Neutral Citation Number: [2024] EAT 17

Case No: EA-2021-001004-RN
EA-2022-000937-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 February 2024

Before :

JUDGE STOUT

- -

Between :

MR L HUMBY

Appellant

- and –

BARTS HEALTH NHS TRUST

Respondent

- -
- -

The Appellant in person
Jack Mitchell (instructed by **Capsticks LLP**) for the Respondent

Hearing date: 19 December 2023

- -

JUDGMENT

SUMMARY

DISCRIMINATION – PRACTICE & PROCEDURE

The claimant was employed by the respondent NHS Trust at Band 6. A restructure was proposed which involved reducing the number of Band 6 roles albeit that, as a result of vacancies, the number of employees actually employed at Band 6 would not reduce. Following a lengthy process, during which he and other Band 6s were required to compete for roles in the new structure, he was unsuccessful in obtaining any Band 6 role and was reassigned to Band 5. He resigned, claiming unfair constructive dismissal and also victimisation in relation to both the restructure and prior alleged detriments of restricting management duties and placing him on a performance management process. At a preliminary hearing, one judge (sitting alone) decided that the prior alleged victimisation detriments were out of time and refused the claimant's application to amend to bring claims of victimisation in relation to his applications for two specific roles within the restructure process. At the final hearing, a Tribunal panel dismissed all the claimant's claims.

Held:-

(a) The Tribunal at the preliminary hearing erred in law in considering the claimant's amendment application by perversely proceeding on the basis that the proposed amendments involved different witnesses and also in failing to recognise the extent to which the factual basis of the proposed amendments was going to form part of the evidence to be considered at the final hearing in any event.

(b) The Tribunal at the preliminary hearing erred in law in concluding that the claimant did not have an arguable case of 'continuing act' in relation to the earlier acts of victimisation. It was not open to the Tribunal on the particular facts of this case to hold otherwise than that the claimant did have an arguable case that there was a continuing course of conduct.

(c) As the claimant had an arguable case on 'continuing act' there was no need for the Tribunal to go on at the preliminary hearing stage to consider whether it was just and equitable to extend time. The question of whether the earlier claims were in time should remain for

consideration at the final hearing.

(d) The Tribunal at the final hearing erred in law by considering the constructive unfair dismissal claim before the victimisation claim and thus failing to deal with all elements of the claimant's victimisation claim, including the main plank of his case, being whether the demotion to Band 5 was an act of victimisation.

(e) There was an error of law in failing to consider all the evidence 'in the round' before concluding that no inference of victimisation was to be drawn, applying the burden of proof in s 136 EA 2010.

(f) The Tribunal erred in law by failing to direct itself by reference to *Shamoon* in relation to the test for detriment, or to apply that test correctly by deciding whether it was reasonable for the claimant to consider that he was disadvantaged by the matters on which he relied.

(g) There was material unfairness arising from interruptions to the claimant's cross-examination of Ms McConnell.

(h) The Tribunal had not misconstrued the respondent's internal policy document, or at least not in a way that amounted to an error of law.

(i) The Tribunal at the final hearing erred in law by concluding that the unilateral demotion to Band 5, with attendant permanent loss of managerial duties and c£5k reduction in salary was not a breach of any of the express terms of the claimant's contract. This rendered its conclusion that there was no fundamental breach of contract unsafe, and the Tribunal had not in any event properly directed itself by reference to the relevant authorities as to when breaches of express terms of the contract amounted to a fundamental breach. This was also a case where, as the claimant was a litigant in person, the Tribunal ought of its own motion to have raised with the parties the question of whether the respondent's actions amounted to an actual *Hogg v Dover*-type dismissal.

(j) The Tribunal erred in law by perversely regarding the claimant's willingness to continue in employment only in a Band 6 role as affirmation of the respondent's breach of contract in reassigning him to Band 5, and had failed properly to apply *Cockram v Air Products plc*

[2014] ICR 1065 when concluding that the claimant's willingness to work more than his six weeks' notice amounted to affirmation of his contract. There was no absolute rule and all the circumstances needed to be considered. The Tribunal had erred by failing to take into account the relevant circumstances that the offer was made because the claimant was uncertain about the actual length of his notice period, in light of the Covid-19 pandemic lockdown, that he had only offered to work a few extra days (rather than several months as in *Cockram*) and that he had not in the end worked more than his notice period.

(k) In view of the number of errors, the judgment was not saved by the fact that the Tribunal had gone onto conclude that, if the claimant had been dismissed, he was fairly dismissed for redundancy.

The case was remitted to a fresh Tribunal for a complete re-hearing.

JUDGE STOUT:

Introduction

1. Mr Humby is the appellant in this matter. He was the claimant below and I will refer to him as such. He was employed by the respondent NHS trust from 8 November 2004 until he resigned with effect from 1 May 2020 in circumstances that he contended amounted to constructive dismissal. He brought claims of constructive unfair dismissal under the Employment Rights Act 1996 (ERA 1996) and victimisation under the Equality Act 2010 (EA 2010), which were heard at the East London Employment Tribunal. In these joined appeals he appeals against: (1) the judgment of Employment Judge Russell (sitting alone) given orally at a preliminary hearing on 2 June 2021, with judgment and written reasons sent to the parties on 14 July 2021 ("the Russell judgment"); and (2) the reserved judgment of Employment Judge O'Brien, sitting with Mrs B Saund and Ms S Harwood on 16 and 17 September 2021 and 2 December 2021, judgment and reasons sent to the parties on 29 July 2022 ("the O'Brien judgment").

2. Both parties had prepared written skeleton arguments for the hearing before me, which I read. I also heard oral submissions from both parties, in the course of which I identified a number of authorities of potential relevance to the grounds of appeal on which I gave the parties an opportunity to provide further submissions in writing. Both parties took that opportunity and I have carefully considered their responses.

The grounds of appeal

3. Permission to proceed on these appeals was granted by HHJ Tayler at a Preliminary Hearing on 21 December 2022. At that hearing, the appellant had the assistance of counsel under the ELAAS scheme and amended grounds of appeal were filed by counsel on the appellant's behalf subsequent to the hearing. Summarising those grounds of appeal in my own words, they are as follows:-

a. Ground 1 – The Russell judgment erred in law and/or failed to give adequate reasons for refusing to grant the claimant's application to amend to add further claims of victimisation;

b. Ground 2 – The Russell judgment erred in law in determining that there was no prima facie case that the claimant's claims about the removal of his management duties in September 2018 or the performance management process from January 2019 constituted 'continuing acts' with the other allegations of victimisation that went forward to the final hearing;

c. Ground 3 – The Russell judgment erred in law in the approach to deciding whether it was just and equitable to extend time for those claims under s 123(1)(b) EA 2010;

d. Ground 4 – The O'Brien judgment erred in law in failing to consider the claimant's victimisation claims before (or separately to) his constructive dismissal claim to ensure a proper approach to the burden of proof and detriment, in particular by:

   i. Failing properly to apply s 136 EA 2010 in the light of the claimant's evidential case; and/or

   ii. Erred in law in finding that the allegations found proved did not constitute 'detriments' (applying *Shamoon*); and/or

   iii. Erred in law in preventing the claimant from questioning Ms McConnell about the 25 September 2018 meeting, the emails of 25 and 27 September 2018 and the surrounding circumstances;

e. Ground 5 – The O'Brien judgment erred in law in construing the respondent's Managing Change policy as requiring an internal candidate to be interviewed informally only if there had been one application for the post and not if there had been other applications, but the candidates had withdrawn;

f. Ground 6 – The O'Brien judgment erred in law in relation to the claimant's constructive unfair dismissal claim, in particular:

   i. In finding that the claimant had failed to persuade the Tribunal that the result

would have been different if he had been assessed informally, thus impermissibly placing the burden of proof on the claimant;

ii. In holding that by demoting the claimant to a different role at a different banding and with a lower level of remuneration the respondent did not breach his contract of employment;

iii. In finding that by continuing to engage in the restructure process and work for the respondent after 24 February 2020, the claimant affirmed his contract and waived the breach and also failing to consider whether anything that could have constituted a 'last straw'.

Application to amend grounds of appeal

4. In his Skeleton Argument for this hearing, the claimant sought to resurrect certain grounds of appeal that were included in his original notice and grounds of appeal but were (according to him) abandoned by the counsel who represented him at the Preliminary Hearing (through the ELAAS scheme) against the claimant's instructions. After discussion, he formally made an application to amend his grounds of appeal to include as a ground of appeal that the Russell Judgment had erred in law in refusing him permission to amend his claim to include the matters pleaded at paragraphs 66-70 of his amended particulars of claim, which was a further victimisation claim and/or further factual allegation in relation to his constructive unfair dismissal claim. The further allegation concerned a Specialist Clinical Coder post that the claimant contends should have first been advertised internally in accordance with the respondent's Managing Organisational Change policy.

5. Despite the claimant's amendment application regarding the Specialist Clinical Coder post having been refused by the Tribunal in the Russell judgment, it was actually dealt with by the Tribunal in the O'Brien judgment at [56] where it was found that the claimant and another internal applicant were not considered appointable when interviewed alongside an external

candidate. The external candidate subsequently withdrew and so the post was re-advertised and an external applicant appointed. At [96] the Tribunal went on to make an apparently inconsistent finding regarding this post that it had been advertised internally and that only internal candidates were shortlisted.

6. I heard submissions from the claimant and the respondent at the hearing as to whether to allow an amendment to the grounds of appeal before me, but refused that application for reasons given orally at the hearing (in essence because it had been raised too late without good reason and there was insufficient time to deal with it).

The factual background

7. In outline, the relevant facts of the case as taken from the O'Brien judgment are as follows. Paragraph references in the form [x] are to paragraphs of the O'Brien judgment.

8. The claimant had commenced employment on 8 November 2004 as a Clinical Coding Officer. He was promoted twice and had since 16 January 2014 been in a Band 6 role as Clinical Coding Quality Lead, in which band he had by September 2018 reached the top of the payroll ([18]-[23]).

9. The claimant had brought two previous claims against his employer alleging breaches of the EA 2010, one on 22 January 2018 and one on 27 February 2018 ([24]-[25]).

10. By email of 25 September 2018, Ms McConnell (Managing Director of iROC Ltd, a consultancy providing clinical coding expertise and services to the respondent) met with the claimant to discuss a number of concerns, including his health, performance and behaviour at work. Afterwards, she sent an email seeking to record the events of the meeting which included the following: *"I explained that following advice from HR, and due to the occupational health referral, the impending grievance case and the employment tribunal case,*

it was not appropriate to give you more management/team leader duties until these had all been completed or resolved. I explained that the decision as made to ensure that no further undue pressure was placed on you tool [sic] these had concluded" ([26]).

11. Two days later, this was followed by an email from Ms McConnell which included the following: *"Just for avoidance of any doubt, the primary reason for the recent amendment to your workload is in response to concerns around your performance/health and wellbeing and whilst OH advice is being sought. My mention of you having raised a grievance and ET was in regards to the stress that you have stated currently feeling, but has no bearing on the decisions made by management"* ([27]).

12. The claimant following this was not returned to managerial duties before the termination of his employment ([28]).

13. In October 2018 Ms McConnell prepared a business case for restructure. It was not expected that the restructure would result in redundancies as there were more, rather than fewer, posts in the new structure. The total number of Band 6 roles was decreasing from 15.33 to 14, but that was still one more Band 6 role than the number of people actually employed in Band 6 roles at the time so there was no planned reduction in the number of people required for Band 6 roles ([29]-[30]). There were, however, only going to be six full-time "Clinical Board Coding Lead roles" in the proposed structure, whereas there were 11 "CAG Lead/Quality Lead/Co-ordinator populated roles" in the existing structure. It was decided that Band 6 staff would therefore be required to apply for posts in the new structure ([31]).

14. Consultation on the restructure took place in March-April 2019 ([36]-[37]).

15. There were three Band 7 Clinical Coding Engagement Leads in the new structure. These were advertised internally. The claimant applied, but was not successful, scoring lower than the other three candidates ([38]-[40]).

16. There were two Clinical Coding Auditor posts in the new structure (presumably Band 6, although the O'Brien judgment does not specify). These were advertised internally and then also externally. The claimant applied, and was shortlisted and interviewed by Ms Hooper and Ms Szul. He was interviewed on a formal basis, although by the time it got to his interview he was actually the only candidate still interested. The respondent accepted in response to the claimant's grievance that in those circumstances, according to the respondent's policy, his interview should have been informal, but the respondent's case at the Tribunal hearing (as advanced by Ms McConnell) was that the respondent's policy is actually silent as to whether there should be a formal or informal interview at that point. In any event, he was assessed as unsuitable for the post, having appeared ill-prepared for the interview. In the end, three Clinical Coding Auditor posts were created, one of which was filled by an internal candidate who was 'slotted in' as a result of a match with her existing role ([41]-[46]).

17. Two Specialist Clinical Coding Officer roles were advertised internally and appointments made, with a third existing Specialist Clinical Coding Officer being 'slotted in' ([47]) (again, these were presumably Band 6, although the judgment does not specify).

18. Expressions of interest in six available Clinical Coding Board Lead roles were invited in August 2019. The claimant expressed interest. All candidates were asked to submit a questionnaire response. The claimant did so a week late and was therefore told at a meeting with Ms McConnell and Ms Sung (Associate Director of Data Assurance) on 19 September 2019 that his application would not be progressed. There was an evidential dispute as to what was said at this meeting. The Tribunal accepted (paragraph 52) that the claimant was criticised at this meeting for not following management instructions, but was *"not persuaded that either Ms McConnell or Ms Sung … used the word 'troublemaker'"* and the judgment finds *"We are certainly are not persuaded that anything that was said was with his previous grievance and tribunal claims in mind"*.

19. Appointments were made to three out of the six Clinical Coding Board Lead roles in that first round and two of the posts were then re-advertised internally. The claimant applied again and was not successful, scoring less than the two successful applicants ([55]). The sixth role was changed into a Specialist Coding Lead for Obstetrics, into which another employee was slotted without interview as she was regarded as having the right skill set ([54] and [55]).

20. In September 2019 the post of Clinical Coding Performance Analyst was advertised for internal applicants only. The claimant applied, but did not attend the interview after having been refused a request for an extension of time to prepare a presentation, having been unwell for two days and preparing for an EAT hearing in the 2-week period allowed for preparation ([53]).

