Neutral Citation Number: [2024] EAT 151

Case No: EA-2020-000559-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 September 2024

Before :

HER HONOUR JUDGE KATHERINE TUCKER

- -

Between :

MR J EDWARDS	**Appellant**
- and –	
UNITE THE UNION	**Respondent**
MS J FORMBY	**Respondent**
MS G CARTMAIL	**Respondent**
MR L MCCLUSKEY	**Respondent**

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MING-YEE SHIU, Counsel (**Advocate**) for the **Appellant**
MICHAEL POTTER (instructed by **Unite the Union – Legal Services**) for the **Respondent**

Hearing date: 20 June 2024

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JUDGMENT

SUMMARY

TRADE UNION RIGHTS & VICTIMISATION

An Employment Tribunal erred in its approach to the burden of proof. The Claimant had been employed as an employment law solicitor for the RMT. He took proceedings against the RMT. He was a member of the Unite the Union ("the Union"). The Union took advice in respect of his claims and represented him in some of them. The Claimant was dissatisfied with aspects of the decision making and service provided to him by the Union. He asserted that the Union and some of its officers had discriminated against him and subjected him to victimisation. He brought a number of claims before an Employment Tribunal.

The appeal raised two issues. First, whether the Tribunal had erred in concluding that the burden of proof had not shifted to the First Respondent in respect of one allegation of victimisation. Secondly, whether the Tribunal erred in determining that one email sent by the Claimant was not a protected act for the purposes of claims of victimisation.

The appeal was allowed. The Tribunal had erred in its application of the burden of proof provisions. Consideration of relevant authorities. Guidance on the approach to the burden of proof provisions.

As to the second ground of appeal, in context and applying the correct legal principles, and on a fair reading of the relevant email, the Claimant had made an allegation of disability discrimination. The allegation was that the First Respondent had failed to adjust its processes and that as a result, the Claimant, a disabled person, suffered harm. This could be understood to be an allegation of disability discrimination.

HER HONOUR JUDGE KATHERINE TUCKER:

1. This appeal is against the decision of the Employment Tribunal sitting in Manchester (Employment Judge Slater and Members Mr G Pennie and Mrs SJ Ensell). The reserved Judgment and Reasons were sent to the parties on 1st May 2020. The hearing had taken place between the 24th February 2020 to the 4th of March 2020. In chambers deliberations took place on the 5th - 6th of March 2020; and the 7th to the 8th of April 2020. The Judgment and Reasons were sent to the parties on 1st of May 2020. In this appeal I refer to the Appellant as the Claimant and to the First Respondent as the First Respondent, as they were before the Tribunal.

The issues raised in this appeal

2. Two amended grounds of appeal have been considered at the full appeal as follows:

   a. "Ground 1: The Tribunal erred in its application of section 136 of the Equality Act 2010 ("EqA 2010") to the allegation addressed at paragraphs 686-693 (pages 114 -115) of the Reasons.

   b. Ground 2: The Tribunal erred in its application of section 27 of the EqA 2010 in finding that the Claimant's e-mail of the 9th of October 2017 was not a protected act."

   The Tribunal had found that the email of 9th October 2017 was a protected act in relation to race, as discussed further below at paragraph 35. However, it concluded that it was not in so far as it was asserted to contain an allegation of disability discrimination.

3. Therefore, the appeal raises two issues. First, whether the Tribunal erred in its application of, and approach to, the burden of proof in respect of one of the allegations of victimisation made by the Claimant. The second concerns the Tribunal's conclusion that one particular email did not amount to a protected act for the purposes of some of the Claimant's claims of victimisation as set out above.

4. The first ground of appeal concerned an allegation made by the Claimant about a failure by the First Respondent's Regional Secretary, Ms Formby, to properly investigate allegations of discrimination he had made against three individuals within the First Respondent. The Claimant alleged that that failure amounted to an act of unlawful victimisation. In respect of that allegation the Tribunal concluded that the Claimant had done

protected acts which came within the meaning of s. 27 of the EqA 2010; and that he had been subject to a detriment because his specific complaints were not properly addressed by Ms Formby. However, the Tribunal found that the Claimant had not proved facts from which it could conclude that victimisation had taken place; but that, had it concluded that the burden of proof had passed to the First Respondent, it would have found that the First Respondent had not satisfied that burden.

