Neutral Citation Number: [2023] EAT 126

Case No: EA-2021-001045-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 September 2023

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MR R MESHRAM	**Appellant**
- and -	
ENTSERV UK LIMITED	**Respondent**

- -
- -

Mr L Davies (solicitor, Equal Justice Limited) for the **Appellant**
Colm Kelly (instructed by Lewis Silkin LLP) for the **Respondent**

Hearing date: 1 August 2023

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

Shortly after the start of his employment the claimant in the employment tribunal was dismissed. The respondent's case was that this was because the manager who hired him, Mr Nagra, considered that the claimant had misled him, in the recruitment process; specifically, that the claimant had secured an improved financial offer, on the basis that he would be giving up a secure job and salary, whereas Mr Nagra later learned that his former employment had in fact ended the previous year.

The employment tribunal dismissed complaints of victimisation in relation to the dismissal and the subsequent failure of the respondent to progress the claimant's internal appeal against dismissal. The protected act was an **Equality Act** claim brought against the claimant's former employer. The tribunal found that Mr Nagra had learned of that claim prior to the dismissal. However, it was not part of the reasons for the dismissal. The victimisation claim in relation to the appeal also failed.

The claimant appealed on perversity and *Meek* grounds relying on two matters in particular. The first was that the tribunal had failed to resolve disputes of fact between Mr Nagra and a former colleague of the claimant at his former employer, Mr Parvata, about what discussions he and Mr Nagra had had about the claimant's former employment, and when. The second was the tribunal's failure to draw an adverse inference from the fact that Mr Nagra did not forward on the claimant's appeal email to HR, despite the tribunal having observed that it found his evidence about that "hard to believe".

Held: The tribunal's decision in respect of the victimisation complaint concerning the dismissal was not perverse. Nor was it not *Meek*-compliant. The reasons sufficiently explained the tribunal's conclusion as to the reason for dismissal and that Mr Nagra's knowledge of the protected act did not materially influence that decision. It did not need to resolve the disputed issues relating to Mr Parvata and his credibility in order to decide the key issues relating to the live complaints before it.

The tribunal's decision in relation to the victimisation complaint regarding failure to progress the appeal was also not perverse. But it was non-*Meek*-compliant, specifically in relation to Mr Nagra's

failure to action the appeal email that was sent to him. There was no clear or specific finding as whether the burden shifted in relation to that conduct, or if not why not, and/or as to the positive explanation for that conduct. That complaint was therefore remitted for further consideration by the same tribunal. If, upon further consideration, that complaint succeeded, the tribunal would also need to consider whether that affected its conclusion in relation to the victimisation complaint relating to dismissal.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. The claimant in the employment tribunal, Mr Meshram, complained that Entserv UK Limited (Entserv) had directly discriminated against him because of race and/or victimised him, by (a) the decision taken by its then employee, Mr Nagra, to dismiss him, shortly after he started work with Entserv; and (b) the respondent's failure to progress his internal appeal against dismissal. He also brought a factually-related **Equality Act 2010** claim against a previous employer, Tata Consultancy Services Limited (Tata), alleging that it had provided a "bad reference" about him to Entserv.

2. The claims against Tata and Entserv were heard together by Employment Judge K Welch, Mr R Miller and Mr S Pearlman, sitting at London Central, via CVP, in November 2020. Following the hearing, and prior to the tribunal meeting in chambers, the claim against Tata was withdrawn. In its subsequent reserved decision the tribunal dismissed all of the complaints against Entserv.

3. This is my decision on the claimant's appeal against the tribunal's decision dismissing his victimisation complaints against Entserv. There was no appeal in respect of the decision to dismiss the complaints of direct race discrimination. As before the tribunal, the claimant was represented at the hearing of this appeal by Mr Davies, solicitor, and Entserv by Mr Kelly of counsel.

The Tribunal's Findings of Fact

4. Relevant facts found by the employment tribunal were, in summary, as follows.

5. The claimant's employment with Tata ended on 31 August 2018. Thereafter he began a claim against Tata and others including complaints of victimisation. In the victimisation complaints against Entserv before the present tribunal, he relied upon that earlier 2018 claim as a protected act.

6. In November 2018 the claimant applied for a role with Entserv through a recruitment agency.

He provided a CV to the agency, which referred to his employment with Tata "since July 2015". He also sent them his LinkedIn profile, which referred to his current employment as being with Tata. There was a dispute in evidence as to whether, in a phone call, the claimant told Mr Collyer of the agency that his employment with Tata had ended. The tribunal found as a fact that he did not.

7. The agency referred the claimant's application to Mr Nagra, who was the person at Entserv responsible for managing recruitment to a number of positions. Mr Nagra interviewed the claimant twice in December 2018. He then had two further interviews, each with a different manager, in January 2019. In none of these interviews was the claimant's current employment status mentioned by anyone. One of the other managers was against appointing the claimant, but Mr Nagra decided to move forward with an offer to him. On 20 February 2019 a conditional offer was made, one of the conditions being that the claimant provide three years' worth of employment references.

8. Entserv had a team which managed pre-employment screening, including reference-checking carried out by a third party. The screening team would not share the third party's report with HR or Mr Nagra unless there was an issue. In the completed form which he provided to the third party the claimant correctly stated that his employment with Tata had continued until August 2018 and that he was not employed from September 2018. On 30 April 2019 Tata provided a factual reference confined to the claimant's start and end dates and job title. The end date given was 31 August 2018.