21. Another Specialist Clinical Coder Band 6 role was advertised in November 2019. The claimant and another internal candidate were not successful. The post was re-advertised externally ([56]).

22. In November 2019 a Clinical Coding Engagement Lead post was advertised. The claimant and two others applied. The claimant scored second best. The employee who was successful (VR) had in fact already got one of the original six Clinical Coding Board Lead roles. VR suggested he could do both roles and the respondent agreed ([57]).

23. That left no more Band 6 roles for the claimant and so he was on 6 February 2020 notified that he would be appointed as a Band 5 Senior Clinical Coder Officer with effect from 24 February 2020. This was a demotion, with attendant decrease in pay, albeit that he would have 18 months' pay protection before his salary reduced from £44,044 to £39,145. The Band 5 role was regarded by the respondent as suitable alternative employment under its policy and the offer was subject to a 4-week trial period ([58]-[59]).

24. The claimant rejected the Band 5 role and maintained that he remained in a Band 6 role as

Clinical Coding Quality Lead ([60]-[63]). Ms McConnell informed him that role no longer existed, and that the Band 5 post was the one the respondent regarded him as now occupying. The respondent's position was reiterated in a letter of 4 March 2020, written following a meeting that the claimant did not attend, saying he had not been able to obtain proper advice from his trade union.

25. On 6 March 2020 the claimant emailed to confirm he had not accepted the offer, to which Ms McConnell responded that he was *"declaring himself redundant"* and he would have to provide written notice of termination. The claimant *"declined to do so but instead engaged in a course of correspondence denying the respondent's right to unilaterally change his contract"* ([64]). This culminated in an email of 23 March 2020 in which the claimant wrote:

> "As the trust is still insisting that it has the unilateral right to change my contract and substitute a band 5 post for my contract post as a band 6 clinical coding quality lead … I have no alternative but to leave.
>
> I believe my notice period is 6 weeks, although I have worked for the trust so long that I am not sure and don't immediately have the documentation at hand. I am not of course required to give notice as it is the trust that is attempting to unilaterally change my contract but I don't want to leave without notice.
>
> These are, however, unprecedented times as we are currently fighting a national and international pandemic. Many of us were expecting a lockdown similar to those announced in several continental European countries to be announced last Friday and I have been very conscious over the last two weeks as I have been considering how to respond if your position didn't change … further restrictions have been judged necessary tonight, and I have delayed sending this email to consider what was announced. I am still doing that. … There may therefore need to be some flexibility either way, but six weeks seems a sensible timeframe, although the exceptional circumstances that we find ourselves in may mean that it proves sensible to lengthen or curtail it, depending upon what unfolds over the next few weeks."

26. Ms McConnell responded on 24 March asking the claimant to bear with her while she sought advice and formulated a response. She had still not done so by 9 April 2020 when the claimant confirmed that he would work his 6-week notice period so that his last day would be 1 May 2020 (i.e. slightly less than six weeks from 23 March 2020) ([66]).

27. The claimant had been applying for jobs elsewhere since April 2019 and was successful in obtaining an offer prior to tendering his resignation, and took up the new job on 4 May 2020 ([67]).

28. The claimant commenced the claims in these proceedings by claim form filed on 4 July 2020. He was representing himself. His claim form referred to having been constructively dismissed by being demoted from Band 6 Clinical Coding Quality Lead to Band 5 Senior Clinical Coder; he complained that the restructure process had breached the implied term of mutual trust and confidence. He asserted that the principal reason for his dismissal was because he had brought a previous tribunal claim or alternatively there was no potentially fair reason for his dismissal or his dismissal was unfair. He also referred to victimisation in having management responsibilities removed in September 2018 and placed on a performance improvement plan in February 2019, with the restructure that led to his demotion being commenced on 5 March 2019.

The Russell judgment

29. The case was listed for a preliminary hearing on 2 June 2021 before Employment Judge Russell (sitting alone). The first paragraph of the reasons states that the preliminary hearing was listed to decide whether the victimisation claim should be dismissed as it was presented out of time and/or whether it should be struck out on grounds that it is res judicata or an abuse of process by reason of a final hearing in October 2018 of two earlier claim forms presented by the claimant.

30. It is apparent from the second paragraph of EJ Russell's reasons that the claimant had by correspondence dated 25 March 2021 expressed an intention to apply to amend his claims and that, despite the claim having been commenced in July 2020, there had up to that point been no clarification of the claims and the parties had been unable to agree a list of issues between themselves. A draft list had been prepared by the respondent, which Mr Mitchell says is now

at pp 61-62 of the EAT bundle, and the Russell Judgment purportedly refers to paragraphs 6(b), (c) and (d) in that draft list, but those issues relate to restrictions on the claimant attending meetings, carrying out management duties and being placed on a performance procedure, which are the issues that were found to be out of time and not the issues that EJ Russell deals with in the section of the judgment concerned with the amendment application.

31. EJ Russell records the respondent (through counsel Mr Mitchell, who has also represented the respondent on this appeal) as having accepted that 'read holistically' the claim form had *"pleaded the move to Prescott Street in the context of the restructure process and to some extent issues arising out of the restructuring"*. She granted permission to amend to include victimisation detriments *"about the move to Prescott Street and the restructure process, but not about the roles of Board Lead and/or Performance Analyst"*. Her reasons for refusing those amendment applications appear at [5]-[11] of the written reasons. In summary, she found that these roles had not previously been referred to in the claim form, that the alleged detriments were distinct from the issues already pleaded in relation to other posts which focused on the advertisement of those posts and/or interview process and that this would expand the claim. In relation to the roles of Board Lead and Performance Analyst the detriments related to the claimant's failure to comply with the recruitment processes and the respondent's failure to extend deadlines or reschedule an interview. She considered ([6]) that the new detriments would require further evidence to be called and further witnesses to be cross-examined. She directed herself by reference to *Selkent* and *Vaughan v Modality Partnership* [2021] ICR 535. She concluded that the balance of prejudice favoured refusing the amendments because they appeared weak and because of the likely impact on the hearing length.

32. EJ Russell then went on to find at [12]-[24] that the *"detriments of removal of management duties in September 2018 and performance management process from January 2019 were presented out of time and it is not just and equitable for time to be extended"*. At [13]-[14]

she set out her understanding that the claimant's case was that these detriments, and the whole of the restructure process, constituted a course of victimising conduct for his having brought previous Tribunal claims and that his decision to resign in response was therefore also an act of victimisation. Against that, she recorded the respondent's acceptance at [15] that the constructive dismissal claim was in time and submission that, nonetheless, the *"other detriments"* were discrete acts or omissions that were long out of time.

33. EJ Russell directed herself to s 123 of the EA 2010 and the familiar authorities of *Hendricks v Metropolitan Police Commissioner* [2003] IRLR 96, CA, *Lyfar v Brighton and Sussex University Hospitals Trust* [2006] EWCA Civ 1548 and *Adedeji v University Hospital Birmingham NHS Foundation Trust* [2021] EWCA Civ 23.

34. At [21] she concluded that the claimant had failed to establish a prima facie case of 'continuing course of conduct' as follows:-

> 21. Applying the law to the facts of this case, I am not satisfied that the Claimant has shown a prima facie case that the removal of his management duties in September 2018 or the performance management process from January 2019 were capable of being part of a continuing course of conduct. In reaching this conclusion, I take into account in particular that the change of duties was effected by a different manager. This was a discrete act, albeit one which had continuing consequences for the Claimant. The same is true of the performance management process.

35. She then went on at [22]-[24] to consider whether it would be just and equitable to extend time and decided that it would not be. In so doing, she took into account *"the need to hear evidence from different witnesses and the considerable expansion of the scope of the Tribunal's inquiry beyond the restructure and alternative roles"*.

The O'Brien judgment

36. The case came on for final hearing before Employment Judge O'Brien, Mrs B Saund and Ms S Harwood on 16 and 17 September 2021.

37. The claimant had, subsequent to the Russell Judgment, applied by correspondence of 8 July 2021 to amend his claim again. EJ Russell had refused that application on the papers so far as it sought to reintroduce matters that she had dismissed on 2 June 2021. Other amendments fell to be dealt with by the O'Brien Tribunal at the start of the final hearing. They were refused save where the respondent consented to the amendments on the basis that they did not expand the existing claim.

38. At [13] the liability issues to be decided by the Tribunal at the final hearing were identified as follows. The list was drawn from a draft prepared by the respondent and agreed by the claimant (who was still representing himself):

> 13.1 Did the claimant do a protected act, or did the respondent believe that the claimant had done, or may do, a protected act? The claimant relies on the following:
> 13.1.1 Filing an ET1 against the respondent on 22 January 2018 and 27 February 2018;
> 13.1.2 Raising a grievance complaint on 10 October 2017.
> 13.2 Did the claimant suffer any of the following alleged detriments and if so, did the respondent subject the claimant to any of the alleged detriments because he did a protected act?
> 13.2.1 The Clinical Coding Auditor post and the Specialist Clinical Coding Officer posts were advertised externally when they should only have been advertised internally;
> 13.2.2 The claimant was not assessed against the person specification for the post of Clinical Coding Auditor role even though the claimant was the only applicant interviewed for the post;
> 13.2.3 A Specialist Clinical Coding Officer post was created for MS that was not advertised to other candidates or at all;
> 13.2.4 A Clinical Coding Engagement Lead post was created for VR or, alternatively, once he had been offered that post the Clinical Coding Board Lead post that he had already been offered in the restructure should have been re-advertised;
> 13.2.5 The respondent constructively dismissed the claimant.
> 13.3 Did the respondent commit a fundamental breach of the claimant's contract of employment amounting to a repudiation of that contract?
> 13.4 Did the respondent act in a way calculated or likely to destroy or seriously damage mutual trust and confident between employer and employee, as follows:
> 13.4.1 The Clinical Coding Auditor post and the Specialist Clinical Coding Officer posts were advertised externally when they should only have been advertised internally;
> 13.4.2 The claimant was not assessed against the person specification for the post of Clinical Coding Auditor role even though the was the only applicant interviewed for the post;
> 13.4.3 A Specialist Clinical Coding Officer post was created for MS that was not advertised to other candidates or at all;
> 13.4.4 A Clinical Coding Engagement Lead post was created for VR or,

alternatively, once he had been offered that post the Clinical Coding Board Lead post that he had already been offered in the restructure should have been re-advertised;
13.5 Did the respondent commit a fundamental breach of the claimant's contract of employment amounting to a repudiation of that contract by unilaterally assigning him to a band 5 role?
13.6 Did the claimant resign in response to either such breach?
13.7 If so, did the claimant delay in resigning and thereby, affirm his contract of employment?
13.8 If not and in the alternative, did the claimant resign prematurely?
13.9 If the was constructively dismissed, what was the reason or principal reason for his dismissal and is it a potentially fair reason within s.98(1)(b) and s.982(c) ERA?
13.10 Was any such dismissal fair within the meaning of s.98(4) ERA?

39. I have identified the principal findings of fact from the O'Brien judgment above by way of factual background.

40. The O'Brien judgment then goes on at [68]-[84] to set out self-directions on the law of constructive unfair dismissal, including the law as to redundancy dismissals and business reorganisations. At [85]-[91] the judgment sets out the legal principles applicable to victimisation claims. I do not set these self-directions out here, but I deal with them in the course of my discussion and analysis of each ground of appeal as necessary.

41. The O'Brien judgment then sets out its conclusions. It deals with the constructive unfair dismissal claim first, explaining its reasons for doing so as follows at [92]:

> 92 The claimant's victimisation case comprises not only 4 discrete detriments but also the detriment of being constructively dismissed. Therefore, it seems to us convenient to deal first with the claimant's constructive unfair dismissal claim.

42. The Tribunal then went on to do deal with the four issues identified in the list of issues (set out above) at paragraphs 13.4.1, 13.4.2, 13.4.3 and 13.4.4, considering whether any of those matters happened as alleged by the claimant and, if so, whether they 'undermined' trust and confidence. The Tribunal concluded in summary as follows:-

a. *Issue 13.4.1 The Clinical Coding Auditor post and the Specialist Clinical Coding Officer posts were advertised externally when they should only have been advertised*

internally – The Tribunal concluded ([95]) that the Clinical Coding Auditor post was only advertised externally when no internal candidates responded to the first application (although I note that this was not part of its findings of fact at [41]-[42] where it had held that the post was advertised externally when none of the five internal candidates, including the claimant, had been considered suitable). The Tribunal also found that the Specialist Clinical Coding Officer posts were advertised internally in the first instance (although, as already noted, that was based on its findings at [47], but inconsistent with its finding at [56] that the Specialist Clinical Coder Post was advertised both internally and externally simultaneously). The Tribunal concluded that the allegation therefore failed as a matter of fact and that, even if had not, there was no disadvantage to the claimant in relation to the Clinical Coding Auditor post because he was the only candidate to be interviewed and thus suffered no disadvantage from the advertising arrangements.

b. *Issue 13.4.2: The claimant was not assessed against the person specification for the post of Clinical Coding Auditor role even though the was the only applicant interviewed for the post* – The Tribunal concluded that the claimant was assessed against the person specification and so this allegation failed. However, the Tribunal acknowledged that the claimant's real complaint was that he was formally interviewed when he considered he should have been informally interviewed as that is what the respondent's policy states should happen where only one internal candidate applies. The Tribunal concluded that the respondent's policy was actually 'silent' on the question of what should happen where (as it appears to have concluded was the situation in the claimant's case), others apply but then drop out before the final interview. The Tribunal considered that although the interviewer (Ms Szul) believed an error had been made, it could not reasonably have undermined trust and confidence. The Tribunal further concluded that he had been objectively assessed as unsuitable for

the role and it was to be inferred he accepted this by not reapplying when it was readvertised.

c. *Issue 13.4.3 A Specialist Clinical Coding Officer post was created for MS that was not advertised to other candidates or at all* – The Tribunal concluded that the role was not 'created' for MS, but that there was a genuine business need for the role and she was 'headhunted' for it. It acknowledged that the claimant's real complaint was that no similar opportunity was found for him, but as he had not identified any equivalent role for which he was suitable, there was no undermining of trust and confidence.

d. *Issue 13.4.4: A Clinical Coding Engagement Lead post was created for VR or, alternatively, once he had been offered that post the Clinical Coding Board Lead post that he had already been offered in the restructure should have been re-advertised* – The Tribunal concluded (at [107]-[109]) that the claimant accepted that VR would have done better than him in the recruitment process, that the suggestion VR should do two roles was VR's and that it was *"understandable"* the respondent would agree to VR taking the two roles for a trial period *"given the manifest likely budgetary savings"*. The Tribunal concluded that the sequence of events did not undermine trust and confidence.

