EMPLOYMENT TRIBUNALS

Claimant: Mr A Szucs

Respondent: GreenSquare Group Ltd

Heard at: **Bristol** **On:** **25, 26 and 27 July 2022**
(27 July by video-CVP)

Before: **Employment Judge Livesey**
Mrs D England
Ms L Simpson

Representation
Claimant: In person
Respondent: Mr Fitzpatrick, counsel

JUDGMENT having been sent to the parties on 4 August 2022 and written reasons having been requested in accordance with rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claim

1.1 By a claim form dated 5 August 2020, the Claimant brought complaints of victimisation under s. 27 of the Equality Act.

2. The evidence

2.1 The Claimant gave evidence in support of his case and, from the Respondent, the Tribunal heard from;
(i) Ms Bielby; Community Involvement Manager;
(ii) Mrs Crownshaw; Executive Director of Operations (formerly, Executive Director of Customer Experience);
(iii) Mr Holland; former Employee Relations Specialist;
(iv) Miss Britton; Director of Customer Services.

2.2 The following documents were received;
C1 An additional bundle of loose documents in an envelope file;
C2 The Claimant's closing submissions;
R1 The hearing bundle;

R2 The Respondent's closing submissions.

3. The Claimant's witness statement and hearing bundle

3.1 The Claimant had failed to comply with an unless order dated 13 July 2022 in respect of the service of his witness statement. He was prevented from relying upon the contents of it, save with the Tribunal's leave. He sought that leave at the start of the hearing. It was necessary to understand the history of the case and the Claimant's conduct during the proceedings.

3.2 The Claim had been issued on 5 August 2020. The Claim Form was professionally drafted by solicitors, Thompsons. It contained a succint and clear allegation of victimisation. Matters proceeded to a Case Management Preliminary Hearing on 1 April 2021 which I conducted. The Claimant, who was then represented by counsel, and the Respondent consented to the case management directions which were made and a hearing was listed for three days in September 2021. The original date for exchange of witness statements was 5 August 2021.

3.3 Thompsons came off record on 4 August 2021 and that was when things began to go awry.

3.4 On 19 August, the Claimant wrote to the Tribunal to assert that he was not ready for the hearing in September; he alleged that he had received incorrect legal advice and support from Thompsons but stated that he was working on completing the bundle and his witness statement. He also stated that a complaint of failure to make reasonable adjustments was omitted from his claim and/or other acts of discrimination. He therefore wanted them included. A few days later, Employment Judge Cadney decided to postpone the final hearing, but he listed a Case Management Preliminary Hearing to determine the Claimant's application to amend his claim.

3.5 That application came before Employment Judge Dawson on 7 September 2021. He rejected it because "*the claimant and his advisers had made a deliberate choice not to bring* [those] *claims originally (although the claimant now says that was negligent), because the application was made at a point when the claims would be considerably out of time, because of the substantially different nature of the claims and because of the prejudice to the respondent*" (paragraph 29 of the Case Summary). The previous directions were slightly altered, such that the date for exchange of witness statements was amended to 30 January 2022.

3.6 Difficulties with the Claimant's compliance with case management directions continued. An original draft electronic bundle had been sent to him on 12 August 2021, but there was considerable difficulty in having it agreed and a great deal of correspondence ensued on that issue, disclosure and witness statements. Employment Judge Midgley attempted to draw a line under the squabbles with an order on 15 March 2022 which required the Respondent to supply the Claimant with a paper copy of the August 2021 draft bundle and associated documentation so that he could comment upon it by 1 April 2022. Unless he informed the Respondent that there were problems with the bundle, the Respondent was permitted to produce it as the final bundle without further reference to him. At that point, the Judge had been asked to consider striking out the Claimant's case, but

had declined to do so because he thought that a fair hearing was still possible. As part of his directions, the date for exchange of witness statements was moved again to 20 May 2022.