5. The second ground of appeal concerned the Tribunal's conclusion that an e-mail sent by the Claimant on the 9th of October 2017 did not amount to a protected act for the purposes of s. 27(1) and (2) of the EqA 2010 as set out in paragraph 2 above.

6. The two discrete grounds of appeal must be considered within the context of the Tribunal's Judgment and Reasons as a whole. The case before the Tribunal concerned a large number of claims and an even larger number of individual allegations. The Tribunal's Reasons are lengthy and detailed, running into some 933 paragraphs and 142 pages. The Reasons carefully address the issues and allegations set out in a Schedule which is attached to the Judgment and Reasons. The Schedule itself is some 54 pages long.

The relevant factual issues determined by the Tribunal

7. References in [] square brackets are to paragraph numbers in the Tribunal's Reasons. The Claimant was a member of the First Respondent, Unite the Union. He had worked for another union, the RMT, as an employment law solicitor. He wished to pursue claims against the RMT in 2016. He sought to obtain, "industrial and legal representation" from the First Respondent in respect of employment and personal injury claims against the RMT. The claims which he subsequently issued against the First Respondent arose from the way in which he asserted Unite dealt with his request for that representation; the conduct of some of the First Respondent's officers, (some of whom were individual Respondents before the Tribunal) and the manner in which his complaints about those matters were dealt with by the First Respondent.

8. The Claimant made claims of unjustifiable discipline contrary to the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A 1992; disability discrimination and victimisation contrary to the provisions of the EqA 2010. As set out above, the two grounds of appeal concern allegations of victimisation only. However, it was accepted by counsel for the Respondent during the hearing that, if the Claimant succeeded on the second ground of

appeal, consideration would need to be given to how that impacted upon the claim of detriment made under TULR(C)A 1992.

9. Chronologically, some of the events relevant to the second ground of appeal occurred before those which are relevant to the first ground of appeal. The e-mail which the Claimant asserts was a protected act for the purposes of the second ground of appeal was an e-mail dated the 9th of October 2017. The e-mail was sent by the Claimant to Mr. Len McCluskey, the General Secretary of the First Respondent. The email subject line stated, "Complaint and representation at a sickness capability meeting on the 13th of October 2017." It provided as follows:

> "I am a disabled member of the Union.
>
> I am currently employed as a solicitor in the RMT Legal Department.
>
> As a result of suffering from an assault in the workplace, I have been diagnosed with complex post traumatic stress disorder, anxiety, depression and tinnitus on a daily basis. [The Claimant set out details about his disability and treatment].
>
> I originally approached Unite for legal assistance in 2016 but because of administrative errors I could not obtain assistance and had to request help from my Legal Expense Insurer because of time limits.
>
> I requested representation for a grievance and was provided with an officer (Nicole Charlett). My grievance included matters that senior officers of the RMT have discriminated against black members of the RMT and had conspired to pervert the course of justice. Ms Charlett advised me to withdraw allegations against a senior officer of the RMT but I could not as I was telling the truth and because the advice caused me a disabled individual further anxiety, I requested another representative but Vince Passfield and Peter Kavanagh refused my reasonable request and I had to attend the hearing without Unite representation. The refusal to provide alternative representation placed a disabled member of Unite under further strain.
>
> I am a former workplace representative of Unite and as a solicitor worked for Unite members and took pride in the service I provided to my members in the workplace and legal representation to members.
>
> My complaint is against Vince Passfield, Peter Kavanagh and Nicky Marcus (I do not wish to complain against Miss Charlett as I have had the pleasure of working with many officers in the Midlands and the North West and I know it is a difficult job. I only requested a more experienced officer to represent me because of the anxiety I suffer). I will particularise my complaints against Mr. Passfield, Mr. Kavanagh and Ms Marcus when I am feeling better (and in July I tried to obtain the services of a Unite personal injury lawyer as the LEI would not fund my own costs if I lost and I was requested to sign a CFA which I refused and I am still waiting for a return call from a Unite lawyer).