43. The Tribunal went on at [111] to consider whether the respondent committed a fundamental breach of the claimant's contract of employment by unilaterally assigning him to a band 5 role and decided it did not for the following reasons:-

> 111 The claimant was notified on 24 January 2020 that the respondent was considering placing him in a band 5 Senior Clinical Coding Officer role. We accept that at that time no band 6 positions remained available for the claimant to undertake in the restructured coding department. In particular, his previous band 6 role no longer existed. He had not been undertaking management duties for at least 18 months. Even if he had, the senior clinical coding officer role was broadly similar to that he had been previously undertaking, albeit without managerial duties and perhaps undertaking slightly less complex coding tasks. It was only one band below the claimant's existing band, and we accept fell within the respondent's definition of suitable alternative employment. Moreover, the claimant was on the top pay point of band 6 and his pay was to be protected for 18 months. Taking all of

> these factors into account, we do not consider that the respondent's unilateral assignment of the claimant to a band 5 role on 24 February 2020 was a breach of contract. Even if it were a breach of contract, we do not consider that it was a repudiatory breach of contract.

44. The O'Brien Tribunal noted at [112] that its findings to this point were sufficient to dismiss the claimant's constructive unfair dismissal claim, but went on for completeness to hold at [114] that the claimant had resigned in response to being re-banded, but (at [115]-[116]) that he had affirmed the contract after each of the breaches on which he relied. The Tribunal's reasons on affirmation were as follows:-

> 115 Even if we had accepted that the matters said to constitute a breach of trust and confidence had been made out and that they formed part of the reason why the claimant resigned, we would have found that his continual willingness after each of those events to continue engaging in the restructure process and his preparedness to continue working for the respondent on 24 February 22, albeit it is original band 6 role, constituted affirmation of the contract and waiver of that breach.
> 116 As for re-banding of the claimant to band 5, even if we had found that to be a fundamental breach of contract, we take into account the fact that the claimant was willing in his email of resignation to extend his period of notice beyond the six week period the parties agree was contractually applicable. That was in our judgement was an act incompatible with the claimant considering that he was no longer bound by the contract of employment and so constituted affirmation of the contract and waiver of the breach.

45. At [118]-[119] the Tribunal held that, if it had upheld the constructive dismissal claim, it would have found there was a potentially fair reason for dismissal, being redundancy or some other substantial reason (business reorganisation).

46. At [120]-[123] the Tribunal concluded that dismissal for those potentially fair reasons was fair in all the circumstances, consultation having been sufficient, the claimant having failed to secure any of the alternative available roles in competition and having been offered what it considered to be suitable alternative employment.

47. The Tribunal then went on at [124]ff to consider the victimisation claim. It noted at [126]-[132] that each of the claimant's four allegations of specific detriment had failed as a matter of fact for the reasons given in relation to the constructive unfair dismissal claim and that he had accordingly suffered no detriment in relation to any of those roles. It noted at [133] that the claimant had not been constructively dismissed so that this could not amount to

victimisation either.

48. The Tribunal then observed that only two of the five detriments relied on by the claimant had been made out or partially made out, specifically: (a) that his interview on 14 August 2019 was conducted formally rather than informally and (b) the specialist clinical coding officer post into which MS was appointed was not advertised. It went on at [135]-[143] to consider whether there was 'the necessary causal link' between those particular alleged detriments and the protected acts. At this point, it took into account the email from Ms McConnell of 25 September 2018 that, on its face, suggested that his management duties were being removed in part because he had raised a grievance and commenced employment tribunal proceedings. It also took account of her email retraction of that on 27 September 2018. It took account of Ms Sung having criticised the claimant on 19 September 2019 for not following management instructions, and its finding that this had nothing to do with his grievances or tribunal claims. It concluded that neither Ms McConnell or Ms Sung had anything to do with the format of the interview on 14 August 2019.

49. The Tribunal acknowledged that it was Ms McConnell's decision to headhunt MS for the role eventually described as Specialist Coding Lead for Obstetrics ([139]-[140]) and thus (I infer) that she must have been responsible for that role not being advertised – the alleged detriment in respect of which it was considering whether there was a causal link to the protected acts – but concluded that there was no link because it accepted Ms McConnell's explanation for not advertising the role was because *"MS was an ideal fit and should have been given the opportunity to decide whether she wanted to take it up"* and that the claimant's protected acts played no part in that decision.

50. The O'Brien Tribunal made no findings on causation about what it had recognised at [105] as being *"the claimant's real issue"* in relation to the MS role, i.e. that no similar role was created for him. Nor did it make any express findings as to whether the claimant's protected acts

played any part subconscious (as opposed to conscious) part in the treatment to which he was subject.

51. The O'Brien Tribunal thus dismissed all the claimant's claims.

Discussion and Conclusions

52. Although, as will be seen, there is overlap between some of the grounds of appeal in this matter, they each deal with discrete legal issues and I therefore take each in turn rather than attempting to set out any general overview of the relevant law. I add that none of the grounds of appeal raise any difficult point of legal principle: they are all concerned with whether the Tribunal has properly applied well-established legal principles to the facts of the case.

Ground 1 – the Russell judgment erred in law and/or failed to give adequate reasons for refusing to grant the claimant's application to amend to add further claims of victimisation

The claimant's submissions

53. The claimant submitted that the amendments refused concerned allegations that he had been wrongly and unfairly rejected for the ring-fenced Clinical Coding Board Lead and/or Clinical Coding Performance Analyst roles during the restructure process. He submitted that EJ Russell erred in law by perversely failing to appreciate that the allegations would not have required different witnesses to be called. He pointed out that there were essentially three actors for the respondent during the whole process: Ms McConnell, Ms Sung and Ms Szul. The respondent at the final hearing had chosen to call Ms McConnell and Ms Szul and also Mr Johall who had conducted the investigation of the claimant's second grievance complaint. He further submitted that, as the proposed amendments formed part of the restructure process that led to his demotion and subsequent resignation, which had been pleaded in the claim form as victimisation, the amendment should have been permitted. He pointed out that in his claim form he had not referred specifically to what happened with any particular post as he had not thought he needed to: he just referred to the "restructure process" and then provided further

particulars of the posts subsequently.

54. He acknowledged that some confusion appears to have arisen in the Russell Judgment which refers to these amendments that were refused as being issues 6(b), (c) and (d) in the draft list of issues at p 62 of the EAT bundle, but those are different issues relating to the claimant being restricted from meetings and placed on a performance management procedure.

The respondent's submissions

55. Mr Mitchell maintained that the amendments that had been refused related to issues 6(b), (c) and (d) of the draft list of issues (preventing him from meeting with clinicians, restricting his management duties and placing him on a performance procedure were nothing to do with the restructuring process), which were allegations that were a long way out of time (up to 387 days he had submitted to the Tribunal: see p 6 of the supplementary bundle). Mr Mitchell pointed out that the O'Brien judgment had in fact dealt with the Clinical Coding Board Lead and Clinical Coding Performance Analyst roles at [48]-[53] and [55], so findings of fact had been made in relation to those roles. He did not dispute that the same individuals had been involved. He submitted, however, that the allegations on which permission to amend was refused were all separate to what EJ Russell understood to be the main issues in the case. He submitted that she had properly directed herself in law and exercised her case management discretion in a way that was open to her on the facts.

Discussion and conclusions

56. It is fair to say that there was at the hearing before me in the EAT a degree of confusion about this first ground of appeal, and (to a lesser extent) the second and third grounds of appeal too. Mr Mitchell's skeleton argument for the respondent largely failed to distinguish between the claims in respect of which amendment was refused (those concerning the Clinical Coding Board Lead and Clinical Coding Performance Analyst roles) and those claims that were found to be out of time (the removal of the claimant's management duties in September 2018 and

his placement on a performance management improvement plan in February 2019). It is only in reflecting after the hearing that it has become apparent to me that when dealing with the amendment application at the preliminary hearing EJ Russell must either have been looking at a different list of issues to that which the respondent has placed in the EAT bundle at p 62, or have got the paragraph numbers in the list of issues wrong and that this has been the source of at least some of the confusion.

57. I have therefore focused when considering the parties' submissions on the substance of what was decided in the Russell judgment and the substance of their arguments, rather than on paragraph numbering in a list of issues that cannot have been the list that EJ Russell had in mind. So far as ground 1 is concerned, the substantive issues concern the claims that the claimant wished to make about the Clinical Coding Board Lead and Clinical Coding Performance Analyst roles for which he applied unsuccessfully as part of the restructuring process. Those were the substantive amendments that EJ Russell refused, and thus must be the subject of ground 1 of the amended grounds of appeal and were clearly what the claimant was dealing with in his skeleton argument for the EAT appeal hearing.

58. Another reason for the confusion in relation to this ground of appeal is that, as Mr Mitchell observed in the course of his submissions, despite the refusal of the claimant's amendment application, what happened in relation to these two roles actually features extensively in the O'Brien judgment (at [48]-[53] and [55]). In particular, what happened in relation to the Clinical Coding Board Lead role includes what the O'Brien Tribunal described as the *"confrontational"* meeting on 19 September 2019 at which Ms McConnell and Ms Sung told him that his application would not be progressed to the next stage of the selection process because he was late submitting a knowledge assessment. This was the meeting in which the claimant alleged that Ms Sung told him he was a 'troublemaker' and where the Tribunal accepted that he was criticised for not following management instructions, albeit that the Tribunal concluded that 'nothing was said with his previous grievance and tribunal claims in

mind' ([52]). This meeting was also (for obvious reasons, given the 'troublemaker' allegation) referred to by the Tribunal when addressing at [135]-[142] whether there was any causal relationship between the claimant's alleged protected acts and the two alleged detriments that it had found (partially) to be made out.

59. As such, it is clear with hindsight that EJ Russell misunderstood the relationship between these roles and the other claims that were already going forward to a final hearing, and that she had misunderstood that in fact it was the same individuals (Ms McConnell and Ms Sung whose names, along with Ms Szul's, feature large throughout the O'Brien judgment) who had dealt with these two roles as well. However, it does not follow from the fact that with hindsight it is clear that a case management discretion was exercised on an incorrect understanding of the facts that there was any error of law in the decision, which must be judged by reference to the material that was before the judge at the time. It is frequently necessary at the case management stage for a judge to take a high-level view of the factual matrix in order to make a decision about how to manage the case going forward and the importance of the principle of finality in litigation means that case management decisions cannot necessarily be unravelled just because the factual picture turns out to be different to the picture as it appeared to the judge at the time. Nonetheless, a Tribunal will err in law if it fails to take into account relevant factors when exercising its discretion whether or not to permit an amendment or if it exercises its discretion on a factual basis that is perverse in the light of the evidence that has before it at the time.

60. In this case, the judge properly directed herself to the well-established legal principles that must be applied when considering amendment applications as set out by Mummery J in *Selkent* and more recently re-examined by HHJ Taylor in *Vaughan v Modality Partnership* [2021] ICR 535. She considered the nature and extent of the application to amend by reference to the difference between what the claimant had already included in the claim form and his

proposed amended pleading. I reject the claimant's submission that the judge erred in this element of her analysis: she was, I find, right to proceed on the basis that the claimant had referred to specific roles in his claim form, but not to the two in respect of which she refused permission to amend. She was also right to note that the claimant's complaints about how he was treated in respect of the two roles in respect of which amendment was required were different in nature to those that he had previously mentioned in the claim form, being complaints about failure by the respondent to excuse his non-compliance with aspects of the application process, rather than complaints about advertisement of the roles or his assessment against the person specification.

61. However, I consider that the judge lost sight of the important consideration that what the claimant <u>had</u> pleaded was that the principal reason for his (constructive) dismissal was that he had brought previous tribunal proceedings. The proper determination of that victimisation claim was going to require the Tribunal to consider whether the claimant's bringing of previous tribunal proceedings had had a material influence on any of the decisions that had lead to him being left without a Band 6 role at the end of a restructure in which there had in fact been more Band 6 roles than employees to fill them at the start of the process.

62. The nature of the claimant's claim can clearly be seen from his Amended Particulars of Claim (the version the parties have provided to me at p 117ff of the bundle is the version dated 6 July 2021 which shows the amendments refused in red). The claimant relied, or sought to rely, on (both as breaches of the implied term of trust and confidence, and victimisation detriments) a series of steps where opportunities were missed by Ms McConnell and/or Ms Szul and/or Ms Sung that might have secured him a Band 6 role and thus avoided the demotion that he relied upon as the 'final straw' in his constructive unfair dismissal claim. Victimisation claims, like discrimination claims, are fact-sensitive (cf the well-known passage in the speech of Lord Hope at [37] in *Anyanwu* [2001] 1 WLR 638) and it thus ought to have been clear to the judge that the determination of the claimant's already-pleaded claims was going to require

examination of Ms McConnell's, Ms Szul's and Ms Sung's conscious and unconscious motivations so far as the claimant was concerned throughout the restructure process which ended with his demotion. Of course, it does not follow that the claimant should have been permitted to amend the claim to include as separate detriment claims every small step along the way to his alleged constructive dismissal, but in order properly to exercise the discretion to refuse or allow the amendment application, the judge needed to have in mind the true nature of the claim already pleaded and the evidence that would need to be considered in order to properly adjudicate on the claims already brought.

63. No doubt, part of the reason why the judge failed to focus on this point was because she was under the misapprehension that different witnesses were involved in each of these stages. However, it was clear from the claimant's proposed amended pleading, and not disputed by the respondent, that actually the same individuals were involved throughout, in particular Ms McConnell appears to have been a constant. In *Vaughan*, HHJ Taylor at [21] emphasised the importance of *"focus on reality rather than assumptions"* when considering the practical consequence of refusing or granting amendments. What EJ Russell says about the witnesses being different, without identifying which individuals she has in mind or what the differences were, betrays that she was proceeding on the basis of assertion or assumption rather than proper analysis.