3.7 On 28 April, the Respondent then invited the Tribunal to enforce the unless orders because of the Claimant's non-compliance. Employment Judge Midgley addressed the matter and stated that, since the Claimant *had* failed to comply, he was precluded from submitting further documents and the Respondent was able to prepare the bundle without anything additional. The Claimant was, however, given permission to prepare a bundle of documents relevant to the issue of remedy, limited to 200 pages and to prepare a further bundle if he wished to seek permission to rely on anything additional at the hearing, but only with the Judge's permission (the direction of 20 May 2022). At that point, the time for exchange of witness statements was pushed back again, this time to 10 June 2022.

3.8 There was yet further correspondence on the hearing and remedy bundles and the witness statements. The Claimant sought an extension from the Respondent which wrote to the Tribunal and indicated their agreement for one until 24 June.

3.9 On 6 July, as a matter of urgency, Employment Judge Cadney directed the parties to supply final dates for agreement over bundle and and exchange of witness statements by 4:00 pm on 8 July. The Respondent replied by that date. The Claimant did not. He did write at length on 11 July; he alleged that the disclosed documentation contained "*multiple occasions when evidence/minutes were clearly falsified (with other unlawful acts)*", that his disabilities (Asperger's Syndrome, Anxiety Disorder and Depressive Disorder) had affected his ability to comply with case management directions and that the Respondent's representatives' "*aggressive and unreasonable"* conduct had been deployed to gain control of the proceedings. Employment Judge Midgley nevertheless made an unless order in respect of the Claimant's witness statement; unless it was served on the Respondent by 15 July 2022 he was "*precluded from relying on a witness statement and giving evidence without leave of a Judge.*"

3.10 On 15 July, the Respondent asked the Tribunal to enforce the Order as the Claimant had not complied. That Order had, of course, taken effect automatically and no further direction was required. Nevertheless, upon reviewing further correspondence, Employment Judge Smail commented that Claimant should exchange his statement as soon as possible because, if he did so, there was a greater likelihood of it being admitted at the hearing (his email of 19 July).

3.11 Also on 15 July, the Claimant asked for the unless order to be set aside and raised a number of matters which were said to have been impinging upon his inability to prepare for the hearing. He asked for another postponement.

3.12 On 19 July, the Claimant admitted that he had not served his witness statement, but that he had 'drafts'. He also said that he was due to go back to his doctor's surgery to discuss his ability to take part in proceedings as a result of his mental health and the effects of a 'minor car accident'.

3.13 The postponement request was addressed on 21 July 2022. It was refused. The Judge, in reaching that conclusion, commented that the file was

disproportionately large as a result of the Tribunal having to police several breaches of its orders by the Claimant, that he was in breach of a further unless order and that his complaints of physical and mental health difficulties were unsupported by contemporaneous medical evidence and clearly had not prevented him from writing "*lengthy, detailed and persuasive correspondence.*" It was said to have been in "*everyone's interest for this case to be concluded. The Tribunal's resources are being disproportionately drained by this case. It now needs to be heard.*"

3.14 Approximately 1½ hours later, the Claimant served his witness statement. But even by noon on 21 July, he had still not provided the Respondent with his remedy bundle and bundle of additional documents referred to in his statement.

3.15 On 22 July, a short, undated medical note was supplied which referred to the Claimant's underlying mental health condition and a leg sprain caused by a fall. It ended with a repetition of the Claimant's request to have the hearing postponed. That was not referred to a judge before Monday and no further application was then made by the Claimant to postpone at the hearing itself.

3.16 At the start of the hearing, the Respondent maintained its position. Whilst accepting that it suffered no evidential prejudice by the late admission of the Claimant's witness statement, Mr Fitzpatrick considered it unfair that he had had the Respondent's statements for a week before he had disclosed his. The Claimant denied that he had accessed that evidence, an assertion that Mr Fitzpatrick could not gainsay. In reply, the Claimant repeated much of what he had said in correspondence and referenced his health and changes to the bundle.

