could, on these facts, conclude that the questionnaire and claim were material factors in the decision. The ET had addressed the wrong question when considering whether a prima facie case had been established. The error could not be corrected by suggesting that the prima facie case could be established on the basis of the questionnaire alone.

41. As a second example, at paragraph [56], page [12] CB, the ET had referred to the plausibility of Mr Sinclair being unaware of the proceedings, focusing not on the protected act, but on the equal pay claim itself. Because that assessment of Mr Sinclair's knowledge was key to the ET's reasoning, that undermined the ET's findings.

42. It was common ground that the particulars of claim were never the subject of any amendment application by the Respondent.

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43. In relation to ground (2), and the procedural failings, the ET made serious findings in respect of Mr Sinclair, without fairly giving him the chance to respond, for example, at paragraph [57] page [12] CB, where the ET found that Mr Sinclair not only knew about the proceedings in 2004, but that he subsequently recalled or was reminded of them in 2018. That was directly at odds with his clear evidence to the contrary and the findings necessarily impugned his truthfulness. It was never, however, put to him that he was being untruthful and indeed on the Claimant's case it was hardly surprising that it was not put to him, as her case was simpler, namely that Ms Giles was a co-decision maker. It was not understood that part of the Claimant's case was that Mr Sinclair was being deliberately untruthful about his knowledge of the equal pay questionnaire. The Claimant's case had focused on Ms Giles as decision-maker.

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44. The Respondent referred back to the authority of **Williams**, in particular paragraph [95], which was not a single-issue case, where adverse findings on the integrity of Mr Williams, a solicitor, would have significant implications for him. As in that case, it was not appropriate to speculate in this case on what Mr Sinclair would have said in answer to cross-examination. Mr Sinclair did not have the fair opportunity to respond to an allegation that he was lying when he said that he did not know of equal pay questionnaire. Whilst the ET did not say that he had lied, this was the inescapable conclusion. There is no suggestion that he was mistaken or had forgotten, in the ET's findings – instead, the conclusion was that his account was inherently implausible.

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45. The unfairness was demonstrated in the notes of the Judge's notes of the cross-examination at page [127] CB, where it was put to Mr Sinclair that Ms Giles had made the decision, and again at page [128] CB. He was merely asked an open question at page [128] CB, to which he replied, saying that the subject of equal pay never came up, and that he had no memory of it. He was never asked whether in fact he was a co-decision maker and was being

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untruthful. If he had been asked, or it had become apparent that this was what was being suggested, that could have allowed re-examination, which was a potentially mitigating factor, to ensure fairness. Indeed at page [129] CB, Mr Sinclair's reference to possibly having been told about an equal pay issue at some point later in the litigation process would, had it been made clear to him he was not being truthful, prompted greater clarity in re-examination. The Respondent had not appreciated that the Claimant's case was that Mr Sinclair was being deliberately untruthful in his evidence.

The Claimant's skeleton argument

46. It was common ground that the Claimant had done both protected acts. Ms Giles had accepted that she knew of both. The Respondent had not argued that the ET had erred in concluding that the burden of proof had shifted (see paragraphs [48] to [49] of the Judgment, page [11] CB). The claim had then succeeded on the basis that the Respondent had not discharged the burden on it to prove that it had not victimised the Claimant (paragraph [64], page [13] CB). The ET concluded, and was entitled to conclude on the evidence before it, that Mr Sinclair knew about both the equal pay questionnaire and the equal pay claim (paragraphs [10] to [20] of the Further Reasons, pages [74] to [75] CB).

47. In summary, the ET had correctly decided a complaint of victimisation, because of a protected act, on the basis of the evidence before it. Even if the ET had erred in making findings beyond the scope of the claim, the core findings were sufficient to explain why the Claimant was treated the way she was. The ET was required to assess Mr Sinclair's evidence and entitled to conclude that it did not accept his evidence. It was put to him that he knew about the equal pay proceedings.

48. **Chapman** could be distinguished, because it was not a complaint of victimisation, but a claim of direct discrimination, with a wholly different set of facts.