64. I would add that it was also clear (see paragraph 50 of the 6 July 2021 amended particulars of claim in the bundle) that the proposed amendments included allegations that Ms McConnell and/or Ms Szul had called the claimant 'a trouble maker' when informing him that he had not been successful in his application for the Board Lead role. It is well known and well established (cf *Anyanwu* again) that direct evidence of discrimination and victimisation is rare and that in order to succeed on such a claim a claimant will normally need to persuade a Tribunal to draw an inference of discrimination or victimisation from the primary facts. The language 'troublemaker' ought to have 'shouted out' to the judge (using HHJ Auerbach's

'vivid phrase' approved by Bean LJ in *Mervyn v BW Controls* [2020] ICR 1364 at [42]) that it was potential evidence from which an inference could be drawn that those individuals were motivated by the claimant's protected acts, and thus that what happened with the Board Lead role was likely to require careful consideration by the Tribunal at the final hearing whether or not the amendment was permitted.

65. For all these reasons, I consider that the Tribunal erred in law in considering the claimant's amendment application by perversely proceeding on the basis that the proposed amendments involved different witnesses and also in failing to recognise the extent to which the factual basis of the proposed amendments was going to form part of the evidence to be considered at the final hearing in any event.

Ground 2 – the 'continuing act' time point in the Russell judgment

The claimant's submissions

66. The claimant argues that the Tribunal erred in its approach to considering whether he had established a prima facie case that the removal of his management duties and placement on a performance management procedure were part of a continuing act with the detriments that he claimed to have suffered in the course of the restructure process so that they should have been permitted to proceed to the final hearing rather than being struck out as out of time. Again, he in particular relies on EJ Russell's failure to appreciate that the same witnesses were involved in all matters.

The respondent's submissions

67. Mr Mitchell for the respondent accepted in the hearing before me that EJ Russell was mistaken in saying that different witnesses were involved in the earlier acts, but submitted that EJ Russell had nonetheless properly directed herself in law and has properly applied the legal principles to the facts of the test in determining that these two alleged detriments were not arguably part of a continuing act with the later detriments.

Discussion and conclusions

68. Section 123 of the EA 2010 provides as follows:-

123 Time limits

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a)the period of 6 months starting with the date of the act to which the proceedings relate, or

(b)such other period as the employment tribunal thinks just and equitable.

(3)For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.

(4)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a)when P does an act inconsistent with doing it, or

(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

69. It is well established that where a discrimination/victimisation claim is listed for a preliminary hearing to determine whether some allegations have been brought outwith the primary three-month time limit in s 123(1)(a) of the EA 2010, the first question for the judge to consider is whether the claimant has a *prima facie* (i.e. arguable) case that the allegations that are said to have been brought outwith that time limit are linked with the allegations that occurred within the primary three-month limit so as to amount to 'conduct extending over a period' for the purposes of section 123(3)(a) of the EA 2010. There are many relevant authorities, but the parties in this case have referred me to *Commissioner of Police for the Metropolis v Hendricks*

[2003] ICR 530, which includes the following well-known passage in the judgment of Mummery LJ (with whom the other members of the Court of Appeal agreed):

> 47. On the crucial issue whether this is a case of "an act extending over a period" within the meaning of the time limits provisions of the 1975 Act and the 1976 Act, I am satisfied that there was no error of law on the part of the employment tribunal.
>
> 48. On the evidential material before it, the tribunal was entitled to make a preliminary decision that it has jurisdiction to consider the allegations of discrimination made by Miss Hendricks. The fact that she was off sick from March 1999 and was absent from the working environment does not necessarily rule out the possibility of continuing discrimination against her, for which the commissioner may be held legally responsible. … She is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period". I regard this as a legally more precise way of characterising her case than the use of expressions such as "institutionalised racism", "a prevailing way of life", a "generalised policy of discrimination", or "climate" or "culture" of unlawful discrimination.
>
> 49. At the end of the day Miss Hendricks may not succeed in proving that the alleged incidents actually occurred or that, if they did, they add up to more than isolated and unconnected acts of less favourable treatment by different people in different places over a long period and that there was no "act extending over a period" for which the commissioner can be held legally responsible as a result of what he has done, or omitted to do, in the direction and control of the service in matters of race and sex discrimination. It is, however, too soon to say that the complaints have been brought too late.
>
> 50. I appreciate the concern expressed about the practical difficulties that may well arise in having to deal with so many incidents alleged to have occurred so long ago; but this problem often occurs in discrimination cases, even where the only acts complained of are very recent. Evidence can still be brought of long-past incidents of less favourable treatment in order to raise or reinforce an inference that the ground of the less favourable treatment is race or sex.
>
> 51. In my judgment, the approach of both the employment tribunal and the appeal tribunal to the language of the authorities on "continuing acts" was too literal. They concentrated on whether the concepts of a policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken, fitted the facts of this case: see Owusu v London Fire & Civil Defence Authority [1995] IRLR 574 , 580–581, paras 21–23, Rovenska v General Medical Council [1998] ICR 85 , 96, and Cast v Croydon College [1998] ICR 500 , 509. (Compare the approach of the appeal tribunal in Derby Specialist Fabrication Ltd v Burton [2001] ICR 833 , 841 where there was an "accumulation of events over a period of time" and a finding of a "climate of racial abuse" of which the employers were aware, but had done nothing. That was treated as "continuing conduct" and a "continuing failure" on the part of the employers to prevent racial abuse and discrimination, and as amounting to "other detriment" within section 4(2)(c) of the 1976 Act.)
>
> 52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period". I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the appeal tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaint that the commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when

each specific act was committed.

70. Also relevant, because of what the Court of Appeal said about allegations involving the same or different individuals, is this passage from the Court of Appeal's judgment in *Aziz v FDA* [2010] EWCA Civ 304:

> 33. In considering whether separate incidents form part of "an act extending over a period" within section 68(7)(b) of the 1976 Act, one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents: see British Medical Association v Chaudhary, EAT, 24 March 2004 (unreported, UKEAT/1351/01/DA & UKEAT/0804/02DA) at paragraph 208.
>
> 34. One issue of considerable practical importance is the extent to which it is appropriate to resolve issues of time bar before a main hearing. Obviously there will be a saving of costs if matters outside the jurisdiction of the ET are disposed of at an early stage. On the other hand a claimant must not be barred from presenting his or her claim on any issue where there is an arguable case.
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> 35. The Court of Appeal considered the correct approach to this matter in Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548 . In that case the claimant complained of 17 incidents of racial discrimination over a period of many months. The question of time bar was dealt with at a pre-hearing review. The claimant gave oral evidence on that occasion. Having heard the claimant's evidence, the ET allowed five of the claimant's complaints to proceed but dismissed the other 12 complaints as being out of time. The EAT and the Court of Appeal both upheld that decision. Hooper LJ gave the leading judgment, with which Hughes LJ and Thorpe LJ agreed. Hooper LJ stated that the test to be applied at the pre-hearing review was to consider whether the claimant had established a prima facie case. Hooper LJ accepted counsel's submission that the ET must ask itself whether the complaints were capable of being part of an act extending over a period.
>
> 36. Another way of formulating the test to be applied at the pre-hearing review is this: the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs: see Ma v Merck Sharpe and Dohme Ltd [2008] EWCA Civ 1426 at paragraph 17.

71. In this case, EJ Russell properly directed herself in law by reference to these and other authorities. Her conclusion about whether the claimant had established a prima facie case on 'continuing course of conduct' was set out in paragraph [21] of her reasons. The principal reason that she gives for finding that the removal of the claimant's management duties in September 2018 and placement on a performance management process from January 2019 did not form a continuing course of conduct with the restructure process that commenced in March 2019 was that *"in particular ... the change of duties was effected by a different manager"*. On this, however, the parties now agree she was wrong, and it was clear from paragraph 9 of the respondent's written skeleton argument that was before EJ Russell at that

hearing that she was wrong. Ms McConnell and Ms Sung were identified by the respondent as the relevant witnesses in relation to the removal of management duties. Ms McConnell it was who sent the claimant the email of 25 September 2018 telling him the decision had been taken in part because of his grievance and Tribunal proceedings (and the subsequent attempt by email of 27 September 2018 to retract what was effectively an admission of victimisation), and Ms McConnell it was who continued to be involved in all the acts and omissions about which the claimant right up to the point at which she informed him he was to be demoted to a Band 5 role (his 'last straw').

72. As such, I am satisfied that the Tribunal erred in law in concluding that the claimant did not have an arguable case of continuing conduct in relation to the earlier acts of victimisation. Indeed, I would go so far as to hold that it was not open to the Tribunal on the particular facts of this case to hold otherwise than that the claimant did have an arguable case that there was a continuing course of conduct. Ms McConnell was involved throughout and the nature of the complaints (restriction of management duties and placement on performance improvement plan) was not such that it could be said on any other basis that there was no arguable case for a continuing act. The later complaints concerning the restructure turned in many respects on the assessment of the claimant's performance both in terms of assessments of his applications in the competitive processes, or in terms of his suitability for the roles for which individuals were 'headhunted' or allowed to take on two roles at once. Restriction of management duties and placement on performance improvement thus involved complaints very similar in ilk to the later complaints and, given that they involved the same person (or people) throughout, it was in my judgment perverse to hold that the claimant had not discharged the modest threshold of having an 'arguable case' on 'continuing act'.

Ground 3 – the 'just and equitable extension' time point in the Russell judgment

73. Given the conclusion that I have reached on Ground 2, I do not need to deal with Ground 3, since it is clear from *Hendricks* and *Aziz* that if a claimant has an arguable case on 'continuing act' there is no need for the Tribunal to go on at the preliminary hearing stage to consider whether it is just and equitable to extend time. That does not mean, of course, that the time point will not need to be considered at any final hearing: it will. The error here was in regarding this as a case that was suitable (in part) for strike out on a time point.

Ground 4 – the O'Brien judgment on the victimisation claim (burden of proof, detriments, intervention in cross-examination)

The claimant's submissions

74. The claimant's submissions in relation to Ground 4 really amount to four separate potential errors of law.

75. First, he submits that the O'Brien Tribunal wrongly considered the constructive unfair dismissal first before considering victimisation and that it only considered the victimisation claims by reference to the elements of the constructive dismissal claim that it considered had some factual merit, rather than starting with the victimisation claim and properly considering each allegation, properly applying the burden of proof in s 136.

76. Secondly, he submits that the O'Brien Tribunal failed properly to apply the burden of proof in s 136 for the purposes of the victimisation claim, in particular by failing to take proper account of the evidence that he relied on as the "something more" for the purposes of discharging the initial burden of proof. He referred to his closing submissions to the Employment Tribunal which were at pp 96-97 of the Supplementary Bundle. He pointed out that he had specifically addressed the question of the "something more" in his written submissions, and I note in particular that he sets out there an argument that Ms McConnell's attitude to him changed after she became aware (or learned more about) his previous Tribunal claims. The claimant submitted that the O'Brien Tribunal made insufficient findings of fact

from which to draw inferences of victimisation.

77. Thirdly, he submits that he was prevented from exploring with Ms McConnell in cross-examination what her thought processes were around August/September 2018 and the 25 and September 2018 emails. He submitted that the interruptions from the Tribunal prevented him from building up a line of questioning and exploring the circumstances in which his duties had been restricted and the performance management process commenced. He submitted that he had not had an opportunity to explore the evidence by putting to Ms McConnell that he was not having a 'personal crisis' as she viewed it; he was trying to show the falsity of Ms McConnell saying that he was stressed because of the Tribunal processes. He submitted that he was prevented from exploring her thought processes and only allowed to put points to which she would just respond 'no'. He felt that he was prevented from building up a line of questioning, in particular as she was inventing this issue about personal stress as a reason for not allowing him to return to management duties.

78. Fourthly, the claimant submits that the Tribunal did not apply the *Shamoon* test in [128] and [129] because it did not consider whether he could reasonably have considered that the various detriments on which he relied were detriments, rather than just deciding for itself that they were not detriments.

The respondent's submissions

79. Mr Mitchell pointed to [92] of the judgment which explains why the Tribunal considered the constructive dismissal claim first. He also submitted that the judgment does not show whether the Tribunal actually decided the constructive dismissal or victimisation claim first. He submits that if the claimant did not succeed in showing that he resigned in response to a fundamental breach of contract that he could not succeed on a victimisation claim. He submitted that the Tribunal had properly looked at each element of the claims and decided

that there was no element that was influenced by the protected act – including (see paragraph 53 of Mr Mitchell's written submissions subsequent to the hearing) that the Tribunal *"were clearly aware that victimisation was alleged for the 'five' alleged detriments, thereby they were fully cognisant of the need to consider whether victimisation played any part in C not being placed in a band 6 role"*. As such, he submitted that the Tribunal had properly dealt with both claims.

80. Mr Mitchell submitted that the Tribunal had properly directed itself in law on the burden of proof and made findings both on the assumption that the burden had not shifted (paragraph 141) and on the basis that it did shift (paragraph 142), so that there could be no criticism of its conclusions.

81. Mr Mitchell submitted that the claimant was not prevented from questioning on Ms McConnell's motives and the claimant's submissions had moved on from how he had originally put his ground of appeal to his complaint now being that he was interrupted too much. Mr Mitchell submitted that the claimant had in fact been allowed to put all the questions that he needed to and there is a limit to what could be got out of cross-examination. He submitted that the judge had actually provided the claimant with appropriate assistance in relation to cross-examination.

82. At the hearing, I directed the parties' attention to the Supreme Court's decision in *Serafin v Malkiewicz* [2020] UKSC 23, [2020] 1 WLR 2455 and provided the parties with an opportunity to put in written submissions in relation to that case and its potential impact on the claimant's complaint about cross-examination interruptions. Mr Mitchell then made more detailed submissions about how cross-examination had progressed in this case and submitted that the judge's approach in this case had been appropriate. He also referred to *UK Inspection Ltd v Ashley* (EAT 94/97), emphasising the more inquisitorial role that a judge must take where a party is not legally represented and submitting that what matters is whether the

interventions indicate that there is a real risk of bias by the judge that creates a real danger of injustice. He pointed out that the claimant in this case has not complained of bias.

83. Finally, on the detriments point, Mr Mitchell submitted that although the Tribunal had not directed itself to *Shamoon*, it had nonetheless applied the law correctly and provided adequate reasons for why it did not consider that any of the alleged detriments met the legal threshold for detriment.