3.17 The Tribunal concluded that it ought to admit the Claimant's statement. His conduct in preparing for the case had been poor and the decision to admit it, given the history, was generous, but the lack of evidential prejudice to the Respondent was particularly important when balanced against the prejudice suffered by the Claimant of being shut out. The parties were ready, willing and able to proceed with the hearing.

3.18 The Claimant also produced an additional bundle of documents on the morning of the hearing. Again, this was in breach of the orders referred to above. Most of the documents were uncontroversial (his Schedule of loss and the Respondent's Disciplinary Policy) but there were one or two additional emails and other documents which Mr Fitzpatrick did not object to. That bundle was also admitted into evidence.

4. The hearing

4.1 One of the members originally assigned to hear the case was conflicted, as a Unison member with some knowledge of the claim's background. A replacement member, Ms Simpson, was found at short notice and she attended by video (CVP) for the first day.

4.2 On the second and third days, the Tribunal sat together in person but the parties attended by CVP for judgment on the third day, their attendance in person having been difficult as a result of a rail strike.

4.3 A timetable had been agreed for the hearing at the Case Management Preliminary Hearing which had been held on 1 April 2021. At that stage, the six protected acts which were relied upon by the Claimant were denied by the Respondent. At the start of the hearing, however, they were conceded, which ought to have truncated the case. It was, however, difficult getting short, simple answers from the Claimant during his evidence. Whilst that may have been a feature of his disability, it put pressure upon the timetable.

4.4 It was far more difficult for him to cross examine the Respondent's witnesses effectively and within time. He struggled to focus on the remaining issues and needed considerable help to use his time effectively. He used more time than had originally been allocated to him. The Tribunal sat late on the first day of the hearing and he arrived very late on the second day. The Tribunal ultimately had to manage the time under rule 45 as the Claimant's questions became ever more repetitive. We had no doubt that the case would have run for many days if we had not done so.

5. The issues

5.1 The issues had been clearly identified and recorded in the agreed List attached to the Case Management Order of 1 April 2021;

5.1.1 The 6 protected acts, originally defended by the Respondent on the basis that they were not protected under s. 27 (3), but conceded on the first day of the hearing;

5.1.2 The detriment of dismissal on 8 April 2020.

6. The facts

6.1 The following factual findings were made on a balance of probabilities. The Tribunal attempted to restrict its findings to matters which were relevant to a determination of the issues, which was not easy in light of the fact that there was a great deal of extraneous material. We made it clear to the parties that we only read such material that was referred to in the witness statements and/or during the course of the evidence.

6.2 Page numbers within these Reasons are to pages within the hearing bundle R1 unless otherwise stated and have been cited in square brackets. References are to the electronic numbering within the bundle, which did not match the hardcopy pages.

<u>Introduction</u>

6.3 The Respondent is a large housing provider in Wiltshire, Gloucestershire and Oxfordshire. The customer facing side of the business employs approximately 600 people.

6.4 The Claimant commenced work for the Respondent on 8 May 2018, initially as a Community Officer. He subsequently became a Community Involvement Officer from November 2018. His manager was then Ms Bielby, Community Involvement Manager. Her manager was Miss Britton.

6.5 The Claimant's patch was Gloucester and Oxford, which he was aware of when he had applied. He was required to be "*present and active in his patch*", as Ms Bielby put it in paragraph 4 of her witness statement.

6.6 The Claimant's role was to work closely with Housing Officers and to address problems and concerns within the Respondent's housing communities. He had to think of initiatives, often on a collaborative basis with the residents, to address the problems and to improve the neighbourhoods in which they lived. To do so, he needed to build good relationships, contacts and networks. Although there was a certain amount of work which he could have done from an office, it was clear to us that the lion's share of his work needed to have been undertaken on the ground itself. His role enabled him some flexibility and creativity. He was somewhat autonomous, but he needed initiative to be proactive. The key functions of his role were captured in a document [420].

