Case No: EA-2020-000406-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 November 2021

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

DR Z WINDLE	**Appellant**
- and -	
CHIEF CONSTABLE OF WEST YORKSHIRE POLICE (1)	**Respondents**
CHIEF CONSTABLE OF SOUTH YORKSHIRE POLICE (2)	
MS C CUTTELL (3)	
POLICE SERGEANT GREENWOOD (4)	

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Mr N Roberts (instructed by Leigh Day) for the **Appellant**
Mr D Jones (instructed by Weightmans LLP) for the **Respondents**

Hearing date: 21 September 2021

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JUDGMENT

SUMMARY

WHISTLEBLOWING, PROTECTED DISCLOSURES

The claimant in the tribunal is a professional interpreter who provided services to two police forces via the supplier which held the language services contract. She raised a number of concerns about the way in which those services were being procured and provided, which were found to be protected disclosures. She complained that she had been subjected to detrimental treatment on the ground that she made those disclosures. As framed by her, there were eight such complaints. The tribunal found that in five instances the conduct complained of did not entail the claimant being subjected to a detriment. In three, it did, but the conduct complained of was found not to have been on grounds of the protected disclosures. The tribunal's decision was challenged as being not *Meek*-compliant in respect of all eight complaints. The appeal succeeded in respect of three of the complaints, where the tribunal had failed to explain why the conduct was not regarded as amounting to detrimental treatment, and a further pair of complaints, where the tribunal had not addressed the core of the claimant's case as to why the conduct was because of her protected disclosures. The decision in respect of the other complaints was *Meek*-compliant.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. I shall refer to the parties as they were in the employment tribunal as claimant and respondents. The claimant appeals against the reserved decision of the tribunal (EJ Shepherd, Mr Dorman-Smith and Mr Fields), arising from a hearing in February 2020, dismissing her complaints that she had been subjected to multiple detriments on the ground that she had made protected disclosures. Before the tribunal the claimant appeared in person. At the appeal hearing Mr Roberts of counsel appeared for her. The respondents were represented on both occasions by Mr Jones of counsel.

The Facts

2. The tribunal heard evidence from the claimant and from the third and fourth respondents. A summary of its salient findings of fact is as follows.

3. The claimant is a professional interpreter and translator registered on the National Register of Public Service Interpreters (NRPSI). South Yorkshire Police (effectively the second respondent) is the lead force for a regional procurement collaboration agreement between South Yorkshire, West Yorkshire and two other forces. The third respondent works for the South Yorkshire force, and is a Senior Category Manager within the regional procurement team. The fourth respondent, who is a police officer, is the regional specific point of contact for language services and operational lead for the West Yorkshire force (effectively the first respondent).

4. Capita Translation and Interpreting (Capita) took over the interpreting contract from 1 April 2019. The claimant registered with Capita and provided services to the first and second respondents. The tribunal specifically found that, pursuant to the applicable language services framework, the forces' vetting requirement for interpreters was NPPV3 clearance.

5. On 29 March 2019 the claimant emailed the first respondent raising concerns about the use of unqualified interpreters by Capita's predecessor. On 3 April she emailed the first respondent raising a formal complaint against the procurement department and asking for an investigation. On 9 April

she emailed the first respondent alleging that Capita had supplied "unqualified bilinguals". She gave an account of a specific matter involving the victim of an alleged domestic assault. On 9 April 2019 Superintendent Humpage, of the first respondent's Criminal Justice and Custody Services, emailed the third respondent that she had asked the fourth respondent to investigate the claimant's complaint.

6. The third respondent was concerned that, in her 9 April email, the claimant had disclosed the name of the individual who had been in custody, and details of the serious and sensitive offence for which they had been arrested, and that that email had been sent to a generic group email address, and from a non-secure personal email address. "There were data protection issues, a danger that the investigation could be jeopardised, and the safety of individuals put at risk. She therefore took advice from the first respondent's in-house legal team and it was suggested that she should contact NRPSI." (Paragraphs [9.15] – [9.16].)

7. On 10 April a member of NRPSI's professional standards department advised the third respondent that the disclosure of information breached its code of conduct. On 17 April the third respondent completed an NRPSI online complaint form. She wrote:

> "Following Dr Windle's attendance to the booking on 7th April, Dr Windle proceeded to contact the staff officer to complain about another linguist that attended the booking on behalf of a contracted service provider. Within the email to the staff officer, Dr Windle disclosed details of the detained suspect and the offences for which the suspect is detained. Whilst these details have been disclosed to police personnel, the personnel contacted are not involved in the associated investigation nor involved in the custody process; this therefore poses risk to the investigation. No details of arrests made should leave the custody setting without authorisation for the circulation of details. Sharing of such details could jeopardise investigations and put people within the organisation in positions whereby there is a conflict of interest. There is also concern that there is a breach of GDPR, which is also being investigated internally."

8. On 23 April the fourth respondent sent an email to the third respondent and others. She wrote:

> "Sorry all – just getting up to date with emails following leave. If we consider suspending Dr Windle from any Police duties, I think we should take this up with Legal first, bearing in mind that she has previously taken WYP to court for loss of earnings. I believe both Mick Preston and Rachel London both had to give evidence at that court case."

9. On 23 April the fourth respondent further emailed the third respondent. She referred to an email she had received from PS Sanders of the first respondent relating to a particular job.

> "[the email from PS Sanders] referred to the claimant having been booked by Capita after a lot of trying and that the claimant said that Capita had been pestering her all day and she didn't want to do it 'as Capita pay peanuts and this is why they can't get interpreters.' The officer said that the claimant wanted her to feed this back."

10. In her own email, attaching that email from PC Sanders, the fourth respondent wrote:

> "What is very interesting are the comments Dr Windle made to the Officer as below. We thought that she was purposely ignoring calls from Language Empire before they refused to use her (we didn't have any direct evidence to report the matter to NRSPI) but below clearly states that she has been trying to avoid Capita in order to charge more money for her services by being approached by the Police direct. As part of the complaint made to NRSPI, could this be included? Let me know your thoughts please."