Discussion and conclusions

84. I begin with the question of whether the Tribunal erred by deciding the constructive unfair dismissal claim prior to the victimisation claim.

85. Mr Mitchell had initially submitted that it is not possible to tell from the judgment in what order the Tribunal made its decisions, and that it is not an error of law to write out a judgment in one order rather than another, but I reject that submission in this case. It is clear that the Tribunal not only put constructive unfair dismissal first in the judgment but also decided it first because it only went on to consider the claimant's victimisation claims in relation to the two elements of the alleged detriments that it concluded in the course of its analysis of his constructive unfair dismissal claim had been partially made out, i.e. that his interview on 14 August 2019 was conducted formally rather than informally and the specialist clinical coding officer post into which MS was appointed was not advertised.

86. Conspicuously, the Tribunal failed to deal with a substantial part of the claimant's case on victimisation as a result of the way it approached its decision-making. I have already noted when setting out the Tribunal's conclusions above that when considering the claimant's victimisation claim, the O'Brien Tribunal made no findings on causation about what it had recognised at [105] as being *"the claimant's real issue"* in relation to the MS role, i.e. that no similar role was created for him. Given the importance of considering all the evidence in

deciding whether or not to draw an inference of victimisation, that itself was a failure to consider the whole of the claimant's case (see further below).

87. There are two reasons why it is sensible to consider discrimination/victimisation claims before unfair (constructive) dismissal claims where the two are brought together. The first reason is because the test for 'detriment' for the purposes of a victimisation claim (which I deal with further below) is a lower threshold than the test for a breach of the implied term of trust and confidence that founds a constructive unfair dismissal claim, so that the fact that an allegation failed to constitute (in its view) a breach of the implied term of trust and confidence did not necessarily mean it could not be a detriment for the purposes of a victimisation claim. The second reason is because in many cases (although not all: cf *Ahmed v Amnesty International* [2009] ICR 1450) if an employer is found to have discriminated against or victimised an employee that will often constitute a breach of the implied term of trust and confidence or render an otherwise fair dismissal unfair. A Tribunal that proceeds as this Tribunal did by considering the constructive unfair dismissal claim first and using that to limit the issues for consideration as part of the victimisation claim thus risks committing errors of law by failing to consider part of the victimisation claim. In this case, the Tribunal has in my judgment fallen into error because it failed to consider the first four detriments relied on by the claimant for the purposes of his victimisation claim as victimisation claims in their own right, rather than through the limiting prism of whether they amounted to breaches of the implied term of trust and confidence.

88. In this case, the error has been compounded by an error arising from the Tribunal's failure to recognise that the way the list of issues had been drawn up in this case meant that, if taken literally (as the Tribunal did), it would lead the Tribunal to fail to deal with the main thrust of the claimant's case. As can be seen from the List of Issues identified at paragraph 13 of its judgment (and set out earlier in this judgment), there were five identified alleged detriments in relation to the victimisation claim set out at paragraph 13.2: four relating to specific posts

and a fifth that 'the respondent constructively dismissed the claimant'. Constructive dismissal is a contractual concept. Taken literally, what was captured in the list of issues as the fifth allegation of victimisation thus required the Tribunal only to do what it did: to consider whether the claimant had succeeded in showing that he had resigned in response to a fundamental breach of contract by the respondent and, if not, to dismiss his victimisation claim as well. As it happens, I have also concluded (see Ground 6 below) that the Tribunal erred in law in its approach to the constructive unfair dismissal claim founded on the breach of the express terms of his contract by reassigning him to Band 5, so its conclusions on the victimisation claim in relation to this are unsafe in any event. But, even if it had not made the separate error that I consider under Ground 6, the Tribunal's decision to consider the claimant's constructive dismissal claim before his victimisation claim meant that it never considered what had (as the respondent acknowledges in Mr Mitchell's further submissions) been the main part of the claimant's claim from the outset, namely that the respondent unilaterally reassigning him to a Band 5 role had been an act of victimisation, in response to which he resigned, so that what he claimed was his constructive dismissal was in fact a resignation in response to an act of victimisation.

89. As a result of the way the Tribunal approached the decision-making in this case, it did not deal with this element of the claimant's victimisation claim at all. It did not consider whether the demotion to Band 5 amounted to a detriment and it did not consider whether there was the necessary causal relationship between that decision and the claimant's protected acts. When considering the claimant's victimisation claim, it only (as already noted) considered two (minor) elements of the claimant's victimisation case.

90. Mr Mitchell's answer to this point at the hearing before me was that it was not necessary for the Tribunal to do this because the demotion to Band 5 was just a natural consequence of the claimant having failed to get any other job in the multiple competitive opportunities that there had been. It is, of course, possible that this might factually be the answer to the claimant's

case, but it is not the answer the Tribunal gave because it did not address it and in my judgment it erred in law by failing to do so in the circumstances of this case.

91. Further, a Tribunal could not lawfully get to that answer in a case such as this without standing back and considering all the evidence in the round, properly applying the burden of proof in s 136 of the EA 2010, to consider whether any inference of discrimination/victimisation should be drawn: see *Qureshi v Victoria University of Manchester* [2001] ICR 863 per Mummery J at 874C-H and 875C-H. As a result of the way the Tribunal approached the decision-making in this case, there was a complete failure to consider 'the bigger picture'. Nowhere in its judgment does the Tribunal draw together the key elements of that 'bigger picture' and ask itself whether any inference is to be drawn from it. The 'bigger picture' in this case included: the 25 September 2018 email (on its face direct evidence of victimisation in relation to removal of management duties), the 'confrontational' meeting, the fact that there were more Band 6 roles available than Band 6 employees at the start of the process, but the claimant ended up being demoted, despite the numerous opportunities the respondent had to exercise discretion in his favour but failed to do so (such as deciding to make all Band 6 roles subject to a competitive process rather than ring-fencing any for employees at risk of redundancy, advertising externally and not just internally, refusing the claimant's requests for allowances to be made when he did not keep to deadlines, 'headhunting' one employee for a role but not the claimant and allowing another employee to take what was planned to be two jobs). Those core facts needed to be considered, properly applying s 136 of the EA 2010.

92. I should add that the Tribunal's references in its judgment to having taken *"a holistic view all of the circumstances"* ([135]) and *"all the circumstances"* ([141]) do not save it from the substantive failure in this case. There was a complete failure to deal with the main plank of the claimant's victimisation claim or to demonstrate that the Tribunal had truly had regard to all the circumstances in considering that claim.

93. As such, I am also satisfied that (although this is not in itself an error of law) this was a case

where the Tribunal would have been well-advised, as the claimant submits, to take the structured approach set out in s 136 itself of considering first whether, taken as a whole, the claimant had proved facts from which it could be concluded that there was victimisation and then, if it found the burden shifted, properly placed the burden on the respondent to provide an adequate explanation. HHJ Tayler's recent judgment in *Field v Steve Pye and Co (KL) Limited and ors* [2022] EAT 68 at [41]-[46] serves as a useful reminder as to why that disciplined approach will often be preferable to going straight to the "reason why" question.

94. There is also another important element of legal analysis that has been omitted by the Tribunal both from its self-directions on the law and in its conclusions. There is nothing in the judgment to suggest that it sought to consider not only what the respondent's witnesses conscious motivations were, but also whether the claimant's protected acts unconsciously played a material part in the reasons for his treatment: see *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at [29] per Lord Nicholls, and *Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at [78]-[82]. This is vital, and may perhaps in part account for the Tribunal's failure to recognise the importance of considering the 'bigger picture' when addressing the claimant's victimisation claim.

95. It is convenient before turning to the claimant's complaints about interruptions to his cross-examination to deal briefly with his concerns about the Tribunal's approach to considering whether any of the matters constituted 'detriments' for the purposes of s 27 of the EA 2010. In its self-directions on the law the Tribunal has not given itself any direction about the meaning of 'detriment'. There is no reference to the guidance given in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at [34]-[35] per Lord Hope and at [104]-[105] per Lord Scott that a detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work, that something may

be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment. The *Shamoon* test thus requires the Tribunal to consider, in effect, whether a claimant's opinion that he has been disadvantaged is within the range of reasonable responses to that situation. The Tribunal must not approach the question with 'a substitution mindset' (to borrow the terminology used in relation to the approach to the employer's decision to dismiss for the purposes of the law on unfair dismissal). In this case, the Tribunal when considering at [128] and [130] whether the claimant suffered a detriment as claimed appears simply to have decided for itself that the claimant was not disadvantaged. There is no hint in the judgment that it understood that the law requires it to consider whether the claimant could reasonably have regarded himself as disadvantaged. I am therefore satisfied that this was also an error of law on the part of the Tribunal.

96. Finally under this Ground, I deal with the claimant's argument that he was unfairly interrupted during cross-examination.

97. The Supreme Court in *Serafin v Malkiewicz* [2020] 1 WLR 2455 held that such an argument may properly to be judged by reference to whether the interruptions rendered the trial unfair and it is not necessary to consider whether the interruption gave rise to an appearance of bias. Mr Mitchell's argument that this element of the claimant's grounds of appeal cannot succeed unless the *Porter v Magill* bias test is met must therefore be rejected. It is worth setting out the Supreme Court's guidance in full. Lord Wilson, with whom the other Supreme Court justices agreed, first reviewed the authorities on judicial interruptions of cross-examination as follows:

> 39 I have no doubt that the Court of Appeal in the present case was correct to treat the claimant's allegation as being that the trial had been unfair. We have not been addressed on the meaning of bias so it would be wise here only to assume, rather than to decide, that the quite narrow definition of it offered by Leggatt LJ and quoted by Hildyard J is correct. On that assumption it is far from clear that the observer would consider that the judge had given an appearance of bias. A painstaking reading of the full transcripts of the evidence given over 421 days strongly suggests that, in so far as the judge evinced prejudice against the claimant, it was the product of his almost immediate conclusion that the claim was hopeless and that the hearing of it represented a disgraceful waste of judicial resources.

> 40 The leading authority on inquiry into the unfairness of a trial remains the judgment of the Court of Appeal, delivered on its behalf by Denning LJ, in Jones v National Coal Board [1957] 2 QB 55. There, unusually, both sides complained that the extent of the judge's interventions had prevented them from properly putting their cases. The court upheld their complaints. At p 65 it stressed in particular that interventions should be as infrequent as possible when the witness is under cross-examination because "the very gist of cross-examination lies in the unbroken sequence of question and answer" and because the cross-examiner is "at a grave disadvantage if he is prevented from following a preconceived line of inquiry".
>
> 41 In Southwark London Borough Council v Kofi-Adu [2006] HLR 33, Jonathan Parker LJ, giving the judgment of the Court of Appeal, suggested at paras 145 and 146 that trial judges nowadays tended to be much more proactive and interventionist than when the Jones case was decided and that the observations of Denning LJ should be read in that context; but that their interventions during oral evidence (as opposed to during oral submissions) continued to generate a risk of their descent into the arena, which should be assessed not by whether it gave rise to an appearance of bias in the eyes of the fair-minded observer but by whether it rendered the trial unfair.
>
> 42 In Michel v The Queen [2010] 1 WLR 879, it was a criminal conviction which had to be set aside because, by his numerous interventions, a commissioner in Jersey had himself cross-examined the witnesses and made obvious his profound disbelief in the validity of the defence case. Lord Brown of Eaton-under-Heywood JSC, delivering the judgment of the Privy Council, observed at para 31: "The core principle, that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the evidence, applies no less to civil litigation than to criminal trials."

98. Lord Wilson then moved on to consider whether any difference in approach was required for a litigant in person and observed as follows:

> 46 No authority has been cited to us in which the conduct of the trial was alleged to have been unfair towards a litigant in person. The appearance of a litigant in person presents the court with well-known challenges. When, at an early stage of his judgment, the judge said that, for a number of reasons, conduct of the trial had been difficult, his first reason was that the claimant had appeared in person. The appearance of the defendants by leading counsel will no doubt in one sense have assisted the judge but in another sense will have made his task even more difficult. For Mr Metzer's appearance made the imbalance of forensic resources all the more stark. Every judge will have experienced difficulty at trial in divining the line between helping the litigant in person to the extent necessary for the adequate articulation of his case, on the one hand, and becoming his advocate, on the other. The Judicial College, charged with providing training for the judges of England and Wales, has issued an Equal Treatment Bench Book. In chapter one of the edition issued in February 2018 and revised in March 2020, the college advises the judges as follows:
>
>> "8. Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure about which they may have no knowledge. They may well be experiencing feelings of fear, ignorance, frustration, anger, bewilderment and disadvantage, especially if appearing against a represented party.

> 59. The judge is a facilitator of justice and may need to assist the litigant in person in ways that would not be appropriate for a party who has employed skilled legal advisers and an experienced advocate. This may include: . . .
>
> > Not interrupting, engaging in dialogue, indicating a preliminary view or cutting short an argument in the same way that might be done with a qualified lawyer.
>
> Training and experience will generally have equipped the professional advocate to withstand a degree of judicial pressure and, undaunted, to continue within reason to put the case. The judge must not forget that the litigant in person is likely to have no such equipment and that, if the trial is to be fair, he must temper his conduct accordingly.

99. In that case, the Supreme Court went on to hold that the judge's interruptions of the litigant in person during cross-examination rendered the trial unfair. It did so in fulsome terms as follows at [48]:-

> … when one considers the barrage of hostility towards the claimant's case, and towards the claimant himself acting in person, fired by the judge in immoderate, ill-tempered and at times offensive language at many different points during the long hearing, one is driven, with profound regret, to uphold the Court of Appeal's conclusion that he did not allow the claim to be properly presented; that therefore he could not fairly appraise it; and, that, in short, the trial was unfair. Instead of making allowance for the claimant's appearance in person, the judge harassed and intimidated him in ways which surely would never have occurred if the claimant had been represented. It was ridiculous for the defendants to submit to us that, when placed in context, the judge's interventions were "wholly justifiable".

100. I must say immediately that in the present case the claimant does not allege, and I do not find, that there was anything in the judge's conduct that comes anyway near what was described by the Supreme Court in *Serafin*. However, it does not follow that there were not interruptions to the claimant's cross-examination that rendered the trial unfair.