9. Meantime, in March 2019 the claimant asked for, and then had, a meeting with Mr Nagra. At the meeting he asked for the financial package that he had been offered in February to be increased. The tribunal accepted Mr Nagra's evidence that the claimant explained that he would be leaving a steady role with Tata after 20 years, and moving into a probationary role with no job security. Following the meeting he emailed Mr Nagra a Tata salary letter from 2017 and stated that he was expecting an increase in base salary "since I am making a career change after over 20 years…".

10. The tribunal accepted Mr Nagra's evidence that he believed that the claimant was still employed by Tata, and was using this as a negotiating tactic to get an improved offer. Mr Nagra sought approval for the claimant to be offered a sign-on bonus, and an improved offer was then emailed to him on 4 April 2019. Mr Nagra also interviewed another candidate who he thought might prove stronger than the claimant, and asked for the improved offer to the claimant to be put on hold for 48 hours, but, by the time he made that request, the email had already gone out to the claimant.

11. In May 2019 Entserv introduced a new online test, administered by Gallup, for future recruitment exercises. Those currently going through a recruitment process were also asked to take it. The claimant took the test, and the result was that he was assessed as being of "low potential". The tribunal found that, had he not applied for the job prior to the introduction of the test, this result would have meant that he would not have been interviewed for it.

12. On 22 May 2019 the claimant was informed that background checks had been completed and that everything was settled for his start date of 3 June 2019.

13. I will set out the next part of the employment tribunal's decision in full. Before the tribunal the First Respondent was Tata and the Second Respondent was Entserv. Reference is also made in this passage to Mr Basterfield, who was a member of Entserv's HR team.

> **"49. At some point following the revised offer being sent to the Claimant and his agreed start date of 3 June 2019, Mr Nagra became aware that the Claimant's employment with the First Respondent had ended in August 2018. Mr Nagra's evidence was that he had received this information from Mr Parvata, a former colleague of the Claimant's, who had worked with him at the First Respondent's and who had informed him that the Claimant had been involved in some wrongdoing and had been dismissed for fraudulent activities in exceeding his authority in respect of corporate hospitality. Mr Parvata gave evidence to the Tribunal and stated that he had not provided this information to Mr Nagra, but that Mr Nagra had asked about it following the Claimant's commencement on 4 June 2019. It is unnecessary for the Tribunal to decide how and where Mr Nagra obtained information relating to the Claimant's employment with his former employer, the First Respondent. However, it is necessary for the Tribunal to consider what information Mr Nagra was given.**

50. The Panel was satisfied that Mr Nagra had been informed, not only of the Claimant's termination of his employment, but also that he had brought Employment Tribunal proceedings. Whilst Mr Nagra disputes this in his evidence, we are satisfied that this is the case from the email which the Claimant subsequently sent to Mr Nagra following his discussions with him on the day of his commencement (referred to below).

51. The Claimant therefore commenced employment with the Second Respondent on 3 June 2019. He was initially 'buddied' by Mr Singh, who helped with his induction due to Mr Nagra being unavailable due to meetings.

52. Mr Nagra gave evidence that he initially spoke to the Claimant and said to him to think about whether there was anything that he needed to share about his employment at TCS, as some things he had been told did not stack up. Mr Nagra's evidence was that they were going to talk after his meeting.

53. Mr Singh had taken the Claimant to a café for lunch. Following his meetings, Mr Nagra attended the café. The Claimant gave evidence that Mr Singh was in attendance at this meeting, although Mr Nagra gave evidence that he was not. The documentation provided as part of the appeal process supported Mr Nagra's version in that Mr Singh confirmed that he was not in attendance during this meeting [p566]. We accept that evidence.

54. There was a difference in evidence between what was stated in this meeting. Although it is accepted by both parties that there was a discussion of the fact that the Claimant had left the First Respondent's employment in August 2018 due to redundancy, and the fact that he was bringing Employment Tribunal claims against TCS, the difference in evidence related to who brought this information up first. The Claimant asserted that Mr Nagra had brought this up by mentioning a bad reference that he had received from the First Respondent earlier that day [paragraphs 108-110 of his Witness Statement]. Whereas, Mr Nagra's evidence was that the Claimant told him all about what he said had happened with TCS. Mr Nagra's evidence was that the Claimant informed him that he had been made redundant in August 2018 and that he was bringing Employment Tribunal claims against the company. Mr Nagra went on to further state that he told the Claimant how he had clearly lied to him and had lost all trust in him.

55. The Panel accepts Mr Nagra's evidence and finds that Mr Nagra knew of the Employment Tribunal claims and that the Claimant had been terminated months prior to his commencement before the conversation with the Claimant on 3 June 2019.

56. The Claimant sent an email to Mr Nagra on 3 June 2019 [page 400]. The email referred to the discussion earlier that afternoon, "where [Mr Nagra] mentioned receiving bad references from [the Claimant's] previous employer, TCS. [Mr Nagra] stated matters related to Employment Tribunal claim and [the Claimant's] business expenses". The email went on to refer to the Tribunal claim and the fact that the Claimant had been told by the Judge to maintain strict confidentiality on information relating to that litigation, but it confirmed that the Claimant had raised a grievance for victimisation that occurred when the Claimant had defended the unfair treatment that female colleagues were subjected to. It also provided confirmation that the Claimant had never been subject to disciplinary actions during his employment.

57. Mr Nagra, on receiving this email, forwarded it to Mr Collyer, at the recruitment

consultants [page 401]. In this email, Mr Nagra requested that Mr Collyer obtain the case number and the name of the Employment Tribunal where the Hearing was listed.