11. On 24 April NRPSI's Professional Standards Manager emailed the fourth respondent asking for redacted copies of the emails sent by the claimant, which would be "really helpful."

12. On 25 April the fourth respondent checked the portal for the national vetting contract, held by Warwickshire Police. She was told that there was no record for the claimant. She emailed Superintendent Humpage "[j]ust to keep you in the loop regarding Dr Windle." She stated that Warwickshire had confirmed that she was "not vetted with them" and that NRPSI showed that "she only has DBS clearance and there is no mention of police clearance", adding that the force required NPPV3. She had been advised to contact the Manchester force (which, the tribunal explained, had held the vetting contract before Warwickshire) and would "update everyone" once they had replied.

13. On 26 April the third respondent provided NRPSI with a redacted copy of the claimant's 9 April email.

14. Capita emailed the fourth respondent that the claimant needed NPPV3 in addition to Home Office clearance. On 29 April Greater Manchester Police informed her that they had no vetting record for the claimant. On 2 May the third respondent emailed Capita that, until the claimant had NPPV3 clearance, she would not be booked for any jobs. Capita confirmed that she had been removed from future bookings.

15. On 9 May Superintendent Humpage responded to the issues raised in the claimant's emails of 29 March and 3 and 9 April.

16. On 9 May the claimant emailed Superintendent Humpage raising issues concerning the earlier

award and management of the contract held by Capita's predecessor, and further concerns about the management of the Capita contract.

17. On 14 May NRPSI requested from the third respondent, further details of the fourth respondent's complaint.

18. On 18 May the claimant wrote to the second respondent alleging a breach of the Freedom of Information Act 2000 in relation to a response to an FOI request she had made concerning unqualified individuals.

19. On 6 June the third respondent informed the fourth respondent that NRPSI had asked that she provide a statement "in relation to the feedback provided in respect of the claimant's comments about ignoring calls and the rates of pay."

20. On 12 June NRPSI dismissed the complaint. It was indicated that the file had been kept open beyond normal deadlines to facilitate the supply of further evidence which, in the event, did not arrive. The report stated that the Information Commissioner helpline "has confirmed that the GDPR does not apply." As to the second complaint: "there has been no evidence supplied and it is based on hearsay."

21. On 23 August Capita informed the third respondent "that the claimant had received NPPV3 clearance along with other interpreters." All interpreters would now receive offers for West Yorkshire region bookings.

The Tribunal's decision

22. It was accepted, and found, that each of the claimant's emails of 29 March, 3 April, 9 April, 9 May and 18 May 2019 amounted to a protected disclosure (PD). She "had very serious concerns about the use of unqualified interpreters and the effect on the investigation of crimes and the administration of justice."

23. In an extended section of the reasons, the tribunal considered whether the claimant was a worker for the purposes of her PD detriment complaints. The conclusion was that this had no

significance in relation to the first PD, as there was no detriment complaint relating to it. The four subsequent disclosures were all made at a time when she was a worker.

24. The tribunal set out the eight complaints (which arose from three claims), and its conclusions in relation to whether in relation to each, there was detrimental conduct, in the following passage:

> "40. The alleged detriments were as follows:
>
> > 1. The third respondent made a complaint of professional misconduct against the claimant to her professional body the NRPSI. The complaint asserted that the claimant was defrauding the taxpayer to get more money by not being booked via Capita. Secondly, it was asserted that the claimant had breached confidentiality/the GDPR.
>
> 41. The complaint was submitted to NRPSI on 17 April 2019. The complaint was about the claimant posing a risk to an investigation and breach of confidentiality. On 23 April 2019 the third respondent added a further complaint in respect of the incident at Stainbeck Police Station on that date and the email which had been sent from a Police Officer.
>
> 42. This was a serious allegation and the Tribunal accepts that it was a detriment.
>
> > 2. The third respondent unlawfully disseminated a copy of the claimant's confidential email to the first respondent's office.
>
> 43. On 25 April 2019 the third respondent sent a redacted copy of the claimant's email to the NRPSI Professional Standards department. During the hearing, the claimant agreed that this was not unlawful but she said that it was unnecessary and inappropriate. This was in the context of the third respondent submitting a complaint about the claimant in respect of the respondents' concerns about the claimant disclosing confidential details in relation to criminal offences and investigations.
>
> 44. It was submitted by Mr. Jones, on behalf of the respondents, that the claimant had not proven that there had been detrimental treatment on the balance of probabilities.
>
> 45. The Tribunal is satisfied that the making of the complaint to the claimant's professional body was a detriment. However, it is not satisfied that the dissemination of the claimant's email was a detriment.
>
> > 3. The respondents cancelled the claimant's work bookings for 30 April 2019 and 4 May 2019 or asked for cancellation of the same by Capita.
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> 46. The third respondent wrote to Capita on 2 May 2019 indicating that the claimant should not be booked for any jobs until her NPPV3 vetting was cleared. This was a detriment.
>
> > 4. The respondents suspended the claimant from receiving further bookings via Capita or requested that Capita suspend her from further bookings after 4 May 2019.
>
> 47. This appears to be a, in effect, duplication of detriment 3 and the claimant deals with it on this basis in her submissions.

> 5. The fourth respondent wrongly disseminated the email from PC Sanders which was marked "protected".

48. The respondent submitted that this is unclear and confusing – the claimant made it clear that she objected to the email being sent to Sergeant Humpage and the third respondent but the Tribunal is satisfied there is no detriment established here.

> 6. The third and fourth respondents deliberately refused to co-operate and properly follow up the NRPSI's complaints investigation. Whilst indicating that they had further information to provide, they failed to provide it.

49. The alleged detriment is that the third and fourth respondents failed to cooperate with the investigation by NRSPI. There was a delay with regard to providing statements but this was not unfavourable to the claimant. No further action was taken against her and there was no detriment to the claimant.