6.7 The Claimant had lived in Winsley, Wiltshire, near Bath. His travelling time to Oxford, at the extremity of his patch, took between 1¾ and 2 hours. It took him slightly less time to get the Gloucester.

Disability

6.8 The Claimant claimed to be disabled for the purposes of the Equality Act as a result of Asperger's Syndrome, Anxiety and Depressive Disorder. It was not important to determine the presence of the Claimant's disability for the purposes of his victimisation claim, but the following observations about his health and its management were relevant.

6.9 It was agreed evidence that the Claimant had declared that he had Asperger's syndrome on his application form for employment but had stated that he coped well and needed no adjustments.

6.10 The Respondent had tried to refer him to Occupational Health in March 2019, but he had failed to sign the consent form.

6.11 He was absent from work for three weeks in July 2019 and a further four weeks between October and November 2019 as a result of his mental health [419].

6.12 There were discussions around his condition with his employers and changes were discussed to his work location and other aspects, as reflected in the documentation [116-8].

Expenses

6.13 The Claimant became extremely vexed about issues concerning his expenses claims. Much of the problem emanated from his initial role as a Community Officer.

6.14 He had initially tried to use Chippenham, one of the Respondent's offices where he had been permitted to undertake some of his office work, as his base for travel purposes because he was not allowed to charge travel from home to his patch. The Respondent's position, however, was that the Claimant was allowed to *work* from the Chippenham from time to time to save on his travelling, but he was not allowed to treat it as his *base* for the purposes of expense claims. His base was within his patch.

6.15 The Claimant had raised a claim for travel expenses in 2019 which covered a substantial period back into 2018. Although it was paid, the Respondent

reasserted the fact that Chippenham was not the Claimant's base for travel purposes. Although it asserted that it had overpaid him [116], it agreed not to reclaim the sum. The Respondent appeared to have been somewhat culpable in the mistaken payment.

6.16 Whatever the rights or wrongs of the expenses situation, it was clear that it remained a significant bugbear for the Claimant who frequently raised it when other matters were being discussed. He subsequently told the grievance investigation that he became "*dis-incentivised*" to drive to Oxford or Gloucester because of his inability to recover his mileage in expenses [188]. Ms Bielby said in evidence that his attitude became negative and that it was "*a struggle from then on*" because "*it was very difficult to do anything without that being raised.*" This was echoed by Miss Britton within paragraph 5 of her witness statement.

Protected acts

6.17 In November 2019, the Claimant unsuccessfully applied for an internal post of Neighbourhood Project Manager, following which he approached ACAS on 12 November. That was the third protected act relied upon [308-312].

6.18 The Claimant raised a grievance on 28 November (the first protected act) and the letter made clear reference to his mental health and there were allegations of unfavourable treatment that were linked to it [136-8].

6.19 The Claimant raised a further grievance on 16 December 2019, a substantial, 17 page document [144-160]. It was broad ranging and contained allegations that the Respondent had breached trust and confidence regarding his expenses claims and/or work location, had failed to act in respect of a resident who had allegedly abused him, had failed to handle his illness absence properly and had provided misleading and/or unregulated advice on an immigration issue. He also alleged that he had been discriminated against with regard to his non-selection for the post of Neighbourhood Project Manager. He specifically stated that the role would have been a reasonable adjustment for him and cited the case of *Archibald-v-Fife* in that regard [159].

6.20 An external HR consultant, Ms Brooks, was appointed to consider the grievance. She was supported by Mr Holland from the Respondent's HR function. The Claimant was interviewed on 30 December 2019 and a number of further questions were raised of him in emails [173 and following]. Eight other employees were also interviewed.