> I contacted Unite again on the 6th of October by completing a query form for representation in London on the 13th of October 2017 but I was informed by e-mail that my request was treated as a complaint and I must provide further particularisation.
>
> General Secretary, I filed the query to obtain representation. I am a disabled, vulnerable member of the Union and I am travelling from Liverpool to London to attend a capability meeting and request representation from the Unite official (lay or full time) on the 13th of October 2017 at noon in Unity House in London.
>
> I have raised serious concerns that senior officials of the RMT have conspired to pervert the course of justice, which is a criminal offence; I am at risk of suffering from further detriments, which could further effect (sic) my health and I would be grateful if the union could provide representation"

10. The factual context against which that email was sent was set out by the Tribunal, particularly at paragraphs [48-95].

11. In summary, the Claimant had sought assistance from the First Respondent in early 2016 for workplace representation and legal representation. Due to the combined effect of time limits with which he was required to comply, and the fact that his union membership was still in the Northwest, albeit he was working in London, the Claimant initially issued proceedings with the assistance of solicitors he paid for through legal expenses insurance and without the input of the First Respondent. However, in March 2016, the Claimant was provided with some assistance from a Regional Officer from the First Respondent's London and Eastern region, Ms Nicole Charlett. The Claimant and Miss Charlett exchanged emails about his case. The Claimant asked for legal representation from the First Respondent. In July 2016, Miss Charlett raised some points regarding information the Claimant had sent to her, including information about an allegation of harassment. She expressed the view that, without solid proof to back up the type of allegations he was making, the Claimant was in danger of being put through disciplinary proceedings for gross misconduct and suffering the consequences of that. Subsequently, in an email dated the 4th of August 2016, she reiterated that, during the investigation of a grievance, the Claimant would need to substantiate the allegations of race discrimination and victimisation he made. She continued:

> "… Please note, disciplinary action may follow if any allegations are found to be malicious. At this stage, if there are any allegations you cannot substantiate then you might want to consider withdrawing them and say your judgment at the time may have been affected by how it appeared your essential grievance issue was being denied or possibly being brushed under the carpet."

12. The Tribunal concluded that the Claimant "took offence" at some of the advice that Ms Charlett had given (paragraph 53 of the Tribunal's Reasons). The Claimant's view was that he was being encouraged, or advised, to say something that was not true: he believed in the truth of the allegations he had made. Further, he did not wish to say that his judgment at the time had been may have been affected. He explained that he had been diagnosed with anxiety, depression and post-traumatic stress reaction, as a result of which he was disabled. He considered that stating that those conditions had impacted his judgment would weaken his entire case. In a subsequent email dated 9th August 2016 he stated:

> "I have to admit suffering from anxiety depression and post-traumatic stress reaction. I did not like the suggestion that my judgment had been effected [sic]". (Paragraph 54 of the Tribunal's Reasons).

13. The Claimant asked Vince Passfield, the Deputy Regional Secretary for London and Eastern region for alternative representation for a meeting which had been arranged to take place on 16th August 2016. He made it clear that he did not wish to complain against Ms Charlett and that he appreciated that she was doing her best in a difficult situation. However, he stated that he had lost faith in her because of what she had written in two emails, one of which was the email of 4th August 2016.

14. In an email dated 10th August 2016, Vince Passfield refused the Claimant's request for different representation. He described difficulties about moving a member from one officer to another without exceptional reasons, stating that it was unmanageable and impractical to do so, and, that in the majority of cases, it was in the member's own interest to maintain the consistency of a single officer when dealing with employment issues. The Claimant alleged that, by refusing his request for alternative representation, Mr Passfield failed to make a reasonable adjustment. Further correspondence took place and the Claimant repeated his request for alternative representation. Mr Passfield stated that the region had agreed to allow their legal officer (Nicky Marcus) to review the legal aspects of the Claimant's employment concerns. That review took place. By an email dated 5th September 2016 Ms Marcus expressed her view that there were not good prospects of success.

15. Ms Marcus wrote to another colleague (Owen Granfield, the Member Relations Officer who administered complaints) on 6th September 2016. The Claimant did not see that correspondence at the time. In that email Ms Marcus stated that she felt that the Claimant was,

"one of those guys who has objected to everyone he comes into contact with …. I've been trying to give him the benefit of the doubt because I do believe he has mental health issues but we really can't support him any further…."