58. Following on from receiving the email from Mr Nagra, Mr Collyer at the recruitment consultants contacted the Claimant by email and suggested that he be open and transparent to show that he had nothing to hide. The Claimant subsequently provided that the case was listed at London Central Employment Tribunal and provided the case numbers for the claims. Mr Nagra gave evidence that he did not do anything with that information and his only interest in the Tribunal claims was to see whether there were allegations of financial impropriety on the part of the Claimant.

59. The Claimant emailed Mr Nagra again on 4 June 2019 confirming that he had raised the issue of the bad reference with TCS through their solicitors.

60. It was agreed that the Claimant would attend the Second Respondent's offices on 5 June 2019. Prior to this meeting, Mr Nagra confirmed that he had made the decision to terminate the Claimant's employment. He discussed the matter with Mr Basterfield and gave evidence that he decided to terminate the Claimant due to the fact that, in his view, the Claimant had lied to him for some months concerning the termination of the Claimant's employment by the First Respondent.

61. Mr Nagra emailed Mr Basterfield at 10.06 am on 5 June 2019 confirming the email as confirmation of the termination of the Claimant's employment, which was stated to be effective immediately.

62. Mr Nagra met briefly with the Claimant on 5 June 2019, during which he confirmed the decision to dismiss him. Mr Nagra's evidence was that this was because the Claimant had been dishonest during the recruitment process, whereas the Claimant's evidence was that this was because he had been dishonest in lying to him about the Employment Tribunal claims against the First Respondent. We accept the evidence of Mr Nagra.

63. A letter was sent to the Claimant dated 5 June 2019 [page 422]. This stated that, "…it appears you have misled the company within the hire stage process leading [the] us to consider and conclude this as a serious breach of trust and confidence". The letter went on to confirm that the Claimant would be paid in lieu of his one-week notice period and that he had the right to appeal against the decision to dismiss him.

64. The Claimant appealed on 14 June 2019 [page 436]. This was sent directly to Mr Nagra, who gave evidence that he did not recall receiving this or passing it on to anyone within the Second Respondent. We find this hard to accept but, in any event, accept that Mr Nagra did nothing with the appeal email. On 28 June 2019, Mr Basterfield emailed Mr Nagra asking why he had decided not to continue with the Claimant's employment, as he could not recall [page 479]. Mr Nagra replied to Mr Basterfield [also page 479], in which he confirmed that the Claimant had been questioned on the first day of his employment as,

"'a word in industry' was that he had been dismissed for fraudulent activities from TCS, the First Respondent. He went on to say, "also discovered that he had [lied] (sic) to me specifically about his employment status at TCS suggesting that he was employed by TCS when in reality he was unemployed. Continued the same lie for almost three months and four [rounds] (sic) of the interview and even suggested that he had to take gardening leave.

> **On day one of his employment commencing at DXC questioned him AND HE CONFESSED, he then shared the fact that he had separate inflight Employment Tribunal Hearings. My trust has been lost on day one and I could not allow him to be in a position of authority, managing key accounts and client relationships based on the fact that he was dishonest and untrustworthy."**
>
> **65. The Claimant's appeal was not initially dealt with by the Second Respondent. When the Claimant commenced proceedings at the end of August 2019, Mr Basterfield of the Second Respondent became aware that the Claimant had appealed the decision to dismiss him. Having carried out an investigation, it became clear that the Claimant's appeal had been received but that it was in a queue and had not yet been assigned to a manager."**

14. The tribunal went on to find that the claimant was finally sent an invitation to an appeal hearing on 31 January 2020. Following postponements requested by the claimant, the appeal was heard by another manager with Entserv, Mr Ambler, in April 2020. Mr Ambler was not able to speak to Mr Nagra, who had by that time left its employment. He concluded that the claimant had not been honest about his employment status during the recruitment process and had actively misled Mr Nagra when seeking an increased package, on the basis of his salary in a job which had in fact ended six months previously by redundancy. In an outcome letter sent in July 2020 he dismissed the appeal.

The Employment Tribunal's Conclusions.

15. The grounds of appeal do not criticise the tribunal's self-direction as to the law, which indeed appears to me to have been correct. The tribunal noted that victimisation may not be conscious and that the protected act must be "a reason" for the conduct complained of. Its self-direction also addressed the burden of proof. As we shall see, in its conclusions it stated that it had considered whether the protected act was "the reason (or even one of the reasons)" for the impugned conduct.

16. In its conclusions the tribunal first considered the complaints of direct race discrimination. It did not find the burden to have shifted in respect of them. In any event it found it not plausible that Mr Nagra, who agreed the claimant's appointment, and a signing on bonus, would have then dismissed him because of race. It also rejected the direct discrimination complaint in relation to the

delay in considering the appeal, finding, at [89], that the "failure to deal with [it] was Mr Nagra's failure to forward it on to the relevant department, and [Entserv's] procedures and nothing else. There was no suggestion at all that there was any other conscious or subconscious motive."