49. In relation to ground (2) and procedural unfairness, if the legal effect of findings of fact is obviously and unarguably clear, no injustice would been done because of the lack of opportunity to respond and the appellate courts should only interfere if the lower court's application of the law was wrong: see **Judge v Crown Leisure Ltd [2005] IRLR 823** at paragraph [21].

50. It was sufficient for the ET to have found that the equal pay questionnaire was a material factor in the Respondent's decision to revoke the offer of locum work. The ET had been entitled to reject evidence about what both witnesses had said during a telephone conversation, in which a decision was made to revoke the offer to the Claimant (paragraphs [58] to [63], pages [12] to [13] CB. It was fanciful to suggest that the ET would have reached a different decision.

51. Returning to ground (2), it was plain to the Respondent that the issue of Mr Sinclair's knowledge of equal pay proceedings, whether the questionnaire or claim itself, was an issue. He had specifically denied knowledge of either protected act. The ET did not make any findings of dishonesty against Mr Sinclair but rejected the evidence he gave, which was properly challenged, as it was entitled to do. Even if put to him and he had denied the allegation of being untruthful, the claim would still have succeeded.

The Claimant's oral submissions

52. The claim was one of victimisation and the issue was whether the detriment was because of the protected act, as there was no issue over detriment. The authority of **Sridar v Kingston Hospital NHS Foundation Trust [2020] UKEAT/0066/20** had referred, at paragraph [84], to **Parekh v The London Borough of Brent [2012] EWCA Civ 1630** and the use of a list of issues. Such a list was not something that the ET was required to stick to slavishly but instead of the ET should determine the claim before it in accordance with the law and the evidence before it.

53. The authority of **Chapman** was different in a number of respects from this case. **Chapman** was a direct discrimination case, where the ET had rejected the complaint but they went on, as recorded by the Court of Appeal at paragraph [23], to consider a separate complaint. Moreover, the conclusions on the separate complaint were not supported by any primary findings, so that the ET had not only reached a decision on the claim not before it, but without findings of fact.

54. In contrast, in this case, the claim was one of victimisation where there was one only detriment relied on and which had occurred. The central complaint had never changed. The evidence before the ET and on which it had made findings of fact was of two protected acts. As per **Parekh,** the ET was correct to engage with the evidence before it.

55. The suggestion that the Respondent had always rejected the assertion that there had been an equal pay claim was not consistent with the Grounds of Resistance. Instead, in the introductory paragraph at page [63] CB, the Respondent had referred to historic equal pay claims. At paragraph [1.18] (page [65] CB), the Respondent referred to Mr Sinclair not being aware of historic equal pay disputes that the Claimant had raised in around 2004. The Respondent did not assert that

A there had not been such an equal pay claim. This lack of denial was compounded by Ms Giles's witness statement, paragraph [27], page [93] CB, which referred to the Claimant issuing a claim for equal pay. At paragraph [14], page [101] CB, Mr Sinclair stated that he had not known at the time of speaking to Ms Giles that the Claimant had raised a previous equal pay claim against the Respondent and that the first time he became aware of the historic equal pay claim was when he received details in this litigation.

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56. Whilst much has been made of the Claimant's witness statement at paragraph [8], page [85] CB, whilst she had referred to not being in a position to risk pursuing the matter through the courts, this did not mean that the Claimant had not brought a claim at all. Indeed, in the Further Reasons, paragraph [5], page [73] CB, the Claimant specifically stated, when asked to clarify by the ET, that she had both issued proceedings and submitted a questionnaire. The detriment remained the same and so the evidence on which the witnesses might realistically be cross-examined remained the same. Moreover, as recorded later in the Further Reasons, at paragraph [7], page [73] CB, on the key issue of whether the Respondent retracted the offer of locum work for a prescribed reason, the Respondent's Counsel before the ET defined it as the equal pay claim and the questionnaire. Insofar as Ms Giles was aware of an equal pay claim, Counsel for the Respondent submitted that it was of little importance.