> 7. Excessive email correspondence without justification between the third respondent, the fourth respondent, Warwickshire Police, Greater Manchester Police, Capita and others.

50. The Tribunal has considered the email exchanges between the third and fourth respondent, colleagues, other police forces and Capita. These appear to be reasonable and appropriate once the issue in respect of the claimant's vetting had arisen. The claimant referred to the fourth respondent's email exchange with Capita with regard to CTC clearance in which the fourth respondent indicated that there was a difference tween "Home Office clearance" and CTC which is a counterterrorism check. The claimant submitted that this was unnecessary and unjustified. She also submitted that if the fourth respondent genuinely wanted to establish the claimant's NPPV3 status one email to Capita would have been sufficient.

51. The Tribunal is not satisfied that there was any detriment to the claimant established in the content of these emails.

> 8. The fourth respondent's excessive and bizarre enquiries damaged my relationship with Capita and made Capita think there was something wrong with me.

52. The claimant said that this detriment concerned her allegation that the fourth respondent watched her and reported on her various activities to Superintendent Humpage.

53. The claimant said that Superintendent Humpage is one of the senior officers within the force and does not deal with the day-to-day issues, such as the booking of interpreters.

54. Superintendent Humpage had appointed the fourth respondent to investigate the concerns raised by the claimant in her emails of 29 March 2019 and 9 April 2019 to the Office of the Chief Constable. It was not a detriment to the claimant that the fourth respondent continued to keep Superintendent Humpage informed of the issues with regard to the claimant, and the reference to keeping her in the loop regarding the claimant was not a detriment to the claimant.

55. Superintendent Humpage provided a response to the issues raised by the claimant on behalf of the Chief Constables and Police and Crime Commissioners and it was entirely appropriate for her to be kept informed of issues with regard to the claimant and issues with regard to her vetting status at that time."

25. In relation to those complaints in respect of which the tribunal had found that there was detrimental conduct, it directed itself that it "must determine whether the protected disclosures materially influenced the respondents in making the detriments." It referred to section 48(2) **Employment Rights Act 1996** and held that the burden had shifted to the respondents to prove that the claimant was not subjected to the detriments on the ground that she had made the PDs. The tribunal noted, citing the words of Elias LJ (wrongly attributed by the tribunal, I interpose, to Mummery LJ, though he concurred with Elias LJ) in *NHS Manchester v Fecitt* [2012] ICR 372, that the claimant had exhorted it to look with a "critical – indeed sceptical – eye" at the respondents' explanations. The tribunal stated that it "gave careful consideration to this matter and finds that the evidence of the third and fourth respondents was clear, consistent and credible."

26. The tribunal's reasoning and conclusions on the causation question were as follows.

> "61. There was clear evidence that there was concern that the claimant had potentially endangered an investigation and breached security by disclosing the name of a detainee and the offence for which he was investigated. The information had been sent by the claimant to a generic email address from what could be an insecure email address. The third respondent considered that this may be a breach of the NRPSI guidelines and she sought guidance from the respondents' legal department and the Professional Services Department of NRPSI before submitting a complaint. The Tribunal has considered this carefully and is satisfied that this concern was the genuine reason for the complaint to NRPSI and was not materially influenced by the protected disclosures.
>
> 62. The email on 23 April 2019 from PC Sanders was forwarded to the fourth respondent. It was information provided by the claimant to the Police Constable. The fourth respondent was concerned about the information that had been provided and said that her sole concern was to try and end the practice of interpreters going "off contract" which was costing the force a considerable amount of public funds. The Tribunal is satisfied that the respondent has established that this was the reason the fourth respondent raised the issue and the third respondent added it to the complaint to NRPSI and that the protected disclosures did not materially influence this.
>
> 63. The request or requirement that Capita ensure that the claimant was not used on police assignments until she had the NPPV3 clearance as required by the framework agreement was because the claimant did not have the requisite vetting clearance. It was a temporary measure and, once the claimant obtained the NPPV3 she was provided with information in respect of a further police assignment. The Tribunal is satisfied that the respondents have shown that the genuine reason for this detriment was that the claimant did not have the requisite vetting and it was not materially influenced by the protected disclosures.
>
> 64. The claimant referred to the email of 29 April 2019 from the fourth respondent to the third

respondent and others as a "smoking gun". The Tribunal is satisfied that this email serves to confirm that the fourth respondent had legitimate concerns that Capita had been sending interpreters who did not have the requisite vetting. It was submitted by Mr Jones that it was an "absurd proposition" on the part of the claimant to suggest that this is evidence that establishes the detriments were done on the ground of the claimant having made protected disclosures. The Tribunal has considered the contents of this email carefully. It refers to the claimant having made complaints about inadequately vetted interpreters and that it had then been found that the claimant did not have the appropriate clearance.

65. The reporting of the claimant to her professional body was established to be because of the respondent's concerns about the potential breach of confidentiality and jeopardising investigations followed by the further concern with regard to the claimant not having the required level of vetting.

66. The claimant submitted that the evidence given by the fourth respondent in cross examination raised a question of credibility in that it contradicted the wording of the grounds of response when there was reference to the fourth respondent becoming aware of "five" (referred to as "several" in the third grounds of response) linguists who did not have the requisite vetting.

67. The claimant referred to "false information and intention to mislead" in the 3 grounds of response and the evidence from the fourth respondent with regard to the discovery of four or five interpreters without the requisite vetting. The Tribunal is satisfied that this came as a complete surprise to the fourth respondent. It was an error on the part of the legal representatives. The Tribunal is satisfied that it would have been appropriate for the fourth respondent to have sight of each of the ET3s and the grounds of response but it was apparent that she had not, even when she had been named as a respondent. This was a repeated pleadings error. The claimant referred to it as false information that could only have been put in all the responses to mislead the claimant and the Tribunal. The fourth respondent gave an honest response. She did not know how that information had come to be included in the grounds of response. There had been some confusion with regard to a reference to four interpreters. The Tribunal is satisfied that this was an error and it did not damage the credibility of the fourth respondent.