17. In relation to the victimisation complaints against Entserv the tribunal concluded as follows.

> **"90. We considered carefully whether the claims of victimisation had been made out, particularly as it was clear to the panel that the Second Respondent was aware of the Claimant's discrimination claims before it made the decision to terminate his employment.**
>
> **91. However, we were not satisfied that the reason (or even one of the reasons) for the Claimant's dismissal was because of his protected act, in bringing those claims. We consider that the real reasons for the Claimant's dismissal was the misleading way in which he had approached his application for employment with the Second Respondent. He had sent a CV and LinkedIn profile which both suggested that the Claimant remained employed by the First Respondent. We consider that the Claimant maintained this stance throughout the application process, although acknowledge, that during interviews he was not asked about his employment status. We accepted the evidence of Mr Nagra that he felt that he had been effectively lied to by the Claimant, particularly in trying to obtain a higher financial package; we also considered that the fact that he had shown low potential in the Gallup test and was not considered appropriate by one of the Senior people within the organisation, may have had some effect on Mr Nagra's decision. However, we find that the reason for the decision to terminate the Claimant was that Mr Nagra considered that the Claimant had been dishonest throughout the recruitment process.**
>
> **92. We carefully considered the evidence relating to Mr Nagra's knowledge of the earlier Tribunal Proceedings, and whether they had any influence on the decision to dismiss the Claimant. We did not believe it had. We acknowledge that Mr Nagra asked Mr Collyer to obtain details of the earlier Tribunal proceedings, but accept Mr Nagra's explanation that this was to see whether there was any financial impropriety on the part of the Claimant. We also took into account the email of Mr Nagra to Mr Basterfield [page 479] which talks about the fraudulent activities and the Claimant's continued lie for over 3 months and 4 rounds of interview and that he had spoken to him and on day one "HE CONFESSED". It is only after that, that mention is made of the Tribunal proceedings. Therefore, we do not accept that the protected act formed any part of the decision to dismiss the Claimant.**
>
> **93. Turning to whether the failure to progress the appeal was an act of victimisation, we do not accept that it was. We find that there was no causal link between the failure to progress the appeal and the protected acts."**

The Grounds of Appeal and the Arguments – Overview

18. Amended grounds of appeal were permitted to proceed at a preliminary hearing before HHJ Katherine Tucker. In discussion at the start of the hearing before me Mr Davies indicated that there

was an error in the wording of ground 3, a perversity ground, the preamble to which referred to the decision to dismiss, but which in substance in fact related to the failure to process the internal appeal. Mr Kelly indicated that, if this be an error, correction of it required permission to amend. I granted such permission, as the error appeared to me to be clear; and in any event the matters relied upon were already in play (in particular by ground 4, raising a *Meek* challenge in relation to the failure to progress the appeal, relying on the same supporting points), and Mr Kelly acknowledged that his client would not be prejudiced, as it was able, through him, to respond to it, as amended.

19. In overview the grounds (as amended) contend that the tribunal's decisions in respect of each of the two victimisation complaints were perverse or, alternatively, not *Meek*-compliant (**Meek v City of Birmingham DC** [1987] EWCA Civ 9; [1987] IRLR 250).

20. The grounds refer to a number of features of the evidence and litigation background in support. Central to the challenge with respect to the outcome of the complaint of victimisation by dismissal is the tribunal's statement, at [49], that it was unnecessary for it to decide how and where Mr Nagra obtained information relating to the claimant's employment with Tata. The tribunal is said to have erred by failing to make findings of fact resolving the stark conflict of evidence between Mr Parvata and Mr Nagra about what, if anything, Mr Parvata told Mr Nagra, on a date prior to 3 June 2019, about the termination of the claimant's employment with Tata, and about what Mr Parvata and Mr Nagra discussed when (which was common ground, as such) the two of them met on 4 June 2019.

21. The grounds also refer to a number of features which are said to have supported the account of Mr Parvata being more credible than that of Mr Nagra, and/or to put into question Mr Nagra's credibility as a witness generally. The latter are said to include emails contained in a supplementary bundle placed before the tribunal by Entserv, relating to Mr Nagra's stance in the run-up to the tribunal merits hearing, regarding his projected participation as a witness for Entserv, and the witness

statement he had given it. The tribunal said of this material, at [11], that it "did not have regard to it" and that "there is no need for this to be considered", for reasons it set out there. The claimant contends that the tribunal thereby erred by effectively excluding relevant evidence from its consideration, contrary to the principles discussed in **HSBC Asia Holdings BV v Gillespie** [2011] ICR 192.

22. Reliance is also placed on the tribunal's conclusion that (contrary to his evidence) Mr Nagra knew about the 2018 tribunal claim against Tata (being the protected act relied upon) prior to meeting with the claimant on 3 June. The tribunal failed to consider the impact of this on the credibility of Mr Nagra's evidence that this knowledge did not materially influence his impugned decisions.

23. Central to the challenge to the outcome of the complaint of victimisation in connection with the appeal is the tribunal's statement, at [64], in relation to the claimant's appeal email to Mr Nagra, that it found his evidence that he did not recall receiving this email or passing it on to anyone "hard to accept"; its finding there that he in any event "did nothing with this email"; and the evidence that the tribunal had, that the claimant chased the matter in a further email of 24 June to Entserv's HR Connect team, together with its findings that Entserv was further alerted to the appeal in August, but the claimant was finally sent an invitation to an appeal hearing (only) on 31 January 2020.

24. By reference to that material, it is contended that the tribunal erred by failing to consider, or address, whether Entserv's failure to provide a credible explanation for why the appeal was ignored at the relevant time, caused the burden of proof to shift, and/or by failing to make any, or any sufficient, positive finding as to the explanation for that conduct. The tribunal is also criticised for failing to consider the position of a hypothetical comparator. This material is also said to have been potentially relevant to the victimisation complaint about the decision by Mr Nagra to dismiss, on the basis that it potentially cast evidential light back on his reasons for that earlier decision.