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57. The ET fairly rejected the Respondent's case on its merits. Central to this was the ET's analysis of the conversation between Ms Giles and Mr Sinclair at paragraph [33], page [6] CB. The ET had not accepted the account of the witnesses and at paragraph [48], page [11] CB, concluded that the Claimant had discharged the prima facie case that the withdrawal of locum work was because of the equal pay proceedings – this was clearly a reference to the claim and the questionnaire, as both had been referred to at paragraph [49] as being material factors in the

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decision. The ET rejected the Respondent's case that the decision was taken in accordance with a general policy at paragraph [51], page [11] CB and the claim of a vivid recollection of Mr Sinclair and Ms Giles of serious, credible, historic bullying allegations against the Claimant (paragraph [53], page [12] CB). The ET had provided, in the Further Reasons, in answer to question [1(c)], answer [9], page [74] CB that the lack of plausibility was based on three factors: Mr Sinclair's replies in cross-examination and in answers to the Tribunal; the size of the charity and his position within it; and his and Ms Giles's description of their respective responsibilities.

58. The rejection of the account of the telephone conversation was also because of changed accounts in oral evidence (paragraph [60], page [13] CB). Given the description of the collegiate working relationship between the two employees, that was another reason for rejecting their account. It was further rejected on the basis of the absence of contemporaneous notes (paragraph [63], page [13] CB). Having rejected the Respondent's explanation as implausible and applying the provisions of the burden of proof, on that basis alone, the Claimant's claim of victimisation succeeded.

59. The ET did not need to go further, but did so on a "belt and braces" approach, making a finding on the balance of probabilities that the decision to revoke the offer was taken by both Ms Giles and Mr Sinclair in consultation with each other. There was also a finding that they discussed the equal pay proceedings and that this formed at least part of their reason for revoking the offer.

60. Looking at the analysis from the other end of the telescope, had the ET focused solely on the equal pay questionnaire, it would have made no difference. It was fanciful to the point of absurdity to say that they would have come to a different conclusion. The finding at paragraph [65] about what had been discussed between Ms Giles and Mr Sinclair was unnecessary.

61. In relation to the second ground, the Respondent's case was that the decision to withdraw locum work was Mr Sinclair's alone and that he had not known of the earlier protected act, so that his knowledge was directly in issue. The Claimant could not know exactly what had happened and the ET needed to carefully examine and decide what had happened.

62. The authority of **Vogon** had very different features. It was an appeal about a term in a commercial contract, where the Claimant had succeeded, but the Judge at first instance had declined to award the Claimant its costs because of what he regarded as the opportunistic nature of the claim, and instead awarded the Defendant its costs on an indemnity basis. The difficulty in the costs decision was that the Defendant had never suggested that the claim was an opportunistic one. There was no cross-examination to that effect and no indication by the Judge to the witnesses or the Claimant's Counsel that he was thinking of making findings of that kind. In those circumstances, findings of dishonesty were unfair and likely to have a serious adverse effect on both witnesses and the Claimant company. **Vogon** did not support allowing an appeal, but related to an unjustified costs award.

63. Whereas the authority of **Williams** was also relied upon, as the Court in that case stated at paragraph [76], any rule that the impugning of any integrity or credibility of a witness was somehow impermissible without him having had the opportunity to give an explanation should not be applied in an over-technical way. Provided that a witness was on notice that his account was being challenged as untruthful in the relevant respect, there was no requirement mechanistically to go through each and every statement of fact to challenge them, provided that the thrust of the cross-examination was clear and indeed to go further would have been an empty technicality. The problem highlighted in **Williams** was not that the witness had not had it put him that he was lying, but that he was not cross-examined on the issue at all. The situation was

more nuanced in the context of fairness in that case, as it was the most serious allegation that could be made against a practising solicitor, in a complex case involving multiple allegations. That was not a single-issue case, when it was obvious that the issue would or might end up with a central finding of dishonesty. There had been ambiguity in the pleaded case and in the circumstances it was necessary for Mr Williams to be challenged directly on the point. The Tribunal in that case could not find him to be dishonest about the most careful consideration of what he said in his defence.

64. Turning to the **Judge** case, at paragraph [22], it was not an invariable requirement to give a party an opportunity to respond where a Tribunal might make a finding of fact which had not been contended for, for two reasons. First, Employment Tribunals have a wide discretion. Second, if the legal effect of the findings is obviously and unarguably clear, no injustice would be done. The main issue for an appellate court was whether the ET had applied the wrong legal test question of the facts. In this case, Mr Sinclair claimed to have decided to withdraw the provisional offer of locum work and his knowledge was in issue. It was open to the ET say that regardless of the Claimant's case, the ET was satisfied that he was a joint decision-maker. The Claimant couldn't be expected to know in advance of what Mr Sinclair said he knew or didn't know.