6.21 Meanwhile, the Claimant contacted ACAS again on 23 February 2020, the fourth protected act relied upon.

6.22 Ms Brooks completed her grievance investigation and compiled a lengthy report [180-208]. The Claimant then received the grievance outcome letter of 5 March 2020. His grievance was largely rejected, but two allegations were partially upheld; that he had not been provided with a laptop quickly enough and the fact that he had been interviewed for the Neighbourhood Project Manager role when he ought not to have been. No evidence of discrimination was demonstrated [225-234].

6.23 The Claimant appealed against the grievance findings on 20 March, the fifth protected act relied upon [235-244]. Again, he made reference to his

physical and mental health and alleged that reasonable adjustments had not been made.

6.24 On 2 April, the Claimant informed Ms West in HR that he intended to bring another grievance regarding his failure to be appointed to a different position, that of Customer Account Officer. This was not covered in any of the evidence but it was still agreed by the Respondent as the sixth protected act.

Claimant's performance and dismissal

6.25 Concerns were held about the Claimant's performance and the amount of work that he was doing from an early stage. Because of the geographical challenges which he faced in his role, he tried to secure a change of position, without success (as discussed above). Miss Britton said that, by 2020, it was obvious from his calendar that he was then not travelling much to his patch.

6.26 In more specific terms, Ms Bielby had initially been largely positive at his first end of year review in 2019 [75-89], but some gaps were identified [82]. According to the Respondent's appraisal traffic light system, the Claimant scored mostly 'green', with some 'amber', on that occasion.

6.27 Things deteriorated in the spring and summer of that year. In cross-examination, the Claimant accepted that his performance did deteriorate after February 2019. In a One to One meeting which was held on 16 April, problems were clearly identified [111-2];

> "*I don't feel you are fully focused on the job and we agreed you would concentrate on getting the basics covered in order to build your workload and confidence in the role.*"

6.28 On 17 July, at a further One to One, Ms Bielby raised the Claimant's underperformance again [363]. She asserted that he was not organised and was not completing tasks. Again, he blamed issues around his travel and expenses, but he also alluded to 'sensory overload'. It was agreed that further meetings were to have been arranged and the list of actions would have been prepared and sent to him. The Claimant then had his first significant period of illness absence in July (discussed above).

6.29 At the Claimant's performance review in September 2019, he was marked as 'amber' overall and his performance was again noted to have been a long way below par [90-104]. On 20 February 2020 at a catch up meeting with Ms Bielby [220-1], further actions were discussed, but the Claimant was then focused upon redeployment.

6.30 Ms Bielby then conducted the Claimant's six monthly review in March by telephone as a result of the government imposed lockdown. The Claimant recorded the call, unbeknownst to her [421 and following]. The transcript made it very clear that his performance was still far from good, which he accepted; his objectives had not been met, he was not reliable, he was not contributing to the team and his communication was criticised.

6.31 Ms Bielby discussed an 'amber' grading over the telephone but, on reflection and having re-read the grading system, she ultimately chose 'red' [359-362];

"*I feel that over the past 12 months you have not given your work the priority needed to perform effectively. You have delivered far too little and I have a sense that what you have done was somewhat rushed and not properly planned. There is a lot of room for improvement around planning and progressing work and building effective working relationships.*"

6.32 On 27 March, the Claimant was invited to comment upon his grading [316]. It was then discussed on 1 April, another call which he secretly recorded [405-9]. He did not substantially dispute the ultimate outcome and the discussion on that occasion seemed to concentrate upon other things.

6.33 During Ms Bielby's management of the Claimant over this period, concerns were being expressed by her own manager, Miss Britton, about the difficulties which she was facing. Miss Britton had acknowledged the effect of the Claimant's performance upon Ms Bielby's own performance (see paragraph 11 of her witness statement and [377-390]). She ultimately discussed the issue with Mr Lillis in HR and had prepared a formal brief for help in February [218];

"*This individual scored amber at their last check in and will again at their end of year assessment. This means there is a strong case to performance manage them to achieve the best exit…*
.. currently he is doing little to no work, his whereabouts are often unknown and he is practically difficult to manage…
I believe any further time he spends in the business will be a detriment to those who manage and have to work with him and would like to explore options to end his employment with GreenSquare as swiftly as possible as a result."