25. Mr Davies submitted that the conflict about what, if anything, Mr Parvata had told Mr Nagra

about the claimant's employment with Tata, and when, was so significant to the issues, and the evidence about Mr Nagra's conduct in the run-up to the tribunal hearing so striking, that it was necessary for the tribunal to grapple with these, and the other foregoing aspects, in order properly and fairly to dispose of the victimisation complaints. He submitted that, as discussed in authorities such as **Bah v Berendsen** [2020] UKEAT/0256/19, it will be an error for the tribunal to fail to engage, or engage sufficiently, with a matter that is significant and material to the issues in the case.

26. In overview, the main planks of Entserv's response to the appeal were as follows.

27. First, it relied upon the well-established high hurdle for a perversity appeal, and the strict limitations on the ability of an appellate court to disturb findings of fact. Secondly, it relied also on the well-established principle that it is not necessary for the tribunal to address in its decision every feature of the evidence, to make findings about every factual aspect or conflict of fact canvassed in evidence, nor to address every argument or submission made to it. Mr Kelly highlighted the reformulations of these principles recently by Lewison LJ in **FAGE UK Limited v Chobani UK Limited** [2014] EWCA 5 and **Volpi v Volpi** [2022] EWCA Civ 464; [2022] 4 WLR 48; and the well-known discussion of the approach to adequacy of reasons in **English v Emery Reimbold & Strick Limited** [2002] EWCA Civ 605; [2002] 1 WLR 2409, as well as other authorities.

28. Mr Kelly submitted that the tribunal had properly taken a view that it did not need to resolve the conflict of evidence between Mr Nagra and Mr Parvata. It did not relate to the core issue of when Mr Nagra first learned of the claimant's protected act, and the tribunal made the salient finding, which was that he *did* know about it before he decided to dismiss the claimant. The tribunal had not excluded the material in the supplementary bundle provided by Entserv, but had properly decided that it did not need to address it in its decision. He submitted that there was also material that Tata had put before the tribunal, relating to exchanges between Mr Parvata and the claimant's solicitors,

prior to his agreeing to be a witness for the claimant, which cast doubt on Mr Parvata's own credibility. While the claimant maintained that it was Mr Nagra who had lied, nothing in any of this material meant that the tribunal was bound to so find. It was entitled to take the view that this material overall was not decisive and did not assist it to determine the key issues that it needed to decide.

29. Mr Kelly also submitted that the grounds, and the claimant's arguments, studiously avoided the fact that the tribunal properly concluded that Mr Nagra believed that the claimant had deliberately misled him in the negotiations, by giving him to understand that he remained employed by Tata and using that as a lever to secure an improved offer, that the fact that his employment with Tata had indeed ended the previous August had been confirmed by the claimant on 3 June, and that it was the view he took of that conduct which was the reason why Mr Nagra decided to dismiss the claimant. It had also properly considered factual features said to support the inference that the protected act had materially influenced the decision to dismiss, and given a reasoned decision why not. These were positive findings about the reason or reasons for dismissal which could not be challenged on appeal.

30. As to the failure to progress the internal appeal, the complaint was about the overall delay. The tribunal had made positive findings of fact at [65] and [66] as to why it had not progressed more rapidly after a follow-up email was sent by the claimant to HR Connect on 24 June and the appeal also then came to Mr Basterfield's attention in August 2019. Nor did it err by not regarding Mr Nagra's failure to action the initial appeal email sent to him on 14 June 2019 as shifting the burden of proof. Unreasonable conduct alone was not necessarily sufficient, and the tribunal was entitled to conclude that the burden had not shifted, so that no explanation for this conduct was required. The further criticism of the tribunal made in the grounds, for not considering the position of a hypothetical comparator, was misconceived, as none is required in respect of a victimisation complaint.

Discussion

31. The relevant general principles are well-established and were not in dispute before me. Mr Davies accepted, as he must, the high threshold for a perversity challenge, and the well-established principles about what is necessary to produce a decision that is "*Meek*-compliant", and that the tribunal does not have to deal in its decision with every evidential or factual matter or submission that was canvassed before it.

32. However, it is also well-established that the tribunal *does* have to make sufficient reasoned findings so as to enable the parties to understand how it has engaged with, and resolved, key areas of dispute that are material to how a given complaint has been advanced or defended. See the discussion in **English v Emery, Reimbold & Strick Ltd** (above). What are, as that discussion variously calls them, the "critical", "central", "fundamental", or "essential" issues or contentions, and whether the tribunal has sufficiently engaged with them in its decision, will, inevitably, be sensitive to the particular nature of the claims and issues, and how they are advanced or defended, in the given case.

33. I will consider first the challenge based upon the fact that the tribunal considered it unnecessary to resolve the conflict of evidence between Mr Parvata and Mr Nagra to which it referred at [49]. I start with a reminder of what it had to decide in order to determine the victimisation complaint relating to the dismissal, and the findings and conclusions which the decision *did* contain.

34. First, did the claimant do a protected act? It was not disputed, and the tribunal found, that the 2018 tribunal claim against Tata (which was also ongoing at the relevant time) was a protected act. Second, did Mr Nagra know of the protected act at the time when he took the decision to dismiss? The tribunal found that he did. Third, did that knowledge materially influence Mr Nagra's decision to dismiss? For reasons that it set out, the tribunal found that it did not.