68. The requirement for Capita to take the claimant off the list and that she be provided with no more police assignments until she had the NPPV level 3 clearance was not materially influenced by the disclosures. It was purely because it had come to the respondents' attention that the claimant did not have the required level of vetting. The claimant obtained the requisite vetting and was then provided with an indication that she would be considered for a further assignment through Capita for the respondents. She was provided with an indication in respect of some potential work but was then not provided with the assignment and removed herself from Capita's list.

69. The Tribunal has been careful to use a "sceptical eye" when considering the innocent explanation given by the respondents. The Tribunal entirely satisfied that the identified detriments were not as a result of or, materially influenced by, the protected disclosures that have been identified."

The Grounds of Appeal and the Arguments

27. Although, as framed, there were three live grounds of appeal before me, Mr Roberts acknowledged that they overlapped, and that the whole live appeal is by way of a *Meek* challenge. In summary, it asserts that the reasons given by the tribunal for concluding (a) that, in respect of each of the matters raised by complaints 2, 5, 6, 7 and 8, there was no detrimental treatment, and (b) that the detrimental treatment found to have occurred as alleged by complaints 1, 3 and 4 did not occur on grounds of the PDs, did not in any such case comply with *Meek v City of Birmingham DC* [1987] IRLR 250 and/or rule 62(5) **Employment Tribunals Rules of Procedure 2013**.

28. I will next set out a summary of the principal arguments on each side. I will also return to some aspects of the arguments when I come to set out my conclusions.

Claimant

29. Mr Roberts submitted that the conduct complained of as a whole arose from three purported concerns on the part of the third and fourth respondents, which he labelled as follows:

(a) The "email complaint" – being the stated concerns about the claimant's email of 9 April 2019, which were the subject of the initial complaint to NRPSI;

(b) The "money complaint" – being the stated concerns raised in relation to the "Capita pay peanuts" email, which formed the subject of the additional complaint to NRPSI; and

(c) The "vetting complaint" – Mr Roberts used this label to describe the activity around checking the claimant's vetting status. While this was not actually the subject of a further complaint to NRPSI, he referred to an email which showed that the possibility of making such a complaint was considered, but rejected, because there was potential for embarrassment.

30. Complaint 2 concerned the claimant's confidential email of 9 April having been, on her case, wrongly copied on to NRPSI. At [43]-[45] the tribunal had simply stated its conclusion that this was not detrimental treatment, without providing any substantive reasoning in support.

31. Complaint 5 concerned the sending, to Superintendent Humpage, of a copy of the PC Sanders email. Again, the tribunal simply stated at [48] that it was satisfied that this was not detrimental treatment, but without setting out any reasoning at all.

32. In relation to complaint 6 the tribunal found that there was "delay", but that there was no detriment because NRPSI dismissed the complaints. But the complaint was about the process: the failure of the respondents to respond promptly to NRPSI enquiries, which in turn led to the resolution of the matter by NRPSI being delayed. The tribunal, despite making factual findings about that, had not considered whether that inaction was deliberate or was otherwise a detriment.

33. Complaints 7 and 8 related to the various internal and external communications about the claimant's vetting status. The tribunal had failed to address at [50] – [54] why, if suspending her from further work with Capita pending resolution of her vetting status was (as it had correctly found) detrimental treatment, these various extensive communications were not also detrimental treatment. It also failed, as the law required, to analyse that question from the claimant's subjective perspective.

34. In relation to the reasons why the conduct to which complaints 1, 3 and 4 related had occurred, the tribunal did little more than restate the respondents' arguments. The burden was on them to show that the PDs did not materially influence this conduct. The tribunal's examination of this should have included consideration of the possibility of unconscious influence. There was also no critical analysis of various important features of the case. As to that, Mr Roberts developed a number of points.

35. Firstly, by only considering the complaints piecemeal, there was a failure to analyse the big picture. This was one in which, within a month of making her PDs, the claimant was the subject of two complaints to NRPSI and an investigation of her vetting status, by the person whose department she had criticised, and the person charged with investigating her concerns, working in concert, and without them first raising any of these matters with her. The initial complaint to NRPSI was intimately linked to one of the PDs. The authorities warn tribunals of the dangers of abuse of the line of argument that an actor was motivated by some feature connected to the complaint, but which is properly separable from the making of the complaint itself.

36. Secondly, it was not enough to say that the third and fourth respondents were clear, consistent and credible. As the authorities establish, the possibility of unconscious discrimination needed to be considered as well. There was no indication that the tribunal had done this.

37. Thirdly, in relation to the "money complaint", this was made to NRPSI by the third respondent, but the tribunal did not make a specific finding of fact about that complaint made by her. Rather, it focussed at [62] on the thought process of the fourth respondent, not that of the third respondent. It also did not consider the fact that what started as a concern that the claimant herself asked PC Sanders to raise, became the basis for a further complaint about her.

38. Fourthly, in relation to the vetting status investigation, there was no consideration by the tribunal of whether the claimant was singled out in relation to the matter of checking her vetting status, and, if so, why. This was particularly important in view of the fact that the respondents had consistently pleaded that she was not singled out, but the email evidence showed that she was. At [67] the tribunal considered a particular issue raised by reference to the respondents' pleadings, but failed to do so adequately. The point arose in the following way.

39. The grounds of resistance to the first claim, entered on behalf of the first three respondents, pleaded that the fourth respondent became aware of "five linguists", including the claimant, who did not have NPPV3 clearance, and that others had been dealt with in the same way as the claimant. The grounds of resistance to the second claim, on behalf of all four respondents, asserted that the fourth respondent became aware of "several linguists", including the claimant, who did not have clearance, and that others had been dealt with in the same manner as her. The grounds of resistance to the third claim, again on behalf of all four respondents, stated that "on or around 25 April 2019" the fourth respondent became aware of "several linguists" who did not have NPPV3 clearance.