6.34 Mr Lillis reviewed the Claimant's file and considered a number of options regarding his future from an HR perspective [247-250]. The 'Synopsis' document which he produced on 31 March referred to the Claimant's poor attendance (17% absence) and performance (40%). A series of questions and answers followed in which he pointed out that reasonable adjustments which had been requested had been made and that there appeared to be little realistic chance of performance improvement. One of the answered questions was as follows;

"*Q: Why do you think he may sue for discrimination?*
A: He may take the view that we are seeking to terminate his employment because he has raised a grievance, thus discriminating against him. Of course, this is not the case."

6.35 A number of options were considered; to continue the Claimant's employment and begin a formal performance management process, to conduct a protected conversation or to dismiss at that point since he lacked two years' service.

6.36 On 2 April 2020, the Claimant was informed that Mr Lillis wanted to discuss his performance, attitude and attendance with him. The invitation also made reference to the discussions extending to the future of his employment.

6.37 A telephone call took place between them on 8 April. Again, it was one which the Claimant covertly recorded and for which a transcript was subsequently prepared [258-262]. During the call, Mr Lillis explained that

the business had asked him to "*release him*" .. "*on the basis that your performance is poor, your attendance is poor, your attitude is poor and the company doesn't see any real partnership between you and GreenSquare going forward.*" It appeared that it had been the CEO who had ultimately directed him to dismiss (C1, document 6).

6.38 On two occasions, later on in the call, Mr Lillis said this;

> "*So the issue is now, Andras, the issue is not who's right and who's wrong, the issue is one of why should this company to keep you* [sic] *employed as a resource when you don't perform and all you do is complain.*"

And

> "*We feel that we treated you fairly or GreenSquare feels they treated you fairly. GreenSquare feels that they listened to all of your concerns and GreenSquare believes that they addressed all of your concerns. We now have an appeal situation and we now have a situation for a Subject Access request as well. Don't know what we've done to deserve that, but there you are!*"

Mr Lillis concluded;

> "*..the bottom line is, Andras, that the company can no longer employ a person that has got poor performance, poor attendance and a poor attitude.*"

6.39 Mr Holland said in evidence that this had been a "*highly unusual process to follow in order to terminate someone's employment*". Mrs Crownshaw described Mr Lillis as "*quite bullish*" and "*not the best fit*" for the organisation. He is no longer employed by the Respondent.

6.40 The Claimant then wrote to the CEO to complain about his treatment [414]. He also then received a letter of confirmation, which reiterated the reason for his dismissal having related to attitude, performance and attendance. He was paid in lieu of notice [263].

6.41 On 23 April 2020, the Claimant appealed against his dismissal [317-325]. In the letter, he complained that the decision had been in breach of contract, in breach of the Respondent's policies and unfair because his performance had not been that bad and because his grievances had not been addressed properly. He did not clearly allege that he had been dismissed because he had brought grievances in relation to Equality Act issues specifically, but he did make that assertion within some other rather muddled allegations;

> "*I believe that the real reason for my dismissal is my disability of Asperger's Syndrome, depression and anxiety; the grievances that I intended to raise, raised already and recently appealed, including a whistleblowing act that has a public interest element. In addition, with Trade Union support, I engaged in the Employment Tribunal process by starting ACAS early conciliation to resolve my complaints about various forms and incidents of disability discrimination, asserting statutory rights and alleged breach of contract/health & safety and duty of care issues.*"

6.42 Mrs Crownshaw dealt with the appeal on 19 May 2020 and she sat as a co-chair with Mr Shipway, the Marketing and Sales Manager. Mr Holland provided the HR support and the Claimant was supported by Mr Drake from Unison. The meeting was conducted by MS Teams and, despite the

Respondent's attempt to clarify the fact that its recording was not permissible, the Claimant nevertheless covertly did so again [326-357].