35. As the second of these, there was no dispute that the claimant shared some information about the 2018 tribunal claim with Mr Nagra on 3 June 2019. There was a factual issue, however, as to

whether Mr Nagra already knew about that claim before the café meeting. Mr Nagra's evidence was that, prior to the discussion with the claimant that day, he had been told that his employment with Tata had ended in August 2018 and that there had been allegations of fraud, but not about the tribunal claim, and that he heard about that first from the claimant on 3 June. However, the present tribunal found as a fact that Mr Nagra already knew about the 2018 tribunal claim against Tata as well.

36. On that last point, I note (and raised with counsel during the hearing of this appeal) that at [55] the tribunal began by saying that it "accepts Mr Nagra's evidence". Those words read in isolation, following on from paragraph [54], might give the reader the impression that the tribunal accepted that Mr Nagra did *not* know about the 2018 tribunal claim prior to the 3 June meeting. However, reading the relevant paragraphs as a whole, the following emerges.

37. First, it was Mr Nagra's own evidence (not disputed, and accepted as such) that what he *had* been told, prior to the café discussion, was that the claimant's employment with Tata had ended in August 2018 and that there had been allegations of fraud. Secondly, the tribunal plainly concluded that he had also already heard about the 2018 tribunal claim. It so found, in terms, at [50], and repeated that finding in the body of [55]; and at [50], [55] and [56] it explained that the particular evidence that led it to that conclusion was what the claimant wrote in his email to Mr Nagra following the 3 June meeting. It appears to me that, in saying in the opening words of [55], that it accepted *Mr Nagra's* evidence, the tribunal probably mis-spoke; but either way, its overall finding of fact on this point is still, I think, clear.

38. Next, I ask myself, what was the significance of this factual dispute for what the tribunal had to decide? On either version of events, by the time that Mr Nagra decided to dismiss, he knew (a) that the claimant's employment with Tata had ended back in August; (b) that there had been (disputed) allegations of fraud; and (c) that the claimant had brought a claim against Tata. The tribunal had to

decide whether (c) had materially influenced that decision. The tribunal found that, when Mr Nagra saw the claimant at the start of the day on 3 June, he asked him to think about whether he wished to share anything about his employment at Tata, as some things he had been told, "did not stack up". On Mr Nagra's evidence, later that day the claimant confirmed that what Mr Nagra had heard was true (although the claimant disputed the fraud allegations) and also revealed (c) to him. The claimant's case was that Mr Nagra already knew all three, and that the fact that he had brought a tribunal claim was *already* part of what was preying on Mr Nagra's mind, before they first spoke.

39. I pause to observe that, on any version of events, *someone* had told Mr Nagra, at some point before he met with the claimant on 3 June, at least about the allegations of fraud, allegations which the claimant maintained were without foundation (and his position is also that he was effectively vindicated by the outcome following trial, in due course, of his 2018 claim against Tata).

40. By the start of the trial in the present case the claimant knew that Entserv's case was that the source of that information was Mr Parvata, and that Mr Parvata (who was now the claimant's own witness) denied that. The claimant was plainly exercised about who, if not Mr Parvata, the source was. Potentially, it appears to me, their identity might also have been said to be relevant to the claims against Tata that were live at the start of the tribunal hearing. But those claims were withdrawn before the tribunal produced its decision. I therefore see the force of Mr Kelly's point that, from the point of view of the tribunal, what was material to what it had to decide in relation to the complaints against Entserv was *when* (in the sequence of relevant events) Mr Nagra first learned about the fact that the claimant's employment with Tata had ended in August 2018, and of there having been allegations of fraud, and when he first learned about the 2018 employment tribunal claim against Tata. That was what now mattered for the tribunal's purposes, not the identity of the source or sources.

41. Nor do I consider that, on the evidence before the tribunal, it could, in any event, only have

found that the source of Mr Nagra's knowledge about the claimant's previous employment at Tata prior to 3 June was not Mr Parvata. I was shown by Mr Davies various parts of the documentary evidence before the tribunal, in particular Mr Parvata's phone records, and other messages relating to the setting up of the 4 June meeting. It is not necessary to set out all the detail here. The material point is that I do not accept that the tribunal would have been bound to conclude that this evidence irrefutably showed that Mr Nagra's evidence about these matters was not true; and that is even before I remind myself of the dangers, in Lewison LJ's memorable image, of "island hopping".

42. I turn then to whether the tribunal erred by not addressing, and resolving, the question of whether, when Mr Nagra and Mr Parvata met on 4 June, Mr Nagra told Mr Parvata that he had learned about the claimant's employment with Tata having ended the previous August, that there were allegations of fraud, and that the claimant was bringing a tribunal claim. That was the gist of Mr Parvata's evidence, but Mr Nagra's evidence was that they did not discuss the claimant at all.

43. Once again, on the perversity point, I do not accept Mr Davies' submission that evidence of the communications leading up to that meeting demonstrated incontrovertibly that Mr Nagra's account must be untrue; once again I remind myself of the dangers of the EAT dipping into parts only of the evidence that the tribunal had. Nor, even had the tribunal found that Mr Parvata and Mr Nagra had only discussed the claimant for the first time on 4 June, would that necessarily have meant that it would have been bound to conclude that this meant that Mr Nagra's knowledge of the Tata tribunal claim materially influenced the decision to dismiss.