40. It became apparent in evidence at the hearing that in fact no other linguists had been treated the same way as the claimant in relation to this matter. The fourth respondent's evidence was that she was not consulted about the wording of the pleadings, which came as a complete surprise to her. Mr Roberts accepted that the tribunal's conclusion at [67] could not, in light of her evidence, be said to be perverse; but it had failed to grapple with the fact that the pleadings must have been drafted on someone's instructions; that, when the fourth respondent was added, the wording changed; and that no specific evidence was presented as to how the solicitors could have made such serious mistakes.

Respondent

41. The tribunal's reasons must be read as a whole. Doing so, they satisfied the fundamental requirement in *Meek*, being that the parties should know why they have won or lost, and were therefore also compliant with rule 62. The tribunal's decision contained a comprehensive factual summary. It gave itself a correct self-direction as to the law, and reminded itself of this when coming to its conclusions. The tribunal had a lot of documents in its bundle and heard both the third and fourth respondents cross-examined. It specifically stated that it had found the evidence of the third and fourth respondents to be "clear, consistent and credible". There was ample evidence to support its conclusions. It was not obliged to set it all out in its decision. Failure to refer to some particular aspect of the evidence did not mean that the tribunal had failed to take it into account. The tribunal specifically and properly flagged at the start of its fact-finding section (paragraph [9]) that its findings were not intended to cover every point of the evidence. The claimant was seeking to re-run her case, by having the EAT review selected aspects of the evidence, which she was not entitled to do.

42. In relation to complaint 1, PC Sanders' email reported that the claimant had said that "she wished she'd have waited longer so she could have done it privately", which the tribunal was entitled to find gave rise to a genuine concern that the claimant was playing the system for financial advantage.

43. Complaint 2, as pleaded, was unclear as to what "unlawfully disseminated" referred to. As the tribunal recorded at [43], the claimant explained that this was about sending to NRPSI an unredacted copy of her 9 April email. But she also accepted that doing that was not unlawful. The assertion that it was nevertheless unnecessary and inappropriate was not what was claimed. The tribunal properly found that the pleaded detriment was not made out.

44. Regarding complaints 3 and 4 the tribunal found as a fact that the claimant was required to have NPPV3 clearance, which she accepted that she did not have at the time. PS Greenwood did confirm that no other linguists were in fact suspended from Capita work on that account; but the claimant was the one who had come forward and was on their radar. The tribunal also had email evidence that PS Greenwood had a genuine concern that Capita might be using other unvetted

interpreters, which had been a problem with its predecessor, and wanted to investigate this further.

45. Complaint 5 related to the email from the fourth respondent of 23 April, copying, and commenting upon, the PC Sanders email. The recipients included the third respondent and Superintendent Humpage. The email was marked as classified "PROTECT". It was hard to see how forwarding it in that way could be a detriment. The tribunal did not need to go to town to explain that. What the tribunal said at [62] also supported its conclusion that this was not a detriment.

46. Complaint 6 was said to be deliberate refusal to co-operate with NRPSI. Mr Jones accepted that the tribunal had not made an express finding as to whether there was a deliberate refusal; but it had evidence that the fourth respondent replied to the third respondent's email informing her of NRPSI's request for a statement from her, indicating that there were aspects that she (the fourth respondent) needed to look into. That did not support the contention that there was a deliberate refusal. The tribunal found that there was a delay, but the complaint had not been about delay. The tribunal's observation about the outcome of the NRPSI complaint was irrelevant.

47. Regarding complaints 7 and 8, relating to the vetting enquiries, the tribunal had copies of the emails that the fourth respondent had sent enquiring as to the claimant's vetting status. It could judge the contents for itself. The complaint at 8 was of "bizarre and excessive enquiries", not of singling the claimant out. The tribunal heard from the third and fourth respondents. It was entitled to assess their credibility, including that of the fourth respondent in relation to the pleadings point. It did not need to have more evidence about what the solicitors had done. It was not an error in this case not specifically to consider the possibility of unconscious influence. A positive case had been advanced as to why the checks were carried out, and the tribunal had properly accepted it.

48. As the tribunal described at [52] and following, the claimant told the tribunal that complaint 8 was actually about emails concerning the vetting enquiries being copied to Superintendent Humpage. The tribunal had these emails and was in position to take a view about whether there was anything detrimental about that conduct. It had explained sufficiently why it thought not.

Reply

49. Mr Roberts submitted that the respondents relied heavily on taking unattractive points about the claimant's pleadings. For example, they maintained that the claimant had not complained that she had been singled out for a vetting check; but it was the respondents that had pleaded in various ways that the fourth respondent had not treated her differently from others. He accepted that the tribunal was not obliged to refer to all of the evidence in its decision. But it had failed properly to set out its conclusions on essential elements of the legal tests that it had to apply, and/or as to the broad themes of the claimant's case. The claimant was not seeking to rerun her case. It was the respondents who had, in defending the appeal, sought to resort impermissibly to extensive reference to the documents, to try to plug gaps in the tribunal's own reasoning.

The law

50. In *Meek* Bingham LJ (Ralph Gibson LJ and the Master of the Rolls concurring) said:

> "It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; and it is highly desirable that the decision of an Industrial Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted."

51. Rule 62(5) of the **Employment Tribunals Rules of Procedure 2013** provides:

> "In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. Where the judgment includes a financial award the reasons shall identify, by means of a table or otherwise, how the amount to be paid has been calculated."

52. In *DPP Law Limited v Greenberg* [2021] EWCA Civ 672 Popplewell LJ (at [57]) particularly emphasised that a tribunal is not required to identify all the evidence relied upon in reaching its conclusions of fact:

> "It follows … that it is not legitimate for an appellate court or tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in

> the decision. What is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind."