6.43 The Claimant subsequently alleged that Mr Holland's notes were falsified [283-290]. The Tribunal examined a comparison between those notes and the Claimant's transcript [326 and following]. Mr Holland stated that his minutes were as accurate an account as was possible as people spoke. He did not make deliberate omissions. With that evidence in mind and having compared the documents, we saw nothing obviously fundamental to the Claimant or damning to the Respondent which was omitted. We did not consider that it would have been possible for Mr Holland to have kept a verbatim note, but his notes were nevertheless a good summary. The serious allegation that they had been deliberately fabricated was not made out.

6.44 The Claimant's appeal failed. He was provided with an outcome letter dated 8 June 2020 [292-3].

6.45 In the meantime, he had appealed against the grievance outcome as well. That appeal was heard by Mr Sheppard, Operational M & E Manager, with Mr Holland also in support on 20 May. That appeal was also dismissed by letter dated 2 June [291].

7. The relevant law

7.1 As to the remaining live issue of detriment, the test of causation under s. 27 was similar to that under s. 13 in that it required us to consider whether the Claimant had been victimised '*because*' he had done a protected act, but we were not to have applied the 'but for' test (*Chief Constable of Greater Manchester Constabulary-v-Bailey* [2017] EWCA Civ 425); the act had to have been an effective or substantive cause of the detriment, but it did not have to have been the principal cause. The most recent formulation of the test, in *Warburton-v-Chief Constable of Northamptonshire Police* [2022] EAT 42, stressed the need to focus upon the 'reason why' question and consider whether the protected act had been, at the very least, a significant influence of the detriment.

7.2 It had to have been the protected acts themselves that caused the treatment complained of, not issues surrounding them. In *Martin-v-Devonshire Solicitors* [2011] ICR 352, a claim of victimisation had failed because the motivation for the unfavourable treatment had not been the fact of the Claimant's complaints, but the way in which they had been made. The Claimant had been dismissed as a result of an irretrievable breakdown in the working relationship between her and her employers. The Tribunal dismissed her claims, holding that there were several things about the Claimant's behaviour in relation to her grievances (their frequency, repetitive nature and untruthfulness) which affected the employer's view and which owed nothing to the fact that the grievances had raised allegations of sex and disability discrimination. Having reviewed the law in this area the then President of the EAT, Underhill J, encouraged tribunals to concentrate upon the statutory language on causation (in the context of this case, the word '*because*') and he referred back to Lord Nicholls' test in *Nagarajan-v-London Regional Transport* [1999] ICR 877; "*whether the prescribed ground or protected act 'had a significant influence on the outcome'*" (paragraph

36).

7.3 The further case of *Woodhouse-v-West North West Homes Leeds Ltd* [2013] UKEAT/0007/12 countenanced against using the case of *Martin* "*as a template into which to fit the factual aspects of a case in which victimisation was alleged.*" It was said that the circumstances in that case had been exceptional and that tribunals needed "*to be cautious about regarding features such as a multiplicity of grievances and obsessive over-reaction by an employee as exceptional*". The EAT (His Honour Judge Hand QC presiding) referred back to paragraph 23 of the decision in *Martin* in which the Tribunal's finding in respect of the reason for dismissal had been dealt with. Within paragraph 98 of its own decision, the EAT then clearly accepted that an employee's conduct or behaviour might have been a reason to separate (or stand between) the conduct complained of and the protected act.

7.4 In order to succeed under s. 27 therefore, a claimant needed to show two things; that he was subjected to a detriment and that it was because of the protected acts. In addressing those questions, we applied the approach suggested in *Igen-v-Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3).