44. However, the claimant also sought to attach distinct significance to what on his case was said during the 4 June conversation, from the issue about who Mr Nagra's source was, prior to the events of 3 June. Even if the tribunal were to find that Mr Nagra was principally concerned that he had discovered that, in his view, the claimant had misled him, at the time of their negotiations, about

whether he was still employed by Tata, and had thereby secured a better financial package, it would have been sufficient to the claimant's victimisation claim had the tribunal found that Mr Nagra was *also* materially influenced by the claimant having brought a tribunal claim against Tata. It was part of the claimant's case that one of the features supporting that conclusion was that, when Mr Nagra and Mr Parvata met on 4 June, that claim was one of the things to which Mr Nagra referred. Mr Davies' submitted that the tribunal therefore needed to engage with this factual issue, as it was an important further plank of the claimant's case.

45. As to this, the tribunal specifically referred, at [49], to Mr Parvata's evidence about the 4 June meeting, as well as about whether he had discussed the claimant with Mr Nagra before that, when discussing what matters it was or was not necessary for it to make findings about. It plainly therefore understood, and had not forgotten, the claimant's case on this.

46. I note also that the tribunal did consider the evidence that it had, about Mr Nagra, following the claimant having confirmed the existence of the tribunal claim on 3 June, having asked Mr Collyer to find out more about it, and also having referred to it in his communications with Mr Basterfield. The tribunal specifically considered at [92] whether this material indicated that his decision to dismiss has been materially influenced by the claimant having brought that claim. Given all of that, I do not think that the tribunal erred by not also making a specific finding about whether Mr Nagra also referred to the claim when speaking to Mr Parvata on 4 June. The failure to make a finding about that falls, as it were, the **Fage v Chobani** side of the line, rather than the **Meek** side of the line.

47. The next area of the evidence which, on the claimant's case, the tribunal erred by not addressing in its decision, was the evidence of Mr Nagra's communications with Entserv's solicitors about whether he would be a witness for it at the tribunal hearing. In summary, Mr Nagra had himself left Entserv's employment in December 2019. He had initially provided a statement to them with a

view to being their witness, but ultimately declined to do so, and withdrew their authority to rely upon it. It was their case that the stance taken by Nagra in the course of the communications relating to that falling out reflected adversely on him and his credibility. I do not need to set out the details. It is apparent to me that Mr Nagra would not agree that there was any impropriety on his part; and I cannot say that the tribunal would have been bound to agree with the claimant's view about that.

48. Having been told that Mr Nagra would not, after all, be a witness for Entserv, the claimant's solicitors had then sought a witness order, but in the event he was called as a witness by Tata. There was no dispute that Entserv then tabled the pre-hearing correspondence, because they wished to be able to rely upon it to challenge Mr Nagra's credibility in the event that his evidence departed from the statement he had given them. But in the event it did not. It was also agreed by both representatives before me, indeed averred by Mr Davies, that, Mr Nagra in the event having been called by another party, he, Mr Davies, was permitted to, and did, cross-examine him by reference to that material.

49. Mr Kelly, for his part, showed me material relating to communications between the claimant's solicitors and Mr Parvata, relating initially to the claimant canvassing a possible defamation action, the contents of which Mr Kelly submitted cast doubt on Mr Parvata's credibility. Once again, I do not need to go into the details; and it is apparent to me that Mr Parvata would not agree that the material undermines his credibility. Nor can I say that the tribunal would have been bound to so conclude. There was no dispute that *this* material was also put before the tribunal, in this case by Tata, and indeed Mr Kelly for his part had cross-examined Mr Parvata with reference to it. Once again, the tribunal did not, however, see the need to consider this material in its decision.

50. Against that background I do not agree with Mr Davies' submission that the tribunal erred by wrongly excluding evidence relating to Mr Nagra that was potentially relevant. The evidence relating to these various communications, said by either the claimant or Entserv to be relevant to the credibility

of either Mr Nagra or Mr Parvata, *was* before the tribunal, and it was plainly aware of all of it and submissions were made about it. But the tribunal was entitled to take the view that this material did not assist it to decide what it had to decide for the purposes of determining the claimant's claims. It was not an error for it, in that sense, to put it to one side, and not deal with it in substance, or the submissions that were made about it, when setting out the reasons for its decision.

51. Next, Mr Davies submitted that the tribunal erred by failing to address in its decision the implications of the fact that it had not accepted Mr Nagra's evidence that the first time that he learned of the 2018 tribunal claim against Tata was from the claimant on 3 June. He submitted that the tribunal should have considered that the fact that he had denied in evidence knowing this already, itself supported an inference that he had been influenced by that knowledge, and/or a shifting of the burden of proof.

52. As to that, I do not think that the fact that the tribunal did not accept Mr Nagra's evidence on this point would have meant that it was bound to conclude that he had deliberately lied about it, nor that this should necessarily lead to the drawing of an inference, or the shifting of the burden of proof. Once again, however, Mr Davies submits that this was a contention that at least needed to be specifically engaged with and addressed.

53. As to this, the tribunal plainly was aware of this dispute of fact, and devoted a significant passage to addressing and explaining how it had resolved it. I do not think it can be supposed that the tribunal did not have in mind that it had not accepted Mr Nagra's evidence on this point, when it reflected on and came to its conclusions. Once again, it plainly considered, and made a positive finding about, the substance of the reasons why Mr Nagra took the decision to dismiss and whether the knowledge of the 2018 claim materially influenced it. Given all of that, it was not an error not to also address whether the fact that it did not accept his evidence on this point would have supported

the drawing of an inference, or the shifting of the burden, in the absence of a positive explanation.