16. On the 9th of September 2016 the Claimant wrote to Mr. Passfield setting out his complaint about the service he had received from the First Respondent. He copied in Ms Jennie Formby (then in the mistaken belief that she was the Regional Secretary for London and Eastern region). Ms Formby replied to correct that error, and stated that Pete Kavanagh was the Regional Secretary for the London and East Region. She copied him in to the reply. In his e-mail dated 9th September 2016, the Claimant complained about the views expressed by Ms Marcus, stating that she reached those views without having had sight of all relevant documents and information. In addition, the Claimant asserted that,

> "in the circumstances the refusal [to provide him with different representation for the meeting he had been due to attend in August 2016] was not and is not reasonable and in circumstances could be discriminatory as he [Mr Passfield] has refused to make a reasonable adjustment for a disabled individual."

17. The Claimant wrote to Mr Kavanagh on the 9th September 2016 and stated, amongst other matters, that he did not consider that Mr Passfield could deal with his complaint as he was part of the complaint. Further correspondence took place as set out in the detailed conclusions of the Tribunal in paragraphs [80-86]. In an email dated 14th September 2016, Mr Passfield stated that he had acted with the delegated authority of the Regional Secretary. Correspondence then ceased between September 2016 to October 2017. During that period of time the Claimant was very ill.

18. On the 6th October 2017 the Claimant wrote to the First Respondent via its website [88]. He made a complaint about the trade union services and made a request for representation. Mr. Owen Granfield, who was the Member Relations Officer and administered complaints, emailed the Claimant on the 6th of October 2017. He acknowledged receipt of the Claimant's e-mail and stated that he awaited the Claimant's written complaint. Some correspondence between them followed. In that correspondence, the Claimant questioned who would be dealing with his request for representation. Mr Granfield stated that the route for a valid complaint is determined after receipt, depending on its content. The Claimant informed him that he suffered from a disability and the explained the conditions which resulted in that disability [90].

19. On 6th October 2017, Mr Granfield wrote to Mr Passfield and Mr Kavanagh and stated, *"I don't know whether or not we have reps at RMT, but I think we are being set up for a claim."* He stated that it would seem wise to allocate a Regional Officer to oversee the complaint. He noted that the Claimant had told the First Respondent in his 2016 correspondence that he was a solicitor [93-4]. On 7 October 2017 Mr Passfield wrote to Mr Kavanagh and Mr Granfield with his recollection of the Claimant's case. He noted that the Claimant may still be employed, albeit absent to ill health. He stated:

> "I see this has 3 considerations:-
> 1. If he has a meeting scheduled with his employer then we offer representation as we would any member
> 2. unless something has materially changed Nicky Marcus's original legal advice stands. If something significant has changed it may need revisiting.
> 3. His complaint can be considered once he has quantified exactly what it is." [94].

20. On 9th October 2017 the Claimant sent an email to the General Secretary of the First Respondent set out above at paragraph 9 above. He set out his complaint about the services provided by the First Respondent. He requested representation at a capability meeting due to take place on 13th October 2017.

21. Further correspondence followed between various individuals. On 10th October 2017, 'JF' from the General Secretary's office asked Peter Kavanagh to advise the General Secretary on the Claimant's complaint. That request was forwarded to Mr Passfield who then provided information [100-101]. Assistance was provided to the Claimant at the hearing on 13th October 2017 and in November 2017 [102-4]. That meeting was attended by a Mr Nixon on behalf of the First Respondent. The Claimant resigned from his employment with the RMT on 24th November 2017 [106] Mr Nixon, who appeared to consider that the process adopted by the RMT had been flawed and a threat had been made to the Claimant, requested that the First Respondent refer the Claimant to their North West Solicitors [106; 110]. Steps were taken towards doing so. The Tribunal's Reasons record that the First Respondent considered this to be a difficult and sensitive issue [107-9]. Mr Passfield described the difficulties in the following terms in an email of 5th December 2017 set to the Assistant General Secretary of Unite, Howard Beckett:

> "This has become a bit of an 'hot potato' for various reasons, not least that it is a sister TU and that their representation for the RMT comes from Thompsons.
> The member also has serious mental health issues and is seeking direct access to our

solicitors in the NW."