65. Second, it was also not correct that the Claimant did not put to Mr Sinclair his lack of knowledge of the protected act, which had been referred to in cross-examination - see page [129] CB. The Respondent had asserted in its written skeleton argument before the ET that what was in issue was whether Mr Sinclair's knowledge of the protected act was truthful (paragraph [17], page [113] CB). The Respondent could not now possibly argue that it was unaware that the truthfulness of his account was liable to dispute. The ET had specifically made findings on what

had been discussed between Ms Giles and Mr Sinclair and there was no challenge to that finding. The result of any cross-examination of Mr Sinclair as to dishonesty would simply be to elicit his denial. The Judgment had been clear that the decision-makers' claimed lack of knowledge of the protected act was not accepted, so that the claim would have succeeded. There was no challenge on the grounds of perversity.

Discussion and conclusions

66. Section 27 of the Equality Act defines the act of victimisation:

"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—

(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 this Act."

67. Section 39 goes on to prohibit the act of victimisation:

"39 Employees and applicants

(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(3)An employer (A) must not victimise a person (B)—
(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;
(c) by not offering B employment."

68. As can be seen from section 27 and accepted by both representatives, the act of victimisation contains three elements: subjection to a detriment; the protected act or acts (or belief in them); and the necessary link that the detriment must be because the victim does the protected act.

69. In relation to ground (1), first, I considered, and reject, Ms Criddle's submission that the claim of victimisation which the ET had considered was that which it had been asked to consider, because the detriment remained the same. I accept Mr Tatton-Brown's submission that the claim which the respondent had identified in her Claim Form; in her statement and chronology which was prepared for the purposes of the ET Hearing; and which the ET had previously identified in the issues in a closed Preliminary Hearing, attended by both parties legal representatives, was qualitatively different.

70. That difference is the protected act relied on by the Claimant. I accept Mr Tatton-Brown's submission that a claim of victimisation based on a detriment which is said to be because of protected act 'A', is not the same as a claim of victimisation based on the same detriment, said to be because of protected act 'B'; or protected acts 'A' and 'B' in combination. That is for three reasons. First, the detriment be must be because of the protected act, as identified in the claim. If it mattered not which protected act had occurred, that would undermine the necessary link between the protected act and the detriment.

71. Second, there would be no logical reason to distinguish that scenario, from the scenario in which the protected act was identical, but there were two potential detriments, for example, detriment 'A' – the withdrawal of provisional locum work; as opposed to detriment 'B,' the continuing provision of such work but on more unsociable hours.

72. Third, and as is evident from these examples, the respondent to these claims would be unable to identify with any certainty the precise nature of the claim, with which to formulate its defence and to disclose relevant evidence. The practical nature of the third reason is illustrated by the fact that since pursuing appeal to this Tribunal, the Respondent has apparently been seeking details of the equal pay claim presented in 2004, which, had it been identified as an issue before the parties, would have had a number of implications for the conduct of the litigation. First, had the question been one identified as a relevant issue in dispute between the parties, there would be the obvious disclosure obligation in relation to any claim details, including claim number. Second, the distinction between the lodging of an equal pay questionnaire and the presentation of a Claim Form, both formal in nature but quite separate acts, could have been identified and addressed more clearly with all of the witnesses, and not simply the Claimant who was asked the clarification questions, as confirmed in the Further Reasons at paragraph [5], page [73] CB, but also with Ms Giles and Mr Sinclair.

73. Next, I considered Ms Criddle's submission that any list of issues, even one identified and agreed between legal representatives, was not to be 'slavishly' followed. I considered **Sridar v Kingston Hospital NHS Foundation Trust [2020] UKEAT/0066/20,** paragraphs [84] to [87]:

> **"84. Where a list of issues is agreed, the general rule is that the issues to be determined will be limited to that list. In Parekh v The London Borough of Brent [2012] EWCA Civ 1630, Mummery LJ said at paragraph 30:**

"30. ...the list was described by the employment judge as the issues "definitively recorded" by him. He recorded them following the discussions at the PHR by Mr Parekh and Mr Ross, appearing for the Council, with him. The list was not the product of any adjudication, let alone any binding adjudication, of a dispute of substantive fact or law between the parties, such as whether capability was the reason for the dismissal, or of a procedural application or dispute.