53. Whether conduct amounts to a detriment depends on whether it is reasonably viewed by the complainant as such: *Shamoon v Chief Constable of the RUC* [2005] ICR 1458. The "on grounds of" test in section 47B **Employment Rights Act 1996** requires the tribunal to consider whether the PD was a material influence on the detrimental conduct to which the worker was subjected, in the sense of being more than a trivial influence: *Fecitt* at [45]. A finding that the witness whose conduct is impugned has been honest is not necessarily the end of the road, as the influence of the PD on the conduct may be unconscious: *Anya v University of Oxford* [2001] ICR 847 at 861D; *Geller v Yeshurun Hebrew Congregation* [2016] ICR 1028 at [52]. Section 48(2) places the burden on the employer to show the ground on which the act complained of was done. In some cases a distinction may properly be drawn between treatment by reason of the making of a complaint and by reason of other features which are genuinely separable from it; but tribunals should be alive to the possibility of such a line of argument being abused: *Martin v Devonshires Solicitors* [2011] ICR 352 at [22]-[23].

Discussion and Conclusions

54. I start with some general observations. This whole appeal has been presented, unusually, as being by way of a *Meek* challenge. I have kept firmly in mind the many cautionary words of both the EAT and the Court of Appeal about such challenges, and particularly that it is not an error for the tribunal not to refer to every aspect of the evidence, every dispute or every submission. I keep in mind also, however, Mr Roberts' point that it will be an error for the tribunal to fail to address an issue which is an essential element of a cause of action (unless, of course, it has fallen away). That is, in principle, right, whether that is characterised as a *Meek* point, or as raising a straightforward error of law. Here again, however, the appellate court must be astute to the fact that not all points which *can* arise in some cases, necessarily *do* arise; and it is not an error not to address a legal point which is not truly live in the case before the tribunal on the given occasion. Finally, while the tribunal

is most certainly not obliged to address every point of factual dispute, a *Meek* challenge may succeed, where a factual issue that lies at the heart of the case presented to it, has not been engaged with.

55. I will consider first the challenge to the tribunal's conclusions that the conduct that was the subject of complaints 2, 5, 6, 7 and 8 did not involve the claimant being subject to a detriment.

56. I make two preliminary points. First, I note that the tribunal did not, in its decision, anywhere remind itself of what the authorities say about the concept of detriment. That would not matter, so long as it has in fact given sufficient reasons to show why, in each case, it concluded that the impugned conduct did not in fact amount to such. But it means that the reasons do not contain that tangible evidence that it had the relevant test in mind, to assist the reader to understand its conclusions.

57. Secondly, it is an unfortunate feature that, at the full merits hearing some of the complaints remained framed in terms that were less than clear, and had not been clarified through the processes of prior case management. It appears that, in respect of some of them, clarification or particulars were therefore only elicited from the claimant during the course of the hearing itself.

58. I turn to the individual complaints.

59. The terms in which complaint 2 was framed did not make it clear what factual conduct the claimant was here impugning. However, the first sentence of [43] sets out that she clarified that this complaint was specifically about NRPSI being provided with a redacted copy of the email that was the subject of the original complaint to it. That, she contended, was both unnecessary and inappropriate. That having been clarified, it seems to me that the natural reading of [45], as a whole, is that the tribunal was saying that, while the making of the complaint to the NRPSI about the 9 April email in the first place *was* detrimental treatment (which was the subject of complaint 1 to the tribunal), subsequently also providing a redacted copy of that email to NRPSI, did not, in and of itself, amount to a further distinct act of detrimental treatment. That is conveyed by the tribunal, in the first sentence of [45], reiterating the finding it has already made, that the making of the complaint to NRPSI itself *was* a detriment; and then continuing in the second sentence: "However …".

60. Given that it had been identified that this complaint was solely and specifically about the

provision to NRPSI, of a redacted copy of the 9 April email, in response to a request for it, I do not think the tribunal needed to explain further why it was not persuaded that this was an additional piece of detrimental treatment, over and above the act of making the complaint to NRPSI in the first place.

61. As framed, the specific subject matter of complaint 5 was also not wholly clear. But at [48] the tribunal identifies that it was about the email from PC Sanders to the fourth respondent being copied to Superintendent Humpage. The tribunal simply states at [48] that it "is satisfied that there is no detriment here." I agree with Mr Roberts that this does no more than set out the conclusion. There is no reasoning here to support that conclusion at all. Given the finding the tribunal had made (at [9.19]) about the contents of the fourth respondent's covering email forwarding the PC Sanders email to the third respondent and Sergeant Humpage, including asking if this matter could be included in the complaint to NRPSI, I think the tribunal needed to say more to explain why it thought that this conduct did not amount in law to a detriment. The reasons relating to this conclusion are not *Meek*-compliant.

62. I turn to complaint 6. The difficulty with the reasoning relating to this complaint, at [49], is not its brevity as such, as that I think it is simply unclear what the tribunal is, overall, saying. It might be saying that there was delay *as opposed to* deliberate non-co-operation; and/or that there was a delay, but not one *amounting to* non-co-operation; and/or that the delay was not unfavourable, and *therefore* not a detriment; and/or that the delay was not a detriment because no action was taken by NRPSI. I do not think there is a clear through line of reasoning. This is not *Meek*-compliant.

63. I turn to complaints 7 and 8. It seems to me that, standing back, the nub of the claimant's case underpinning complaints 3, 4, 7 and 8, was all of a piece. In substance her case was that, because she had raised PDs, the respondents had decided proactively and thoroughly to investigate her vetting status. Then, having ascertained for certain that she did not have NPPV3 status, they proactively took steps to ensure that Capita did not give her any further assignments until this was rectified.

64. Within that context, the point of complaint 7 was that the enquiries made of the other forces, and of Capita, about the claimant's vetting status, were overzealous, because they were instigated by

way of a reaction to the claimant having made PDs, rather than being motivated merely by a genuine concern to check whether her vetting status was in order, prompted by something else having brought to their attention that there might be a problem with it.