54. I turn now to the complaint about the failure to progress the appeal against dismissal. As framed, the complaint related to the overall delay by Entserv in progressing the appeal and the apparent inaction at various stages along the way to the eventual hearing of it. However, as to how matters unfolded following the claimant having emailed the HR Connect team a copy of the appeal on 24 June 2019, and it also having come to Mr Basterfield's attention in August, it seems to me that the tribunal made positive findings that the reasons for the delays were administrative and/or because the claimant was himself seeking postponements of the hearing.

55. However, the nub of this complaint related to Mr Nagra failing to take any action in response to the initial email that the claimant sent to him on 14 June 2019, in which the claimant explained that he did not have direct access to HR Connect, and asked Mr Nagra to pass the appeal on. Mr Davies submitted that the tribunal erred in failing to consider in its conclusions, the significance of its observation at [64], that it found Mr Nagra's evidence about that "hard to accept". The tribunal had not found any credible explanation for that conduct, and it should have concluded that the burden of proof shifted to the respondent in this respect, and that it had failed to discharge it.

56. Mr Kelly submitted that the tribunal had, in its self-direction on the law, referred to section 136 of the **2010 Act** relating to the burden of proof. It had properly found that the burden had not shifted at [88]. The conclusion that it reached at [93] had to be read in light of that earlier passage. This was not a case where contradictory or changing explanations for the conduct had been given. The tribunal did not err by not treating this feature of the evidence as sufficient to support a shifting of the burden of proof or the drawing of an inference.

57. Once again, I agree that the perversity challenge does not surmount the high hurdle which it faces. It cannot be said that the tribunal could only properly have concluded that Mr Nagra's failure

to do anything with the email was the result of a deliberate decision which was, consciously or not, materially influenced by the protected act. However, I have come to the conclusion that the decision to dismiss this victimisation complaint is not *Meek*-compliant. That is for the following reasons.

58. First, having read and re-read it, I do not think one can spell out of [64] a positive finding as to why Mr Nagra did not action the email. The finding that Mr Nagra in any event did nothing with the email, is a finding that the conduct complained of occurred, not as to the reason or reasons for it. The "we find it hard to accept" comment at best conveys that the tribunal had its doubts about his evidence, but ultimately neither accepted nor rejected Mr Nagra's evidence on that point. Neither here, nor elsewhere, did the tribunal find, for example, that Mr Nagra never received the email, did receive it but did not notice it, or received and noticed it, but failed to action it for some other reason.

59. Secondly, the tribunal properly ruled out the claimant's race being a material influence. But its observations at [89] were made specifically in the context of its consideration of that distinct complaint of direct race discrimination. It was entitled to take the view that there was simply no good basis at all to infer that (or shift the burden as to whether) the claimant's race was a factor, so that, for the purposes of that complaint it did not need to make any further finding as to the explanation for the conduct in question. But, given the other findings about Mr Nagra's knowledge of, and references that he made to, the protected act, the same reasoning could not simply be transplanted across and applied in the same way, to its consideration of the victimisation complaint.

60. Thirdly, when it returned to the victimisation complaint at [93], the tribunal made no further substantive finding as to the reasons for the conduct, but simply stated its conclusion. Other findings to support that conclusion had, as I have noted, been made in relation to aspects of the failure to progress the appeal, *other than* the conduct of Mr Nagra, in relation to the email to him, but not in relation to that conduct, which was plainly a key part of the conduct complained of in this regard.

61. Standing back, while the reader of the decision knows from its outcome that the particular complaint that Mr Nagra's failure to action this email was an act of victimisation failed, the reader does not know whether that was because the tribunal considered that the burden did not shift in relation to it (and, if not, why), nor whether the tribunal was satisfied as to the positive explanation for the conduct, such as to eliminate the protected act as a material influence, and, if so, what it was.

Outcome

62. I have therefore concluded that, in respect of the sub-strand of the second victimisation complaint relating to Mr Nagra's failure to action the appeal email of 14 June 2019, the tribunal's decision was not *Meek*-compliant. I therefore allow the appeal against that decision on that basis.

63. The remainder of the *Meek* challenges, and the perversity challenges, raised by this appeal, as such, all fail. However, as I have noted, Mr Davies submitted that, were the appeal in relation to Mr Nagra's failure to action that email to succeed, and were that conduct then to be found to have been materially influenced by the protected act, such a finding could, in turn, potentially cast light back on his reasons for dismissal, so requiring the complaint about it also to be further considered.

64. As to that, I note that the tribunal did, of course, make positive findings as to why Mr Nagra dismissed the claimant, excluding the protected act having been a material influence on that decision. Nevertheless it is not doctrinally unarguable that a different outcome in relation to the appeal-email complaint, could potentially be argued to cast evidential light back on the dismissal. I will therefore, strictly only on that consequential basis, also allow the appeal in respect of the complaint relating to the dismissal. Accordingly, once the outcome of the appeal-email victimisation complaint, on further consideration on remission, has been determined, the tribunal will need also to consider what, if any, impact that may have on the previous outcome of the dismissal victimisation complaint.

65. In argument at the hearing, the representatives agreed that, in the event of the appeal being allowed to some extent on *Meek* grounds only, a full re-hearing by a different panel would not be required. Rather, the appropriate course would be to remit to the same tribunal panel (so far as all three are still available) further to consider the complaint or complaints in question, without hearing new evidence, but on the basis of further submissions. I agree, and will therefore remit on that basis.

66. Finally, I note that, depending upon the substantive outcome(s) on further consideration upon remission, there is a section 109(4) point that the tribunal may need to address; although again, if so, on the basis of such evidence as it already was given on that point at the original trial.