31. A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: see *Land Rover v. Short* Appeal No. UKEAT/0496/10/RN (6 October 2011) at [30] to [33]. As the Employment Tribunal that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence: see *Price v. Surrey CC* Appeal No UKEAT/0450/10/SM (27 October 2011) at [23]. As was recognised in *Hart v. English Heritage* [2006] ICR 555 at [31]-[35] case management decisions are not final decisions. They can therefore be revisited and reconsidered, for example if there is a material change of circumstances. The power to do that may not be often exercised, but it is a necessary power in the interests of effectiveness. It also avoids endless appeals, with potential additional costs and delays.

32. While on the matter of appeals I would add that, if a list of issues is agreed, it is difficult to see how it could ever be the proper subject of an appeal on a question of law. If the list is not agreed and it is contended that it is an incorrect record of the discussions, or that there has been a material change of circumstances, the proper procedure is not to appeal to the EAT, but to apply to the ET to reconsider the matter in the interests of justice."

85. Very recently, the question of the status of a list of issues has been considered again by the Court of Appeal in Mervyn v BW Controls [2020] IRLR 464. This was a case in which there was a claim for unfair dismissal, but the list of issues did not include a fairly obvious alternative claim for constructive dismissal. The Court of Appeal said that it was good practice.for an ET at the start of a Substantive Hearing with either or both parties unrepresented to consider whether any list of issues previously drawn up at a Case Management Hearing properly reflected the significant issues in dispute between the parties. If it was clear that it did not or that it might not do so, then a Tribunal should consider whether an amendment to the list of issues was necessary in the interests of justice; see Parekh and Scicluna v Zippy Stitch Ltd [2018] EWCA Civ 1320:

"38. I do not read the last sentence of the judgment of Underhill LJ in *Scicluna* as imposing a requirement of exceptionality in every case before a tribunal can depart from the precise terms of an agreed list of issues. It will no doubt be an unusual step to take, but what is "necessary in the interests of justice" in the context of the tribunal's powers under Rule 29 depends on a number of factors. One is the stage at which amending the list of issues falls to be considered. An amendment before any evidence is called is quite different from a decision on liability or remedy which departs from the list of issues agreed at the start of the hearing. Another factor is whether the list of issues was the product of agreement between legal representatives. A third is whether amending the list of issues would delay or disrupt the hearing because one of the parties is not in a position to deal immediately with a new issue, or the length of the hearing would be expanded beyond the time allotted to it.

42. In the present case to use Judge Auerbach's vivid phrase, it "shouted out" from the contents of Ms Mervyn's Particulars of Claim that, on a proper analysis, she was alleging that she had been constructively dismissed.

Conclusion

43. It is good practice for an ET, at the start of a substantive hearing with either or both parties unrepresented, to consider whether any list of issues previously drawn up at a case management hearing properly reflects the significant issues in dispute between the parties. If it is clear that it does not, or that it may not do so, then the ET should consider whether an amendment to the list of issues is necessary in the interests of justice."

86. It is clear therefore that at a further Preliminary Hearing the ET has the power to revisit the list of issues as indeed does the ET at the Full Hearing, but it does not follow that there is always an obligation to amend the list of issues. Here, the ET was told that an issue had been overlooked, but the list of issues was discussed carefully and thoroughly at the first Hearing and the list of issues was adopted which did not refer to victimisation. Victimisation had not been pleaded and indeed, it was not referred to during that first hearing.

87. In my judgment, the Employment Judge Wright was correct to say that Mr Sridhar could apply to amend and then his application to refer to victimisation could be dealt with on the merits including whether it was now too late to do so. He has chosen not to do so, but that was his decision. I do not think that it was outside the scope of the Judge's discretion to deal with a case management issue in this way, particularly as she was not closing the door entirely to the possibility of relying on the victimisation challenge."