101. To consider this, I need to set out the key passages from the respondent's solicitor's (Ms Stokes') notes of the hearing. (I have also received written witness statements from the claimant, from Ms Stokes' and I have been provided with Mr Mitchell's notes of the hearing and also the judge's notes of the hearing. Ordinarily, the judge's notes would prevail as the proper record of the hearing, but in this case it is clear that Ms Stokes managed to take by far the fullest note of the hearing and both parties were content for me to refer to her notes as

being the best evidence of what happened at the hearing.)

102. From Ms Stokes' notes of the claimant's cross-examination of Ms McConnell, the following passages are relevant. I begin with the question where the claimant alerted the Tribunal to the fact that he wished to ask Ms McConnell questions about the incidents of alleged victimisation that had been struck out by EJ Russell as being out of time. In particular, he wanted to question Ms McConnell about the removal of his management responsibilities and the events leading up to her email of 25 September 2018 in which she indicated that this had been done because he had brought a grievance and Tribunal proceedings (later retracted in her email of 27 September 2018). I should say now that, even if EJ Russell had been right to strike out that part of the claimant's claim as being out of time (which she was not as I have found above), what happened around this incident was evidence that was relevant to the claimant's remaining victimisation claims, and Mr Mitchell accepted as much in the hearing before me. As the Court of Appeal observed in *Hendricks* (ibid) at [50] (set out above); "Evidence can still be brought of long-past incidents of less favourable treatment in order to raise or reinforce an inference that the ground of the less favourable treatment is race or sex."

103. The relevant passages from Ms Stokes' notes are as follows. ([C] denotes the claimant; [W] Ms McConnell; [JM] Mr Mitchell and [EJ] the Employment Judge.)

> [C]: You might not be aware, number of matters that couldn't go through to victimisation but which do inform the history and mistakes and minds of those involved. Referred earlier, met on 21 August at Whipps Cross, first meeting. 2018. You're not sure of date – late August 2018, was it not. At that meeting, met with you, said I wanted to resume management responsibilities. I was not being permitted to manage at Whipps Cross, those concerns I raised.
> [JM]: we've had this question and removal of management function is not an issue
> EJ: JM is making two points, firstly that is almost an identical phrasing from beginning of XX, you introduced these question as saying I'm not allowed as not part of claim. You cannot ask about matters not part of your claim. You've not covered the point – you can ask her whether her decisions influenced by protected acts. Focus on the issues, not on the non-issues.
> [C]: You were aware that I made ET claim and grievance complaint:
> [W]: I was aware
> [C]: Acts of victimisations are ruled out of time, they have some relevance to state of mind regarding current issues
> [EJ]: you're saying things happened which whilst not forming part of claim, we could treat as facts we could incur that claimed incidents were motivated by protected acts
> [C] yes
> [EJ]: ask the questions, if I think too far, I'll stop you

> [C]: At a meeting in September 2018, [W] in response to an issue I raised, said it was not appropriate that I had a management responsibilities whilst I had OH app, outstanding grievance and outstanding ET claim
> [EJ]: she deals in statement Did you say that
> [W]: I don't agree re outstanding ET and grievance, I think I clarified that in email, referred to in statement
> [C]: Very early on in bundle. Email from 27 September 2018 from you which does … is in second bundle – 25 September 2018 – record of a proceedings of that – you repeat that phrase
> [W]: Your question was around me not allowing management duties, it was about presentation I asked you not to do – it was in relation to your health and wellbeing at the time and performance at the time and outstanding OH referral
> [C]: had to submit second bundle – do you have that
> [EJ]: yes – [W] do you have that
> [W]: yes
> [EJ]: how much more do you have
> [C]: There isn't a lot more Maybe a good opp to break for lunch
> [W]: My view to carry on – I'd rather finish before lunch

104. There then follows about a page of notes in which the claimant does continue to ask Ms McConnell questions about events of August and September 2018, including questions in which the claimant challenged Ms McConnell on what she had said about restricting his duties out of concern for his health. He asked her a question about how the fact that they had requested another OH referral for him impacted on his ability to meet with clinicians and the notes then continue as follows:

> [W]: It doesn't directly impact – concern for your health – raised issues about your health and your fiancé at the time, it was felt we didn't want to put more pressure on you
> [C]: My role is – I had expressed repeatedly what was causing stress and depression was fact
> [EJ]: I'm allowing you these questions on the basis you were going to seek inferences that protected acts influencing [W] thought processes adversely – it is not opp for you to rehearse how badly you considered you had been treated. You had answer – extremely concerned having heard matters you raised. We will make of that what we will.
> [C]: Just attempting to rebut the answer the witness had given. Page 65.
> [EJ]: True reason for what
> [C]: Not the true reason for why the change had occurred – wanting me to leave Whipps Cross and restore management duties.
> [EJ]: put that to her then move on

105. The claimant then put to Ms McConnell that he disputed what she had said in her record and the notes continue:

> [W]: You had numerous things going on, that were impacting on your health and wellbeing, didn't want to put more work on you that impacted on that
> [EJ]: you've got document in front of us – page 65, you've asked PM what it was that

> motivated her – she's told you. Not her motivation for this incident that we are concerned about, it is fact of this incident from which we might or might not drawn inferences re malign motive.

106. The notes show that the claimant then proceeded to ask more questions, including about Ms McConnell's attitude to ET claims. He then went on (in the next page of the notes) to ask her about what the O'Brien judgment eventually referred to as the 'confrontational' meeting in which he alleged he had been called a 'troublemaker' by Ms McConnell and Ms Sung. He then sought to ask further questions about the handling of his application for the Board Lead role (one of the points on which his application to amend had been refused by EJ Russell) and the notes continue:

> [EJ]: you're seeking to collaterally get in stuff we haven't allowed. Happy for you to challenge troublemaker – I get that. Rigorous assessment – said tone in voice. Do you remember tone of voice
> [C]: When I was moved to Prescot St – now allowed to perform Band 6 role – highly unusual is it not

107. The claimant then returned to asking about the restriction on his management duties before starting on another question to which Mr Mitchell objected:

> [JM]: this is previous claim – findings made by an ET. Remind ET and LH _ not just removal of management duties – it is also performance management process. Outside the scope of ET to determine. Conscious – don't want C to say I was able to ask questions and therefore you must make findings.
> [EJ]: well aware of our remit. You are going several links away of that key link of hain. Anything else?
> [C]: If I may think
> [EJ]: Yes
> [C]: True to stay that although I had kept ET proceeding and grievance complaint to myself had become well known in department
> [W]: I was aware of both
> [C]: Team were aware
> [W]: Previous ET?
> [C]: Previous ET and October 2017 complaint
> [W]: People were aware, weren't privy to details as I wasn't – I'm assuming people weren't privy. Knew there was ET and grievance
> [C]: Created bad feeling about me
> [W]: I couldn't comment on that – at the time I didn't know – had only met you in the August-late in Autumn – all ready in process
> [C]: You had bad will towards me from either the grievance or Tribunal
> [W] That is my evidence – none at all
> [C] Didn't affect decisions – in no way favoured other people or showed other people you didn't show to me
> [W]: No
> [C]: Can't think of any more questions

108. Having reviewed the notes thoroughly, it seems to me that although there were a number of interruptions of the claimant's cross-examination, with both the respondent and the judge, 'gatekeeping' in an effort to limit the amount of time that the claimant spent on asking questions about issues that had been struck out as out of time, or refused as amendment applications, the judge's comments indicate that he was aware in principle that the claimant needed to be able to ask questions about these matters insofar as they constituted evidence from which inferences could be inferred that were relevant to the claims the Tribunal was deciding. Further, reading the notes as a whole, it seems to me that the claimant was, despite the interruptions, in principle given a reasonable amount of time and opportunity to develop his points. If I was satisfied that the issues on which his cross-examination was interrupted were not of central importance to the case and/or that they had been properly struck out on time grounds, or properly refused as amendment applications, I would not have found that the judge's interventions were sufficient to render the trial unfair. As I made clear at the outset, the judge's interventions were always courteous and there is no suggestion of ill temper.

109. That said, what is clear to me from reviewing the notes of the hearing, is that the claimant was not allowed as free a rein to ask questions on these issues as he would have been if the Russell Judgment had not struck out some of his claims on time grounds or refused the amendments. The flow of his cross-examination was interrupted at a number of points, in particular at what is now p 199 of the EAT bundle when the claimant's questioning about the crucial 25 September 2018 email was interrupted before Ms McConnell had even answered the claimant's preliminary question to say that she deals with the point in her statement. The claimant does appear to get back into a flow of questions at p 200 despite the interruption, but again at the bottom of p 200 the claimant is interrupted in his attempt to challenge Ms McConnell's reliance on his health as justification for the removal of management duties, although it is evident that the judge does this because he has not understood what the claimant was trying to achieve. Once the claimant has explained, he is permitted to put further

questions, although at p 201 the judge interrupts again to remind him that this is not one of the actual claims of victimisation with which the Tribunal is dealing. The result is that it is possible to see that the claimant loses first the momentum and then the thread of his line of questioning.

110. The conclusions I draw from this analysis are as follows: first, I am satisfied that the decisions made in the Russell Judgment about the time point and the amendment application did have a material effect on the final hearing. To the extent that Mr Mitchell invites me to conclude that the decisions made by EJ Russell had no material impact on the O'Brien judgment because the O'Brien judgment considered all the evidence anyway, I reject that. The effect of the decisions made by EJ Russell was that evidence on those issues she had struck out or refused to include was limited by the O'Brien Tribunal and the claimant's efforts at cross-examining on those issues was subject to intervention by the judge which caused him to lose the momentum and thread of his questioning. If these issues were not of central importance to the case or had been properly refused as amendments/struck out on time points, I would nonetheless have concluded that the time the claimant was subsequently given to develop his questions meant there was no unfairness. However, the problem is that these issues were not properly refused as amendments and not properly struck out on time points and they were in fact central to the case as they were concerned with the best evidence the claimant had that the treatment about which he complained had been motivated by his protected acts. As the Supreme Court in *Serafin* made clear, especial care needs to be taken when interrupting a litigant in person because they are more likely than a legal representative to be thrown off course by such interruptions. In this case, although the point is finely balanced, I am therefore satisfied that the interruptions did cause material unfairness to the claimant.

111. It is also notable that one gains the distinct impression from the judgment that the Tribunal viewed this part of the claimant's cross-examination as something that it needed only to

tolerate rather than being a section of cross-examination in respect of which it needed to draw careful evidential conclusions. I say this because in [136] of its judgment where it deals with the 25 and 27 September 2018 emails of Ms McConnell it makes no findings at all about the claimant's cross-examination of her on those crucial points. There is no finding at all as to what her explanation was in cross-examination for telling the claimant that his management duties had been restricted in part because of his protected acts. It appears that the Tribunal has simply accepted that this was a 'mistake' and that, despite what was said in the 25 September 2018 email, nobody at any point took any action against the claimant even in part because of his prior grievance and Tribunal claim. However, if that was its conclusion, that is not actually stated anywhere in the judgment.

112. I add this: I would not want the conclusion that I have reached about the judge's interventions in this case to be taken as an indication that judges should not seek to control cross-examination by limiting questioning that strays away from the core issues in the case. Time management of cases is important, provided it is compatible with proper consideration of the issues. In this case, I am very sympathetic to the judge's courteous efforts to control the evidence and commend him for managing to complete the evidence with the parties in just two days when a case of this nature might in other regions have been listed for 4 or even 5 days to include time for deliberation and judgment. My conclusion that the interventions crossed the threshold of rendering the trial unfair is based squarely on the particular facts of this case and should not be taken as an indication that interventions of this type will be problematic in every case.

Ground 5 – the O'Brien judgment on the managing change policy

The claimant's submissions

113. The claimant submits that at [101] of the judgment, the Tribunal misconstrued the respondent's Managing Change Policy. He argues that the Tribunal should have found that

the policy was clear that if there was only one candidate for a role, the interview format should be informal and that the Tribunal was wrong to regard the policy as being 'silent' as to whether there should be an informal interview if there had initially been other applicants for the role who 'dropped out' of the process. The part of the policy on which he relies is at p 140 of the supplementary bundle. A box in that flowchart states: *"Employees are declared 'At Risk' of redundancy. These employees should have priority applications / manager should invite them to apply for new posts in the new structure before they are advertised for open competition outside the department"*. The Tribunal also quoted from the consultation document and the Managing Change Policy at paragraphs 32-35 of the judgment.

114. The claimant further submitted that at [101] of the judgment the Tribunal had erred in failing to find that his circumstances did fall within the respondent's policy and the respondent had breached that policy. He referred to Ms McConnell's witness statement at paragraphs 30 onwards, where she deals with his application for the Clinical Coding Auditor role. He referred to paragraph 31 where Ms McConnell states: *"In terms of why Mr Humby applied twice for this role, there were three posts available, and because we had only received one application (from Mr Humby), the advertisement was extended for an additional week to attract other applicants, with the aim of scheduling the interviews for all three posts across one or two days and recruiting to the Auditor roles without the need to go back out to advert."* Mr Humby submits that this was an admission by Ms McConnell that the policy had not been followed and that, as it was accepted by the respondent he was the only applicant, there was therefore an error in finding that the consultation document and Managing Change policy did not apply to his circumstances. The claimant submitted that this part of Ms McConnell's evidence had been accepted by the Tribunal because at [41] it states: *"We accept on balance that at this stage the advertisement was for internal candidates only (taking into account in particular the 'Trac' recruitment software records and Ms McConnell's evidence), although we did note that Mr Jobling appeared at the time to believe that it had been open for internal*

and external candidates." He submitted that at [101] the Tribunal appears to have forgotten this element of its findings.

The respondent's submissions

115. The respondent submits that there was nothing perverse about the Tribunal's interpretation of the Managing Change Policy or consultation document and the Tribunal was right to find that the policy was silent as to what should happen where other applicants dropped out of a competitive process. As to the second point that the claimant now makes about the Tribunal erring in finding that the policy did not apply to his situation, the respondent submits that is not the claimant's ground of appeal and that the claimant had not previously asserted that when he applied he was the only candidate and should therefore have been interviewed informally. The respondent submitted that the point the claimant now makes based on Ms McConnell's witness statement was not argued before the Tribunal. The respondent further submits that neither Ms McConnell or Ms Sung played any part in the decision as to the ultimate format of the interview of 14 August 2019 (see [44] and [138]).