22. Mr Beckett informed Mr Passfield that, if necessary, solicitors other than the normal solicitors, Thompsons, should be instructed. (Thompsons also worked for the RMT). In addition, Mr Beckett informed Mr Passfield that, if the case enjoyed merit, then, regardless of the Respondent, the First Respondent would support it [118]. A further review of the case took place, and information was obtained from the RMT's solicitors by Ms Marcus. She discussed the matter with Mr Passfield. Her view of the merits remained the same [119-120]. Subsequently, one of the First Respondent's solicitors expressed concern about some aspects of that advice, particularly the lack of advice about a claim of discrimination arising from disability. Ms Marcus's view of the prospects of success of some of the Tribunal claims was more pessimistic than the view later taken by panel solicitors and counsel [126]. At the time, the Claimant was unhappy with the advice, and with the actions of the First Respondent.

23. On 2nd February 2018, the Claimant wrote to the Secretary General of the First Respondent and set out a complaint about Mr Passfield, Mr Kavanagh and Ms Marcus [156]. The complaint against Mr Passfield included an allegation that he had failed to make a reasonable adjustment; that a letter of 15th January 2018 setting out the assessment of the merits of the Claimant's claims as described by Ms Marcus was negligent, at least, and that Mr Passfield had other motives in sending it. The complaint about Mr Kavanagh was that he had condoned a discriminatory act by stating that Mr Passfield had acted with his full authority. The complaint against Ms Marcus concerned the quality of her advice, an allegation that she had failed to consider relevant documents; that the advice was negligent and had caused a disabled person further distress [157-8]. The Claimant suggested that some of the poor service he received may be due to other motives and referred to the sensitivity/difficulty of a union suing another union. He asked that someone not within the London and East Region investigate his complaints as he had raised a complaint against two senior figures. He also stated that he hoped that he would be interviewed as part of the complaint [159-60]. In a further letter of 19th February 2018, the Claimant made it clear that the complaint concerned an allegation of discrimination, negligence and that the three individuals against whom he complained had an ulterior motive, *"that of protecting senior figures of another sister union they may know"* and named those individuals. Further information about the complaint was set out [169-175]. Discussion took place between Mr Beckett and a Ms Cunningham, one of the First Respondent's solicitors, about how the complaint should be considered [176-182]. External solicitors were asked to undertake a legal review and provide advice in respect of the employment claims and the personal injury claims. Separately, Ms Jennie Formby, the First

Respondent's Regional Secretary for the South East, was asked to examine the complaints relating to service delivery in the London Eastern region. She was asked to review how the case was handled by the Region, consider whether the service level was appropriate and proportional; if it was not, to advise on what lesson should be learned and, if appropriate, what apologies should be made [182-185].

24. The Claimant asked whether he would be interviewed by Ms Formby. He was told that that would be a matter for the senior officer [187]. The Claimant then emailed Ms Formby on 22nd February 2018. He stated that he was disabled, and explained the conditions which he lived with and gave details of his medication. He stated:

> "I often find it difficult to communicate in writing and by telephone: I hope you can interview me face-to-face regarding my complaints so you can understand the true nature of my complaints against senior officials of the union and the impact on my health Unite services has had."

25. Ms Formby replied that there was a large volume of documents for her to consider, and that once she had digested the file, she would let the Claimant know whether she believed it was necessary to interview him personally, although she noted that that would be very unusual. The Tribunal found that it would have been very unusual to interview a complainant personally. The Claimant responded later the same day and reiterated his disability, some of these significant consequences of it, and asked again that he be interviewed [190; 192]. Ms Formby repeated that she would contact the Claimant again after she had read and reviewed the full file [193].

26. The Tribunal found that the complaint process is generally paper based and observed that the Claimant had not provided any evidence that other people making complaints had been interviewed [191].

27. Ms Formby did not interview the Claimant or contact him (as she expressly, and twice said she would) until she had issued him with the outcome of her investigation on the 10th March 2018. During her investigation she had a brief conversation with Mr. Passfield. The Tribunal noted that no notes of that conversation, nor of any other aspect of the investigation was before the Tribunal in evidence.