8. The conclusions

8.1 The Claimant was dismissed in circumstances which departed significantly from good industrial practice. He was not afforded a hearing as such and no proper process was used, certainly not one which complied with any of the Respondent's own policies. A member of HR merely delivered the fact of his dismissal and, in doing so, included reference to the Claimant having been a complainer which *could* have been a reference to his grievance and/or grievance appeal and/or ACAS referrals, the protected acts relied upon in this case.

8.2 All of that evidence, in our view, was sufficient to have shifted the burden of proof to the Respondent under s. 136. It was therefore required to explain the Claimant's dismissal on grounds other than the protected acts. The inference of victimisation had to be rebutted.

8.3 Although the Respondent was not able to call Mr Lillis to explain his decision, Mrs Crownshaw gave good, compelling evidence about what was in her mind at the point of the appeal. The Respondent drew on a number of points;

8.3.1 First, there were the Claimant's concerns over his expenses and the fact that, once they had been resolved in a way which had not been to his liking, a marked impact that was noted upon his attitude and performance;

8.3.2 The significant performance concerns had begun to become apparent from at least the spring of 2019, which Ms Bielby recognised ought to have been addressed sooner and more directly with him. A detailed exposition of the evidence on that issue was set out in the Respondent's closing submissions, R2, particularly between paragraphs 4 and 19;

8.3.3 The Claimant's attendance was also an issue. The trigger under the Respondent's sickness policy had been met (10 days or more in six

months [303]). The Claimant had had seven weeks off in four months;

8.3.4 The Claimant's character and personality had also made it difficult for him to have undertaken the role, it was said. According to his manager, he was someone who had needed direction and structure, whereas the role required initiative and imagination. His personality had also seemed to have caused him to become fixated over the expenses issue;

8.3.5 The Respondent further asserted that it had treated the Claimant's grievance seriously and properly. An external, independent person had been engaged, there was a significant and detailed investigation and the complaints were partly upheld. It could not have been said that they had been ignored or brushed under a carpet.

8.4 There were two main points which the Tribunal took from the Respondent's case. First, whilst it was undoubtedly the case that the Claimant had raised a number of complaints with his employer, only a small part of what he had complained about had been covered by the Equality Act. He had complained about expenses issues, immigration advice, failures to be promoted, residents who had harassed him and many other things. We accepted the Respondent's submissions on this point and concluded that Mr Lillis' reference to him as a 'complainer' was properly to have been viewed as having been separable from the protected features of the complaints themselves, as in *Martin-v-Devonshire*. It was *manner* of the Claimant's complaints which had frustrated Mr Lillis; his inability to accept a decision and move on (regarding his expenses, for example). It was a reflection of the manner in which he had approached issues at work, not the issues themselves. They were separate things.

8.5 But further and more significantly, it was clear to us that the Claimant's performance had been consistently recorded as poor and was deteriorating through 2019 and 2020. Even from the Claimant's closing submissions, it was evident that he was still unable to see the overwhelming evidence against him in that respect. We did not consider that the protected acts had been the effective or substantial cause of the Claimant's dismissal. The overwhelming reason for his dismissal had been his performance but, linked to that, his attitude and, to a lesser extent, his attendance.

8.6 Despite a lot of questions, especially to Mrs Crownshaw, the Claimant never once suggested that his dismissal had been because of the Equality Act element of his grievances, or his grievances at all. He did not even ask her whether she had even known about his contact with ACAS.

8.7 Finally, even if we had been wrong, we considered that it was almost inevitable that the Claimant would have been dismissed in any event. All trust and confidence between the parties had broken down, as perhaps best demonstrated by the Claimant himself when had taken to covertly recording his interactions with his managers (see paragraph 15 of Mrs Crownshaw's evidence). The principle in *Chagger-v-Abbey National plc* [2009] ICR 624 was likely to have applied even if the Claimant had somehow succeeded.

Employment Judge Livesey
Date: 8 August 2022

Judgment & reasons sent to the parties: 18 August 2022

FOR THE TRIBUNAL OFFICE