74. The answer to this is that the Respondent does not seek to criticise the ET for going beyond the pleaded claim or list of issues in circumstances where the ET had been invited to depart from the list of issues by the parties or had, of its own initiative, indicated to the parties that it proposed to do so, for example in circumstances where there was an issue which "shouted out" to be considered. The challenge is a simpler one, namely that the ET departed from both the Claim Form and the list of issues, uninvited by either party; without any indication of its intention to do so; and in circumstances where there was no such issue which "shouted out". In the circumstances, the undoubtedly wide case management powers as identified in **Sridar** are beside the point, and do not address the ET's error in deciding a claim which was qualitatively different from that which it had been asked to consider.

75. Finally, I accept Mr Tatton Brown's submission that the principle set out in **Chapman v Simon [1994] IRLR 124** is equally application to a claim of victimisation, as it is to a claim of direct discrimination. The Court of Appeal was considering, at paragraph [15] of that case, sections 1 (relating to racial discrimination); 32, (relating to liability of employers) and 54 of the Race Relations Act 1976, relating to the jurisdiction of 'Industrial Tribunals', as they were then known:

> **"54. Jurisdiction of Industrial Tribunals**
>
> **(1) A complaint by any person ("the complainant") that another person ("the respondent") –**
>
> **(a) has committed an act of discrimination against the complainant which is unlawful by virtue of Part II; or**
>
> **(b) is by virtue of s.32 ... to be treated as having committed such an act of discrimination against the complainant ...**
>
> **may be presented to an Industrial Tribunal ..."**

76. At paragraphs [42] to [43], Lord Justice Peter Gibson went to say the following:

> **"42. Under s.54 of the 1976 Act, the complainant is entitled to complain to the Tribunal that a person has committed an unlawful act of discrimination, but it is the act of which complaint is made and no**

other that the Tribunal must consider and rule upon. If it finds that the complaint is well founded, the remedies which it can give the complainant under s.56(1) of the 1976 Act are specifically directed to the act to which the complaint relates. If the act of which complaint is made is found to be not proven, it is not for the Tribunal to find another act of racial discrimination of which complaint has not been made to give a remedy in respect of that other act.

43. Racial discrimination may be established as a matter of direct primary fact. For example, if the allegation made by Ms Simon of racially abusive language by the headteacher had been accepted, there would have been such a fact. But that allegation was unanimously rejected by the Tribunal. More often racial discrimination will have to be established, if at all, as a matter of inference. It is of the greatest importance that the primary facts from which such inference is drawn are set out with clarity by the Tribunal in its fact-finding role, so that the validity of the inference can be examined. Either the facts justifying such inference exist or they do not, but only the Tribunal can say what those facts are. A mere intuitive hunch, for example, that there has been unlawful discrimination, is insufficient without facts being found to support that conclusion."

77. First, it is important to note that the Court of Appeal did not limit the principle that a Tribunal ought not to find another act of race discrimination of which complaint has not been made, to give a remedy in respect of that other act, to a claim of direct discrimination alone. The reference in these excerpts to direct discrimination reflects the findings (which related to direct discrimination) made by the Employment Tribunal in **Chapman.**

78. Second, there is no logical reason why the above principle should be so limited and I accept the submission of Mr Tatton-Brown that indeed it would not be logical to limit the principle to claims of direct discrimination.

79. Third, I do not accept that the principle only applies where there has been an absence of primary fact-finding on the additional, unpleaded claim. Lord Justice Gibson was clearly considering at paragraphs [42] to [43] two aspects of the Industrial Tribunal's error. Either was sufficient to amount to an error of law. Lord Justice Gibson did not state, nor does the principle

lend itself readily to an interpretation, that both elements (a decision on an unpleaded claim and absence of primary fact-finding) must be present for there to be an error of law.

80. In conclusion, in relation to ground (1), I am satisfied that the ET erred in law in making findings on, and deciding a claim of victimisation, which was qualitatively different from that which had been pleaded and previously discussed at a Preliminary Hearing. The alternative formulation of the claim was not one which "shouted out"; nor had the ET been asked to, or indicated that it intended to exercise its case management powers; and practically, even to the extent that the Respondent's witnesses was said to have accepted that the Claimant had presented an equal pay claim, the careful distinction which the ET had drawn in asking the Claimant whether she had presented a claim as well as submitting a questionnaire, was not applied to Mr Sinclair.