65. It might be said, reading the wording of complaint 7 in isolation, that the claimant's case as to why the correspondence was "excessive" and "without justification" was not clear. But the tribunal surely appreciated the underlying thrust of her case, given the overall nature of her claims, and its own reference at [50] to the claimant's submission about the different way that the fourth respondent might have acted, had she "genuinely wanted to establish the claimant's NPPV3 status."

66. However, the tribunal states at [50] that the emails were reasonable and appropriate "once the issue in respect of the claimant's vetting had arisen", without addressing there *how and why* that issue had arisen. Similarly, at [51] it confines itself to stating the conclusion that there was no detriment "in the content" of the emails. In reality this was, perhaps, one of those instances where the question of whether the conduct amounted to detrimental treatment, and the question of whether it occurred, in the legal sense, on grounds of the PDs, went hand in hand. It would not have been wrong to take those fences as a pair. But that is not what the tribunal in fact did; and in my judgment, it has not explained at paragraph [51] why it concluded that this conduct was not even a detriment at all.

67. Turning to complaint 8, as framed it appears to focus in on one sub-group of the vetting-enquiry emails referred to in complaint 7, being those that were addressed to Capita. Mr Roberts, in his skeleton, treated 7 and 8 as a pair. Mr Jones also adopted a similar approach in his. However, the tribunal records at [52]-[55] that the claimant said that this complaint concerned the fourth respondent having "watched her and reported on her various activities to Superintendent Humpage", specifically by her being copied in on the emails regarding her vetting status. Mr Roberts said in oral submissions that he could not fault the tribunal for having accepted from the claimant that that was what complaint 8 was about. But he did not develop any argument to the effect that what the tribunal said about *that* in these paragraphs was not *Meek*-compliant. Mr Jones submitted that, once it was accepted that the tribunal had properly proceeded on the basis of the claimant's clarification of

complaint 8, that "closed down" any *Meek* criticism of its reasons in relation to it.

68. I agree with Mr Jones. Responding to the claimant's clarification, paragraphs [53] and [54] explain why the tribunal did not consider that there was a further detriment. I remind myself that the challenge here is one of *Meek*-compliance only.

69. I turn to the tribunal's reasoning in relation to whether the conduct which it did find amounted to detrimental treatment, raised by complaints 1, 3 and 4, was on grounds of the PDs.

70. Complaint 1 in fact has two sub-strands to it, referring as it does (albeit in reverse chronological order) to the initial complaint to NRPSI about the 9 April email, and to the follow-up or additional complaint to NRPSI arising from the email received from PC Sanders. Taking them in the correct chronological order, the tribunal's substantive conclusions about each of these are found at [61] and [62]. Though the tribunal briefly returns to the topic at [65], this does not, I think, add anything more of substance to the reasons. Indeed, the reference to the vetting issue in that paragraph is otiose, as there was, in the event, no follow up complaint to NRPSI about that.

71. Turning then, to the first strand, and paragraph [61], I remind myself again that the challenge is *Meek*-compliance. The claimant's case that her 9 April email was itself one of her PDs, and that the third respondent was influenced by that when she lodged her compliant with NRPSI. But the tribunal, earlier, at [9.15] and [9.16], made specific findings that the third respondent did have the concerns that it set out there, was advised by the legal team to contact NRPSI, and was then advised by NRPSI's Professional Standards Department that the disclosure was a breach of its code, which is why she then lodged the complaint. At [61] the tribunal then states its conclusion that this complaint was indeed made because of a genuine concern that the claimant's email of 9 April breached security and NRPSI guidelines, and was not materially influenced by the PDs (therefore including, implicitly, the fact that the 9 April email itself contained a PD).

72. On the face of it, the tribunal has therefore told the reader why this complaint failed. In short, it failed because the tribunal accepted the third respondent's account of why she complained to NRPSI as wholly explaining the reasons for that conduct. Nor do I think the tribunal failed to explain whether

it had considered the matter in the way that the law required. It directed itself correctly as to the burden of proof, and the correct approach to the "on grounds of" test; and it reminded itself again of these, at [59] and [60] in the run up to these specific conclusions, including the "sceptical eye" dictum.

73. I turn to the submission about unconscious influence, and the tribunal's finding that the third and fourth respondents' evidence being "clear, consistent and credible" being insufficient. As to that, the authorities do of course establish that "on grounds of" can embrace a case in which the influence of a protected characteristic, a protected act or a protected disclosure, as the case may be, is unconscious; and in *some* cases it will be an error for the tribunal not to consider that possibility, or to explain whether it has done so. However, it is not *always* an error to fail to address this possibility in every case. It depends on the circumstances and nature of the particular case: *Geller* at [52].

74. Mr Roberts submitted that here there was a strong prima facie case, so that the tribunal ought to have considered the possibility of unconscious influence. But it seems to me that this case was not one in which unconscious influence was, or might be, a scenario. The third and fourth respondents were plainly very conscious that the claimant was raising complaints and concerns, and never disputed that. The tribunal recorded at [9.14] that it was the third respondent's evidence that she was aware of multiple complaints submitted by the claimant about the procurement department over a number of years, and that her further complaints in March and April 2019 did not come as a surprise. It was also her evidence that she welcomed issues about the qualifications of interpreters being raised, so that they could be taken up with the provider. The claimant's case was that the evidence of the third and fourth respondents was simply not to be believed; and that the complaints to NRPSI and the investigation of her vetting status were by way of a deliberate and conscious response to her having raised multiple concerns. Unconscious influence was not in reality a third scenario that arose in this particular case. I therefore do not think the tribunal's reasons were deficient by failing to address it.

75. The claimant's case might, to a lawyer's eyes, be said to have been more in *Martin* territory: that this was a case where the respondents' attempt to say that it was the inclusion of sensitive case information and the way in which the email had been copied, that was the concern, as opposed to the

substance of the complaint that it contained, was disingenuous and unsustainable. But it seems to me that the tribunal's reasons convey that it did not accept that. Rather, it accepted the third respondent's evidence that, on this aspect, she was solely actuated by the former.