28. The Tribunal set out the following regarding the outcome of the investigation:

> **"196. On 8 March 2018, Ms Formby sent to Howard Beckett and Owen Granfield a draft outcome she proposed to send to the Claimant. Mr. Granfield suggested a change**

because Ms Formby had incorrectly stated that her findings represented the outcome of an adjudication and were final. Mr. Granfield advised that there was a possibility of a review by the Assistant General Secretary and her decision was not the final decision in the process. Ms Formby made the suggested changes to the latter, changing references to "adjudication", which is a term used by unite for a final decision, to "review" and removing a statement that her decision was final.

197. On 10th of March 2018, Ms Formby sent to the Claimant the outcome of her investigation. This was a two-page letter. She wrote that she had been asked to review the Claimant's complaints against unite which had two main themes: concerns about the representation the claimant received from the London and Eastern Region;and concerns about legal support he had received. She wrote:

> **"In addition, for some time you also indicated that you intended to complain about alleged poor treatment of you by Unite but you have not particularised this, so I am unable to uphold your concerns in that regard. Unite's lay member complaint process makes it clear that the responsibility lies with members to set out details of their concerns in order that they might be investigated and addressed but as you did not do this, we cannot take the allegations of poor treatment any further."**

198. In relation to concerns about representation she wrote "I have concluded that whilst I acknowledge that there were some difficulties with communication, the region responded by providing an ASC to represent you. This is consistent with regional practice and I do not find that you were in any way disadvantaged by this." She wrote that the ASC work to a brief the claimant provided but it was not possible to resolve the difficulties experienced through the internal workplace procedures operated by his employer. She wrote that detailed legal advice was therefore now being sought with the prospects of litigation under consideration. This process was continuing and he would be advised of the outcome in due course.

199. In relation to concerns about legal services, she wrote: "a legal services review is in process of being conducted, so I am satisfied that the complaints procedure is being appropriately applied."

200. She expressed her conclusions as follows:

> **"Your concerns regarding the representation you received from the London and eastern region**
> **I acknowledge that communications could have been better between you and the region, but the representation provided was appropriate and the process of the provision of workplace representation did not in any way hinder your case.**
> **Your concern regarding the legal support provided to you**
> **This is currently subject to a legal services review in accordance with the provisions of our lay member complaints procedure."**

201. The letter made no express reference to allegations of disability discrimination. It does not mention Mr. Passfield, Mr. Kavanaugh, Miss Marcus or Miss Cunningham by name or job title.

202. Since Ms Formby did not attend to give evidence and did not provide a witness statement, we have no direct evidence as to Ms Formby's reasons or motivation for dealing with the matter as she did, other than her outcome letter and the draft.

203. We accept the evidence given by Gail Cartmail that her own experience of Ms Formby is that Ms Formby acts in good faith and undertakes duties thoroughly. However, she considered Ms Formby's outcome letter to be brief and would have preferred to have seen a fuller response.

29. Gail Cartmail was the Third Respondent. She gave oral evidence to the Tribunal. She was the Assistant General Secretary of Unite. She subsequently reviewed the Claimant's complaint about officers of First Respondent.

30. An hour after receipt of Ms Formby's letter, the Claimant responded to her in writing. He stated that Ms Formby had not answered his complaints and that that, in itself, could be construed as a detriment. He asked whether Mr Passfield, Mr Kavanagh, Ms Marcus or MsCunningham had been interviewed. On receipt of that email, Ms Formby immediately forwarded the Claimant's email to Mr Granfield and Howard Beckett, copying in the Secretary General, Len McClusky and wrote "over to you …". She did not reply to the Claimant.

The Employment Tribunal's analysis and conclusions in respect of these factual issues and the claims before it

31. The Tribunal set out correctly the relevant statutory provisions of the EqA 2010: s.27 and s.136 [431-2].

32. The Tribunal concluded that the Claimant's email of 9th October 2017 did not amount to a protected act in so far as it was said to amount to an allegation of disability discrimination. At paragraph 640 the Tribunal stated:

> **"640. … The claimant refers to him stating as a result of his disability he did not like the suggestion his judgment was affected and asserts that he makes an allegation of a failure to make a reasonable adjustment and that he was alleging a breach of the EqA. The e-mail does not refer expressly to the suggestion that he should say his judgment had been affected, although it states that Ms Charlett's advice to withdraw allegations caused him, a disabled individual, further anxiety. We do not consider this can reasonably be understood as making an allegation of a breach of the EqA. Although he mentions that he has a complaint about Mr Passfield, amongst others, he does not say state what that is, writing that he will particularize his complaints when he is feeling better. We conclude that the e-mail cannot reasonably be understood as making an allegation of a failure to make reasonable adjustments and, therefore, a breach of the EqA. We, therefore, conclude that the e-mail, in relation to the part identified by the claimant in the Scott Schedule, is not a protected act.**
>
> **641. The e-mail does however, contain a reference to the claimant having raised a grievance against the RMT including allegations that senior officers of the RMT had discriminated against black members of the RMT. we conclude that the part of the e-mail which refers to this allegation is a protected act. Although the claimant did not identify this part of the e-mail as being a protected act in his Scott Schedule, since he makes a reference in incident 20 to victimisation being**

because of discrimination he raised against the RMT we take the view that we should consider whether this protected act was a reason for any of the treatment alleged to be victimisation."

33. In the Scott Schedule attached to the Judgment the assertion that this email was a protected act regarding disability was described in the following terms:

"The Claimant's email dated the 9th October 2017 (page 331). The Claimant stating as a result of his disability he did not like the suggestion his judgment was effected and of a failure to make a reasonable adjustment (breach of the Equality act 2010 and Rule 2.1.6)."

34. In respect of the allegation of victimisation arising out of Jennie Formby's investigation, the Tribunal set out its conclusions as follows:

"686. The claimant relies on acts 1 to 7 as protected acts. We have concluded that, of these acts, acts 3, 4,6 and 7 were protected acts…

687. The alleged victimisation is Jennie Formby not investigating allegations of discrimination. The date is 10 March 2018, the date of her outcome letter, (see paragraphs 197-201).

688. The claimant, in his submissions, relied on Jennie Formby not interviewing the claimant but interviewing Mr. Passfield. He described Jennie Formby's allegation that he had not particularise (sic) his complaints as "nonsensical". He submitted that the tribunal should uphold his complaint since Jennie Formby had failed to give evidence.

689. Ms Formby did not interview the claimant. we found that it would have been very unusual to interview a complainant personally (see paragraph 191). Ms Formby had a brief telephone conversation with Mr. Passfield. (See paragraph 195).

690. We conclude that the claimant was subjected to a detriment in that his specific complaints were not properly addressed.

691. The initial burden of proof is on the claimant to prove facts from which we could conclude there was victimisation i.e. that the reason, or one of the reasons, for Jennie Formby not investigating allegations of discrimination was because of one or more of the protected acts relied upon for this complaint. We conclude that the claimant has not proved such facts. The failure to interview the claimant does not provide us with any assistance since we found it would be very unusual to do so and it was a brief telephone conversation with Mr. Passfield rather than what we would consider to be an interview. As noted above, the claimant has not persuaded us that Jennie Formby's expressed views that he had not particularised complaints about poor treatment by Unite was not a genuinely

> **held view. This was the first complaint Jennie Formby had dealt with. We have no evidence that she subsequently dealt with any other complaints and, therefore how she did so where there was no protected act by the complainant. The only evidence that could suggest that Jenny Formby might have dealt with another complaint in more detail is the evidence of Gail Cartmail that she considers Jenny Formby to be very thorough. However, even if Jennie Formby is very thorough in the way she considers things, that does not necessarily mean that she would express her conclusions in her detailed way.**
>
> **692. Since the claimant has not proved facts from which we could conclude that there was victimisation, we conclude that the complaint is not well founded. This complaint was presented in time.**
>
> **693. Had the burden passed to the respondent to satisfy us that the protected acts were not a material factor in Jenny Formby's actions, given Miss Formby did not give evidence, and no other witness was able to explain why she acted as she did, the respondent would not have satisfied us that there was no victimisation."**

35. The protected acts which the Tribunal found to have taken place were, the Claimant's email of 9th September 2016 (this is the email referred to in paragraph 16 above which was copied to Ms Formby); the email of 9 October 2017 (paragraph 9 above) sent to the Secretary General (only to the extent that it referred to the grievance made against RMT that senior officers had discriminated against Black members of the RMT); an email of 2 February 2018 (paragraph 23 above) which sets out the Claimant's allegation that Mr Passfield failed to make a reasonable adjustment and other allegations of discrimination (referred to in paragraph 59 of the Reasons); and the email of 19 February 2018 sent to Mr McCluskey complaining about Mr Passfield, Mr Kavanagh and Ms Marcus and which included allegations of failure to make reasonable adjustments (referred to in paragraph 169 of the Reasons).