81. I am further satisfied that the error of law was a material one, in the context of this case where the ET's reasoning throughout the Judgment was based on the alternative formulation of protected acts, in combination, without an assessment of the pleaded protected act alone. This was particularly important where, as in this case, the assessment of the Respondent's witnesses evidence depended, at least in part, on the plausibility of their account. By way of example, I accept the force of Mr Tatton-Brown's submission that an assessment of the plausibility of Mr Sinclair's lack of knowledge of the presentation of an equal pay claim, is potentially (and materially) quite different to an assessment of the plausibility of an account, in relation to a statutory questionnaire. It is not possible to isolate, from the ET's reasoning, the assessment of plausibility on the pleaded protected act, when the ET clearly assessed all of the circumstances in the round.

82. In relation to ground (2), on the one hand, I am conscious that the principle that a witness whose integrity is impugned should be given the opportunity to comment is not a rigid one, and is highly context-sensitive. As identified in the cases to which I have been referred by the representatives, there will be cases of a single-issue nature where the effect of the findings will be obvious. I also accept that a putative victim cannot necessarily be expected to know what was in the mind of alleged perpetrators, where knowledge is a necessary ingredient for the link between the protected act and the detriment. In these circumstances, I accept that an Employment Tribunal must remain alive to the need to engage with the evidence before it, not simply based on the questions put in cross-examination.

83. In the particular circumstances of this case, however, what is clear from the Claim Form and issues, recorded in the Preliminary Hearing (and referred to at paragraphs [5] and [6] of this Judgment, above, was that the alleged perpetrator was identified as Ms Giles, as the person with accepted knowledge of the protected act and as the decision-maker. The Respondent had responded that Mr Sinclair was the decision-maker. In contrast, the ET had recorded as the factual questions, at paragraph [6], as being

> **"Who made the decision to revoke the offer to join the respondent's local bank Was it Ms Giles, Mr Sinclair, or both?"**

84. Thus a third factual scenario was introduced, namely the combined decision-making of Ms Giles and Mr Sinclair. The practical difficulty was that the third scenario, combined with the additional unpleaded protected act, resulted in the necessary imputation that Mr Sinclair's evidence was untruthful. The case, as eventually found by the ET, that he was specifically aware of an equal pay claim, in addition to, and as distinct from, an equal pay questionnaire; and that he and Ms Giles were joint decision-makers, with the necessary imputation that his evidence was

untruthful, was not put to him, in the open questions to which I have been referred. The change in the case, from one involving a sole identified instigator with knowledge of a single protected act, to two instigators, both with knowledge of two protected acts, reflects the risk of over-simplifying what may be a complex factual enquiry. The legal effect was not obvious, nor could it have been, where the third scenario envisaged by the ET had not been identified in the pleadings or list of issues. Had such a third scenario, a finding about which necessarily impugned Mr Sinclair's integrity, been put to him, the result may well not have been a sterile exercise. That is particularly so where, as here, the ET had not asked itself the correct legal test by identifying the correct protected act. In the specific circumstances of this case, I conclude that the ET did err in making findings which necessarily impugned Mr Sinclair's integrity, in circumstances where he did not fairly have the opportunity to respond and where the nature of the allegations appears to have shifted by the time the ET reached its decision, in a way that was not apparent at an earlier stage.

85. For the above reasons, the ET erred in law; those errors were material; and both grounds of appeal are sustained. The ET's assessment of credibility was central to a determination of the Claimant's claim. Accordingly, the ET's decision is unsafe and cannot stand.

Disposal

86. In the circumstances where all of the evidence relating to credibility is interlinked, there needs to be a complete rehearing and the appropriate disposal is for the case to be remitted. The only preserved findings of fact (never in dispute) are:

> 32.5 the Claimant issued an equal pay questionnaire 2004, of which Ms Giles was aware at the time.

32.6 The Respondent provisionally offered the Claimant locum work in 2018, but that offer was subsequently withdrawn.

87. While in no way doubting the professional way in which the ET conducted itself, given the firm view that the ET reached on credibility, I direct that the remaking should be conducted by a differently constituted ET.