Discussion and conclusions

116. I deal with the claimant's argument about the construction of the policy first.

117. Paragraphs 32 to 35 of the judgment provide, so far as relevant, as follows (emphasis added):-

> 32 The consultation document said as follows (amongst other things) for the process for filling posts in the new structure:
>
> The process for filling posts within the new structures will follow the processes contained in the Trust's Managing Change policy, Ringfencing and slotting-in, together with internal appointments via Expressions of Interest in the first instance for the new posts.
>
> Where current post-holders meet approximately 70% or more of the new requirements outlined in the job description and person specification, they will automatically slot into a same-band post. Once this process is complete and all relevant posts filled, the following processes will apply.
>
> **Where only one person expresses an interest in a role and there is no other competition, an informal interview will be held to assess the candidate's capability (based on previous experience/skill-set) and the training and developed that would be required to move into**

the required role.

> 33 The respondents managing organisational change policy said the following about redeploying employees at risk of redundancy:
>
> Redeployment: suitable alternative employment options (SAE) must be brought to the attention of employees 'at risk' of redundancy in writing or by electronic means before the date of termination of their contract of employment and with reasonable time for the employee to consider it/them. The employment option should be available no later than four weeks from that date. Where the employee fails to make any necessary application for the suitable alternative employment option(s) made alternative employment. The process for redeployment can be found at appendix 4. Pay protection: the trust has an agreed pay protection policy which applies to all consultations that started on or after 3 April 2012. The policy details the short and long term pay protection terms that are in place and when they would apply.
>
> 34 Suitable alternative employment was defined in that document as:
> Work within the trust that is on broadly similar terms within the same range of skills required as the current employment where the individual meets the essential criteria person specification. It may be on any site operated by the trust subject to consideration of the individual's personal circumstances such as travel caring responsibilities for mutually agreed flexible working arrangements that are in place or that could facilitate SAE.
>
> 35 The document went on to state that, 'a post may be considered as suitable alternative employment if it is banded/graded on the same band/as the staff member's current post, or the next lower band/grade.'

118. At [101], which is the target of this ground of appeal, the Tribunal held as follows:-

> 101 We have considered the consultation document and, whilst it is prescriptive that an informal interview should be undertaken where only one person expresses an interest in a role and there is no other competition, that was not the situation that the claimant found himself in. Indeed, the consultation document is silent as to what should happen if the field narrows to 1 after a formal selection process has begun (in particular one which has sought applications from external candidates) and candidates have been shortlisted for interview.

119. There is nothing perverse about the Tribunal's conclusion about the content of the respondent's policy documents. It is merely stating a fact when it says that the consultation document is silent about what happens where, although other people did express an interest in the role, they then drop out so that by the time of the interview there is no other competition. That said, I am also sympathetic to the claimant's submission that the Tribunal ought to have gone on to consider his argument that, construing the policy purposively, the respondent should have held an informal interview once there was no one else interested in the post since the purpose of the paragraph appears to be to retain existing employees in employment by providing them with training and development to help them fill a vacant role if need be where

there are no better candidates. However, these are all matters for factual assessment and this a factual issue that is at one remove from the central issues that the Tribunal needed to decide. This was not so obviously relevant a factual argument to the issues of whether the respondent's actions breached the implied term of trust and confidence or victimised the claimant that I would hold the judgment to be perverse for failing expressly to consider it, given the way the claimant put his case at first instance (which does not seem to me to be as focused as the way he has put it on appeal: see paragraphs 24-27 of his written closing submissions for the final hearing).

120. As to the claimant's argument that the Tribunal's conclusion at [101] was perverse because it should have found, on the basis of Ms McConnell's evidence at [31] of her witness statement, that he was the only one who had applied for the role, I agree with the respondent that this was not the ground of appeal on which HHJ Taylor gave the claimant permission to proceed. The claimant also accepted that it was not a point he had spotted when the case was before the Tribunal and I note that it does not feature in his written closing submissions. As such, it is not arguable that the Tribunal erred in law in finding that the claimant's situation did not fall within the terms of the policy.

121. There is therefore no error of law in the Tribunal's decision by reference to the matters raised by the claimant under Ground 5.

122. No doubt, if or when this case is reheard (as I have decided it must be), Ms McConnell's evidence that, in relation to this Clinical Coding Auditor role, the respondent re-advertised the post on realising that the claimant was the only person to have expressed an interest, rather than proceeding in accordance with its policy to giving him an informal interview, will need to be considered and, if accepted, will be taken into account by the Tribunal both in relation to the constructive unfair dismissal and victimisation claims.

Ground 6 – the O'Brien judgment on the constructive unfair dismissal claim (burden of proof, fundamental breach of contract, affirmation)

The claimant's submissions

123. The claimant makes three main submissions.

124. First, he submits that at [103] the Tribunal erred in law by placing the burden on the claimant to show that the result of this particular application process would have been different if he had been assessed informally rather than considering whether the failure to assess him informally constituted or contributed to a breach of the implied term of trust and confidence. The claimant submitted that an informal process would have enabled him to explain better how he met the specification for the role.

125. Secondly, he submits that the Tribunal erred in failing to find that the respondent's action in unilaterally demoting him to Band 5 at a lower level of remuneration constituted a repudiatory breach of contract. He submitted that the respondent had breached the express written terms of his contract. He submitted that his pay and job description were fundamental to the contract. He submitted that having pay protection does not mean that your pay has not been changed, it is just a stay of execution. He had a contract for the Band 6 role, with the job title and there was a notice period nominally of 6 weeks, which he was not given. Unlike in *Kerry Foods Ltd v Lynch* [2005] IRLR 680, he was simply notified on 11 February 2020 that he would be 'slotted in' to a Band 5 role from 24 February 2020.

126. In answer to my question as to whether he had considered bringing the claim, or been asked by the Tribunal at any point, if he had considered bringing the claim as one of actual rather than constructive dismissal (following the principles identified in *Hogg v Dover College* [1990] ICR 39), he said that he had never heard of that principle. I gave the parties the opportunity to address this point further in written submissions following the hearing, and the claimant in those written submissions indicated that he considered it was "arguable" that the

respondent's imposition of a Band 5 contract amounted to a *Hogg v Dover* dismissal and submitted that, as he was a litigant in person, the Tribunal should have considered amending the list of issues to analyse his case in that way. He submitted that (now he was aware of it) the *Hogg v Dover* point 'shouted out' from his particulars of claim and that his case was on 'all fours' with the *Jackson v The University Hospital of North Midlands NHS Trust* [2023] EAT 102 case (to which I had also referred the parties) as being another case of a claimant being unilaterally moved from NHS Band 6 to NHS Band 5, where the respondent conceded this amounted to constructive dismissal.

127. Thirdly, the claimant submits that the Tribunal erred in finding that he had affirmed his contract by continuing to engage in the restructure process and work for the respondent after he had first been informed about the demotion on 24 February 2020. He submitted that he had made it clear he was not accepting the Band 5 role and he had resigned. He emphasised that he had not at the hearing had an opportunity to make submissions to the Tribunal about affirmation, or at least, not about the specific points that the Tribunal took into account at [115] and [116]. He submitted that what the Tribunal says at [115] and [116] does not make sense as his wanting to stay in his Band 6 role was clearly not affirming the Respondent's breach in allotting him a Band 5 role. The only point that the Tribunal relies on in finding he had affirmed was his willingness to extend the notice period beyond the six weeks that was contractually required. That point was not raised by the respondent in its closing submissions and the claimant says he did not have an opportunity to address the Tribunal on that point. Had he done so, he would have reminded the Tribunal that he did not work for longer than his notice period and that his willingness to do so had been borne out of a genuine uncertainty as to whether six weeks really was his contractual notice, coupled with concern about implications of the Covid pandemic 'lockdown' that had recently been announced.

The respondent's submissions

128. The respondent's response to the claimant's three arguments was as follows.

129. First, the respondent submitted that the burden was on the claimant to establish the matters he contended amounted to repudiatory breach(es) of his contract and the Tribunal had made no error in that respect.

130. Secondly, the respondent submitted that, given that the claimant had 18 months' pay protection, and given that there were no other Band 6 or 7 roles available as a result of what the Tribunal had found to be a fair and lawful restructure process, and the Band 5 role was 'suitable alternative employment' as defined in the respondent's policy, it was also open to the Tribunal to find that the demotion was not a fundamental breach of contract. Mr Mitchell emphasised that the agreed issue for the Tribunal to determine had been whether the unilateral assignment to Band 5 was a fundamental breach of contract, not whether there was fundamental breach as a result of the reduction in pay. He further submitted that the claimant's claim did not focus upon pay, but on rebanding. He pointed out that although the respondent had given less than the claimant's contractual notice of rebanding, it had given substantially more than the claimant's contractual notice period for the reduction in pay, given that the pay protection was due to last for 18 months.

131. In the respondent's further written submissions following the hearing, Mr Mitchell at paragraph 17 indicated that it *"was accepted on behalf of R that a unilateral variation in pay can give rise to a fundamental breach of contract"*, but emphasised that this was not sufficient if the claimant delayed or affirmed the contract rather than resigning in response. The respondent had at the hearing sought to repeat an argument rejected by the Tribunal at [114] that the claimant had not been 'forced' into resigning but had resigned only because he had already secured a new role. However, Mr Mitchell acknowledged when I put the point to him at the hearing, that the Tribunal had found as a fact at [114] that the claimant resigned in

response to the rebanding and that it was not open to him to re-open that point at this stage of the appeal.

132. The respondent further relied on the Tribunal's finding that the claimant had affirmed the contract so that any error in relation to the question of fundamental breach was not material. The respondent submitted, in reliance on *Kerry Foods Ltd v Lynch* [2005] IRLR 680, that as the changes to the claimant's pay were not to be introduced for 18 months *"if at all"* the claimant had 'jumped too soon' and resigned before the potential anticipatory breach of contract in reducing the claimant's pay. The respondent also pointed out that the Tribunal had made findings to the effect that, even if the claimant had been dismissed, the dismissal was fair in all the circumstances so that any other errors were not material.

133. In relation to the *Hogg v Dover College* point raised by me with the parties at the hearing, the respondent submitted that on the facts as found by the Tribunal, the claimant had failed to establish any of the five potential legal claims that arise in this sort of situation, as identified by Judge Clarke in *Jackson v The University Hospital of North Midlands NHS Trust* [2023] EAT 102, i.e. (a) C did not succeed in establishing that R's breach was repudiatory entitling him to resign; (b) C was found to have affirmed the contract and agreed to work beyond his period of notice; (c) C did not delay and "dare the employer to dismiss" him; (d) C did not stand and sue; (e) C did not work under the new contract and assert dismissal. The claimant's case was in any event to be distinguished from *Jackson* because the claimant had had his management duties removed a long time prior to the demotion to Band 5, and to be distinguished from *Hogg* because the claimant had not sought to work on under the new contract but had resigned and claimed constructive unfair dismissal. Further, if the Tribunal had found the claimant was dismissed, then it would have concluded, for the reasons it had given, that the claimant was redundant and had been fairly dismissed.

134. Thirdly, as to the Tribunal's conclusion on affirmation, the respondent submitted that the

Tribunal had properly directed itself by reference to *Cockram v Air Products plc* [2014] ICR 1065, EAT and it had been open to it to conclude the claimant's offer to work more than his six week notice period constituted an affirmation of the contract.

Discussion and conclusions

135. I take each of the claimant's arguments in turn.

136. There is in my judgment nothing in his first point. The respondent is right that the burden was on the claimant to show that the respondent's conduct amounted to a fundamental breach of contract. The alleged breach of contract here was the failure to hold an informal interview, but the Tribunal found at [102] that, given the lack of clarity in the consultation document, the claimant could not reasonably have regarded the failure to hold an informal interview as undermining trust and confidence (rather than merely a misunderstanding about the policy). The claimant does not complain about this particular conclusion; his argument is addressed to the point that the Tribunal makes at [103] that the panel would not have found he had met the required standard even if the interview had been informal. This paragraph is not actually a material part of the Tribunal's reasoning at all, but just a 'makeweight' argument to the effect that even if the respondent's conduct did undermine trust and confidence, it made no difference to the claimant. In the context of a constructive unfair dismissal claim, this point was immaterial and there is no material error of law. It was in any event a factual conclusion that was reasonably open to the Tribunal on the evidence.

137. As to the claimant's second point, about whether the Tribunal erred in failing to find that his demotion to Band 5 constituted a repudiatory breach of contract, I should first make clear that there is in my judgment no merit in the respondent's argument that the claimant was not asserting that the reduction in pay was a repudiatory breach of contract, only that the unilateral assignment of him to Band 5 was a repudiatory breach. That is a wholly unrealistic distinction. The assignment to Band 5 inevitably entailed demotion, formal reduction in management

responsibility (among other role changes) and also a significant drop in pay, albeit subject to pay protection for 18 months. There is no doubt that the c£5k drop in pay was a major part of the claimant's argument as that is plain from his amended particulars of claim (paragraphs 88-89) and written closing submissions (paragraph 28). I also reject as not being founded in the facts, the respondent's suggestion that the drop in pay was not inevitable once the period of pay protection had expired. It also does not avail the respondent to rely on the fact that the claimant had not been doing management duties for 18 months as part of its argument that the demotion to Band 5 was not a fundamental breach of contract because I have already found that EJ Russell erred in law in holding that the claimant's claim that the restriction in management duties was an act of victimisation was out of time, so that that element of the claim will need to be reconsidered in any event.