76. I turn to the second strand of complaint one, concerning the addition to the NRPSI complaint of the further matter arising from the PC Sanders email. Once again, the issue is whether the reasons – specifically at [62] – are *Meek*-compliant. It seems to me that they are. This paragraph tells the reader that this complaint failed, because the tribunal accepted that the reason this conduct happened was solely because of a concern about the financial implications of interpreters going "off contract".

77. True it is that the tribunal did not, in its fact finding, specifically record that the third respondent had, in her email of 26 April 2019, added this to the complaint to NRPSI. But it is clear from the decision as a whole that the tribunal was aware of this aspect of the evidence, and considered it. Complaint 1 itself identified that it was the third respondent who had raised the matter with NRPSI. The tribunal had the email, which was the same email in which the redacted copy of the claimant's 9 April email was provided to NRPSI (referred to at [9.23]); and, at [62] the tribunal referred to the reason why the fourth respondent raised the issue "and the third respondent added it to the complaint to NRPSI." The tribunal made sufficient findings about the underlying chain of emails at [9.19] to give this conclusion context. The claimant and respondents of course also themselves knew what the Sanders email said the claimant had said, and therefore the full context of the tribunal's conclusions.

78. The *Meek* challenge raised by this appeal in respect of complaint 1 therefore fails.

79. I turn to the challenge in respect of complaints 3 and 4. These were, it was common ground, and I agree, rightly treated as relating to the same matter, being the communications with Capita to the effect that the claimant should not receive any more bookings until she had received NPPV3 clearance. The tribunal's conclusions about them are found at [63]-[64] and [66]-[68]. But the core of the reason found by the tribunal, is, I think, in [64] and [68]. The tribunal is saying that the reason this action was taken was simply because the claimant did not have NPPV3 clearance, in a context in which the respondent had genuine general concerns about a problem of use being made of interpreters

who had not been properly vetted. Mr Jones submitted that the tribunal had said sufficient to explain its decision, given that the context was one in which: (a) the tribunal had found that the forces did require NPPV3 clearance; (b) there was no dispute that the claimant, at the time, did not have it; and (c) there was evidence to support the conclusion that this was a matter of genuine concern.

80. However, the nub of the challenge to the reasons as inadequate in this regard is that what the tribunal failed to make any finding about, was the reason why enquiries into the claimant's vetting status were pursued, when they were, *in the first place*. My starting point is that this was indeed plainly the nub of the claimant's underlying case. In short, and in colloquial language, it was that, because she had raised a fresh raft of complaints, the respondents reacted by determinedly digging into her vetting status, and, when they found a problem, and were sure of their ground, then specifically immediately took steps to ensure that Capita specifically stopped giving her work.

81. The argument about the pleadings was a sub-strand of the claimant's case on this point. The first two grounds of resistance were both to the effect that the claimant was one of a number (whether five or several) of interpreters whose vetting status was of concern at this time, and that the fourth respondent had advised Capita of "the situation". The final grounds of resistance state that the fourth respondent became aware "around 25 April" that several linguists did not have NPPV3 clearance, but only refers to the actions taken with Capita in relation to the claimant. The evidence that the tribunal had, however, was that the claimant, uniquely, was the subject of investigation of her vetting status at this time, and follow-on communication with Capita, and that it was the discovery of the position in relation to the claimant that then prompted concern that the problem experienced with the previous provider could be continuing, and that more general spot checks were now needed.

82. However, as to the specific pleadings point, the tribunal *did* address this: at [67]. It was entitled to accepted the evidence of the fourth respondent as honest, that she was not aware of the content of the pleadings and had not approved them. It recognised that that ought not to have happened; but having stated that it accepted what the fourth respondent had to say about it, the tribunal was not obliged, in my view, to make further findings, about how the pleadings had come about. Its

finding about the fourth respondent's lack of knowledge conveyed that it was not persuaded that the issues raised about the pleadings supported an inference that she was not telling the truth about her lack of involvement in relation to them. This could not be challenged as perverse.

83. However, putting the pleadings point, therefore, entirely to one side, the broader challenge is to the failure of the tribunal to make a finding about what prompted the (as it transpired) unique investigation of the claimant's vetting status, and follow-up with Capita, at the particular point when this all happened. It is correct to say that this is nowhere addressed in the decision. As I have already noted, it is not addressed in the paragraphs that set out the conclusions on complaints 7 and 8; and nor is it addressed in those that set out the conclusions on complaints 3 and 4. The tribunal at [68] confines itself to saying that "it had come to the respondents' attention" that the claimant did not have the required level of vetting.

84. I consider that, given the fundamental nature of the claimant's case, it was incumbent on the tribunal not merely to focus on the immediate proximate cause of the communications with Capita about stopping the claimant's work once her lack of NPPV3 status had been established, but to make a finding about why it was that the enquiries specifically into her status were initiated when they were, in the first place. This the tribunal failed to do. The challenge to its findings on the causation issue in relation to complaints 3 and 4 therefore succeeds.

Outcome

85. The matter must be remitted to the employment tribunal, to give fresh consideration to whether the conduct complained of in complaints 5, 6 and 7 amounted to detrimental treatment, and, if so, whether it was on grounds of the PDs; and to whether the conduct complained of in complaints 3 and 4, which has been found to be detrimental, was on grounds of the PDs.

86. Both counsel have seen this decision in draft and made submissions about remission. The claimant seeks remission to a different tribunal, the respondent to the same tribunal. While the respondent makes the point that the challenge which has succeeded was "only" on *Meek* grounds,

this was not a *Burns/Barke* type case and the tribunal will be required to look again at five complaints which were not adequately dealt with first time around. I do not doubt at all, that if asked to, the same tribunal panel would approach that task conscientiously. But it is important that, whatever the outcome next time around, it commands the confidence of both sides, and there is the finality that both sides plainly seek. The hearing will have a narrower scope than last time and should not be long. It is not, in the round, disproportionate to remit to a different tribunal, and I will so direct.