138. I now focus on what the Tribunal actually said at this point in its judgment. The issue it had to consider had been framed by the claimant as a claim that the unilateral assignment to Band 5 was a fundamental breach of the express terms of his contract. This is clear from the claimant's amended particulars of claim (paragraphs 88-89) and the list of issues which separates this alleged breach from the other breaches said to constitute breaches of the implied term of trust and confidence. However, the Tribunal did not approach this part of the claimant's claim on this basis. It appears to have proceeded on the assumption that this part of the claimant's claim was pleaded as a breach of the implied term of trust and confidence in the same way as the other elements of his constructive dismissal claim. As such, the Tribunal nowhere in the judgment actually set out what the terms of the claimant's contract were. Had it done, it would have had to acknowledge (as I do not understand the respondent to dispute) that there were express terms of the claimant's contract that he was employed as a Band 5 at the commensurate rate of pay. Unless there were terms of the claimant's contract permitting the respondent to demote the claimant and reduce his pay (unlikely, and the respondent did not rely on any such terms), there was therefore no doubt at all that by unilaterally changing

those terms and conditions (albeit on an anticipatory basis so far as pay was concerned), the respondent breached the terms of the claimant's contract. When the Tribunal concluded at [111] that it did *"not consider that the respondent's unilateral assignment of the claimant to a band 5 role on 24 February 2020 was a breach of contract"*, it therefore clearly erred in law. Since it had failed to appreciate that a unilateral change in the claimant's contractual terms amounted to a breach of contract at all, I do not consider that what it said in the next sentence (*"Even if it were a breach of contract, we do not consider that it was a repudiatory breach of contract"*) is a safe finding so as to render its prior clear error of law immaterial. If the Tribunal had properly evaluated the ways in which the respondent had breached the claimant's contract by unilaterally reassigning him to Band 5, and had regard to the relevant authorities, including in particular *Industrial Rubber Products v Gillon* [1977] IRLR 389 (on the significance of pay reduction as a breach of contract) and *Norwest Holst Group Administration Ltd v Harrison* [1985] ICR 668 (on anticipatory breaches of contract), I am not satisfied that it is likely it would have reached the same conclusion on the claimant's constructive dismissal claim.

139. I add that the respondent's argument that the respondent gave the claimant much more notice of the reduction in pay than the notice period he was entitled to under his contract is also not an answer to the claimant's claim. The point made by HHJ Peter Clarke in *Kerry Foods Ltd v Lynch* [2005] IRLR 680 is simply that the giving of notice in accordance with the terms of the contract cannot itself amount to a repudiatory breach. It does not assist the respondent here. If the respondent <u>had</u> given notice in accordance with the terms of the contract, it would have dismissed the claimant and he would have been able to bring his claim as a straightforward claim for unfair (actual) dismissal. Having chosen not to give notice under the contract, but instead to impose a unilateral change in the claimant's terms and conditions, the task for the Tribunal was to decide whether the breaches in question were, in the words of Lord Denning in *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761, significant breaches, *"going to the*

root of the contract of employment, or which show[s] that the employer no longer intends to be bound by one or more of the essential terms of the contract". I note that the Tribunal did not give itself a self-direction in law by reference to that test. Had it done, it is hard to believe that it would not have concluded that a unilateral variation in the claimant's contract amounting to a demotion with a pay reduction of c£5k (albeit subject to pay protection) was indeed a breach going to the root of the contract and affecting its essential terms.

140. Indeed, this is the sort of case where a Tribunal ought to be alive to the possibility that the facts before it amount to an actual dismissal in law, even if the claimant litigant in person has (understandably) not recognised that in law it is possible for the actions of an employer to amount in substance to an actual dismissal even if the employer has not chosen to label it as such, i.e. on the *Hogg v Dover College* principle as recently explained by Judge Barry Clarke in *Jackson v The University Hospital of North Midlands NHS Trust* [2023] EAT 102. I agree with the claimant that, for those aware of the *Hogg v Dover College* line of authority, this is a case that 'shouts out' to be analysed in those terms.

141. Of course, even if this is a *Hogg v Dover College*-type actual dismissal case, it is still necessary for the Tribunal to consider, as it did, whether there was a potentially fair reason for dismissal and whether dismissal was fair in all the circumstances. There seems little doubt in this case that, as the Tribunal found, there was a potentially fair reason for dismissal (redundancy) and, at first blush, it might be thought (as HHJ Tucker thought when initially refusing permission at the sift stage in this case) that the Tribunal's conclusion that dismissal was fair in all the circumstances was sufficient to render any other errors it might have made on the way to that conclusion immaterial. However, given the number of errors I have already identified above in the handling of the claimant's victimisation claim, which errors when corrected may have a very significant impact on the claimant's constructive unfair dismissal claim, I cannot accept the respondent's submission that the Tribunal's decision in this case is saved by its finding that the claimant's (constructive) dismissal (if established) was fair in all the circumstances.

142. Finally, I deal very briefly with the Tribunal's reasoning in relation to affirmation. What the Tribunal said about this was as follows:

> 115 Even if we had accepted that the matters said to constitute a breach of trust and confidence had been made out and that they formed part of the reason why the claimant resigned, we would have found that his continual willingness after each of those events to continue engaging in the restructure process and his preparedness to continue working for the respondent on 24 February 22, albeit it is [*sic*] original band 6 role, constituted affirmation of the contract and waiver of that breach.
>
> 116 As for re-banding of the claimant to band 5, even if we had found that to be a fundamental breach of contract, we take into account the fact that the claimant was willing in his email of resignation to extend his period of notice beyond the six week period the parties agree was contractually applicable. That was in our judgement was an act incompatible with the claimant considering that he was no longer bound by the contract of employment and so constituted affirmation of the contract and waiver of the breach.

143. There are in my judgment two clear errors of law in these paragraphs: first, while the claimant's willingness to continue working for the respondent in his band 6 role may undermine his case that the respondent had breached the implied term of trust and confidence in the various detriments leading up to his demotion, it could not possibly constitute affirmation of the respondent's breach of contract in demoting him to band 5. The claimant's response to being reassigned to Band 5 was not affirmation – he resigned. The Tribunal's conclusion is therefore irrational. Secondly, although there is no doubt that *Cockram v Air Products Plc* [2014] ICR 1065 is good law and that an employee who gives more notice than required to under their contract may well be taken to have affirmed the contract, the Tribunal has taken the claimant's offer to work (slightly) more than his notice period as amounting to affirmation without considering all the relevant circumstances. As Simler J made clear in *Cockram*, there is no absolute rule and context must always be considered:

> 21. In my judgment the proper approach to the question of construction raised on this appeal is as follows. Section 95(1)(c) must be read as a whole, taking account both of the fact that an employee is entitled to resign with notice and the words "in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct". The circumstances referred to include, but are not limited to, the actions of the employer said objectively to amount to a threatened or actual fundamental breach of contract. There is no dispute that they also include consideration of the reason for the employee's resignation and (as a matter of well established common law contractual principle) whether or not the employee has elected to resign or has affirmed the contract. Any such election if made must be clear and unequivocal.

> 22. Affirmation can take various forms, express or implied. Mere delay by itself is unlikely to amount to affirmation, but the case law establishes that the employee must not delay too long in deciding whether to accept the breach and resign, because if he delays too long, while deciding what to do, there may come a time when he will be taken to have affirmed the contract and to have lost the right to treat himself as discharged. Affirmation can be implied, for example, where the employee calls for further performance of the contract (see for example the facts of WE Cox Toner (International) Ltd v Crook [1981] ICR 823) because in such circumstances his conduct is likely to be treated as consistent only with the continued existence of the contract.
>
> 23. However, whereas at common law the giving of any notice to terminate the contract would amount to affirmation of it, under section 95(1)(c) , the fact of giving notice does not by itself constitute affirmation. This is a limited variation of the common law position to allow only for the giving of notice.
>
> 24. Accordingly, to satisfy the requirement that his resignation with or without notice is "in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct" the employee must not affirm the contract—whether by prolonged delay before resigning, by implication, by an equivocal election or by conduct that is consistent only with the continued existence of the contract. Once it is accepted that the concept of affirmation remains relevant to section 95(1)(c) it is difficult to see any principled reason why a distinction should be drawn between pre-resignation affirmation or post-resignation affirmation, with the former being relevant but the latter being an excluded consideration. Although cases where findings of fact of post-resignation affirmation are likely to be rare since, of necessity in such a case, the employee will have communicated his resignation to the employer, there is nothing in the words of the statute that excludes consideration of this question in an appropriate case; and the addition of the words "with notice" do not have this effect.
>
> 25. There is nothing in the wording of this subsection to indicate that the addition of the words "with notice" create a rigid rule of the sort suggested by the claimant. The question whether a party has affirmed the contract is fact sensitive and context dependent. It does not generally lend itself to bright line or rigid rules. As Jacob LJ said in Bournemouth University Higher Education Corpn v Buckland [2010] ICR 908 , para 54, "the law looks carefully at the facts before deciding whether there has really been an affirmation". Similarly the statutory protection provided by the unfair dismissal scheme is also fact dependent. Within that legal framework there is no basis for inferring that section 95(1)(c) provides an inflexible rule that post-resignation affirmation as a concept (however rare as a matter of fact) is excluded from consideration. Where an employee resigns on notice and, despite doing so, his conduct is inconsistent with saying that he has not affirmed the contract, that conduct must be capable of consideration by a fact-finding tribunal. Where he gives notice in excess of the notice required by his contract, he is offering additional performance of the contract to that which is required by it. That additional performance may be consistent only with affirmation of the contract. It is a question of fact and degree whether in such circumstances his conduct is properly to be regarded as affirmation of the contract.

144. In this case, the Tribunal has failed to take into account the circumstances in which the claimant's offer to work longer than his contract was made (the Covid lockdown), the fact that the offer was to work only a short period beyond his contractual notice (rather than three extra months as in *Cockram*) and that in the end he worked *less* rather than more than his

contractual notice. Without consideration of all these plainly relevant factors, the Tribunal's conclusion on affirmation was unsafe and also in error of law.

Conclusions

145. For the reasons set out above I have concluded that EJ Russell and the O'Brien Tribunal erred in law in the following respects:-

   a. Ground 1 - the Russell judgment erred in law in considering the claimant's amendment application by perversely proceeding on the basis that the proposed amendments involved different witnesses and also in failing to recognise the extent to which the factual basis of the proposed amendments was going to form part of the evidence to be considered at the final hearing in any event;

   b. Ground 2 - the Russell judgment erred in law in concluding that the claimant did not have an arguable case of continuing conduct in relation to the earlier acts of victimisation. It was not open to the Tribunal on the particular facts of this case to hold otherwise than that the claimant did have an arguable case that there was a continuing course of conduct. Ms McConnell was involved throughout and the nature of the complaints (restriction of management duties and placement on performance improvement plan) was not such that it could be said on any other basis that there was no arguable case for a continuing act;

   c. Ground 4 – the O'Brien judgment erred in law by considering the constructive unfair dismissal claim before the victimisation claim and thus failing to deal with all elements of the claimant's victimisation claim, including the main plank of his case, being whether the demotion to Band 5 was an act of victimisation. There was also a failure to consider all the evidence 'in the round' before concluding that no inference of victimisation was to be drawn, applying the burden of proof in s 136 EA 2010. The Tribunal erred in law by failing to direct itself by reference to *Shamoon* in relation to the test for detriment, or to apply that test correctly by deciding whether it was

reasonable for the claimant to consider that he was disadvantaged by the matters on which he relied. There was also material unfairness arising from interruptions to the claimant's cross-examination of Ms McConnell.

d. Ground 6 – The O'Brien judgment erred in law by concluding that the unilateral demotion to Band 5, with attendant permanent loss of managerial duties and c£5k reduction in salary was not a breach of any of the express terms of his contract. This rendered its conclusion that there was no fundamental breach of contract unsafe, and the Tribunal had not in any event properly directed itself by reference to the relevant authorities as to when breaches of express terms of the contract amounted to a fundamental breach. This was also a case where, as the claimant was a litigant in person, the Tribunal ought of its own motion to have raised with the parties the question of whether the respondent's actions amounted to an actual *Hogg v Dover*-type dismissal. The Tribunal had also erred in law by perversely regarding the claimant's willingness to continue in employment only in a Band 6 role as affirmation of the respondent's breach of contract in reassigning him to Band 5, and had failed properly to apply *Cockram v Air Products plc* [2014] ICR 1065 when concluding that the claimant's willingness to work more than his six weeks' notice amounted to affirmation of his contract. There was no absolute rule and all the circumstances needed to be considered. The Tribunal had erred by failing to take into account the relevant circumstances that the offer was made because the claimant was uncertain about the actual length of his notice period, in light of the Covid-19 pandemic lockdown, that he had only offered to work a few extra days (rather than several months as in *Cockram*) and that he had not in the end worked more than his notice period.

146. In view of the number of errors, I further found that the O'Brien judgment was not saved by the fact that the Tribunal had gone on to conclude that, if the claimant had been dismissed, he

was fairly dismissed for redundancy.

Disposal

147. In view of the number of errors made both at the preliminary and final hearing in the claimant's case, and applying the guidance of Burton P in *Sinclair Roche & Temperley v Heard* [2004] IRLR 763 at [46], there is in my judgment no alternative to remitting this matter for a complete re-hearing before a fresh Tribunal. The errors I have found have infected nearly every element of the determination of the claimant's case. Although I have no concerns at all about the professionalism of the judges involved, and there is no question of bias, the decisions at the preliminary and final hearing were both 'totally flawed' (to use Burton P's language) and for there to be a fair hearing of this matter, the case needs to start afresh. Mercifully, the hearings that need to be re-done did not between them take up more than four days of Tribunal time, so the consequences for the public purse are not as great as they might be in some cases, but I am conscious that the impact on the parties of a re-hearing will be significant: no one wants a re-hearing after all this time, the passage of time in itself is generally detrimental to the quality of the evidence and the parties will no doubt be acutely conscious that the claimant has (I understand) suffered limited financial loss as a result of what happened, so no doubt a retrial will feel disproportionate to the financial interests at stake. Nonetheless, there are important points of principle in this case, and a public interest in the proper determination of legal claims. This case did not receive a fair and proper hearing in accordance with the applicable legal principles at first instance and it needs to start again.

148. In the light of my judgment, the rehearing must proceed on the basis that the claimant has an arguable case of 'continuing act' in relation to his victimisation claims concerning restriction in management duties and performance management, so that these claims must be considered alongside the others (albeit that the 'time point' will remain a live consideration for the final

hearing). His application to amend to bring claims regarding the Clinical Coding Board Lead and Clinical Coding Performance Analyst roles formally needs to be reconsidered by the Tribunal, although given my observations in this judgment about the relationship between those claims and the others already being considered by the Tribunal, I find it difficult to see on what basis those amendments could be refused at this stage; nonetheless, whether or not they are permitted will be a matter for the Tribunal. Otherwise, all the claimant's claims need to be reheard by a fresh tribunal, which must properly direct itself in law, taking due account of this judgment.