36. As noted above, Ms Formby did not give evidence. The Tribunal was given some reasons for that by the Respondent, which the Claimant appeared to dispute. The Tribunal made no finding about the reason why she did not give evidence. The information about why Ms Formby did not give evidence was set out in paragraph 21 of the Reasons as follows:

> **"21. The Tribunal was told by [counsel for the Respondents] on instructions, in closing submissions that Ms Formby was no longer an employee and had been undergoing treatment for cancer during much of the time the case was being prepared and this was why she did not give evidence. The claimant replied that Ms Formby was General Secretary of the Labour Party and had been unwell but had been in remission for a while and could have attended the hearing."**

The law

Burden of Proof

37. Section 136 of the Equality Act 2010 provides as follows:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

38. This provision has been considered in many significant appellate decisions, including *Igen Ltd v Wong* [2005] IRLR 258, *Laing v Manchester City Council* [2006] IRLR 748, *Madarassy v Nomura International plc* [2007] IRLR 246 and *Hewage v Grampian Health Board* [2012] IRLR 870, and, more recently in the Court of Appeal's decision in *Ayodele v Citylink Ltd* [2018] IRLR 114 and the Supreme Court's decision in *Efobi v Royal Mail Group Ltd* [2021] IRLR 811. As set out in submissions, these cases set out important guidance about how employment tribunals, should apply those provisions to the facts of the cases before them.

39. Several of the authorities contain passages where there is express recognition of the evidential difficulty of proving discrimination and victimisation, and the legislative background to what is now s.136 of the EqA 2010 which seeks to address that issue. As set out by Lord Leggatt in *Efobi v Royal Mail Group Ltd* [2021] IRLR 811, at paragraph 15 (albeit in discussion of discrimination):

> "[t]he rationale for placing the burden on the employer at the second stage is that the relevant information about the reason for … [the prohibited conduct] is, in its nature, in the employer's hands. A claimant can seek to draw inferences from outward conduct but cannot give any direct evidence about the employer's subjective motivation – not least since, as Lord Browne-Wilkinson observed in **Glasgow City Council v Zafar** [1998] 2 ALL ER 953, 958 … 'those who discriminate... do not in general advertise their prejudices; indeed they may not even be aware of them'"

40. By s.136 of the EqA 2010, Parliament has determined that, where a complainant has proved facts from which it could be proved that the statutory tort of discrimination, or other prohibited conduct is made out, the burden should move, or shift, to the putative discriminator/victimiser to prove a negative: that there was no discrimination or victimiastion whatsoever involved. The Claimant is not required to prove that unlawful discrimination or victimisation did occur. The requirement is only to prove facts from which a Tribunal, properly directing itself on the evidence *could* conclude that that was the case. Once that task is established (and because of recognised difficulties in proving discrimination) the onus is on the

putative discriminator; they bear the burden of proving a negative and there was not any discrimination whatsoever involved in the acts complained about.

41. Setting those principles out (as I have done in paragraph 40 above) is a relatively easy task to complete. It is far harder to put those words into practice. That is particularly so in a case such as the present, where there were multiple factual disputes between the parties, several different heads of claims and many allegations. In this case, the Tribunal was required to methodically determine those disputed issues of fact, and then apply to those facts to the provisions of s.136 of the EqA 2010. No one should underestimate the careful and meticulous work, and time it can take to properly consider these issues in respect of each individual allegation.

42. Turning to the authorities, in *Igen*, the Court of Appeal (Mummery LJ) held that the Tribunal must go through a "two-stage process" (paragraph 17):

> a. The first stage requires the complainant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant.
> b. The second stage, which comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act.

43. However, this does not mean that a Tribunal should conduct a hearing in two parts (as some speculated might be the case shortly after the decision in *Igen).* Rather, the Tribunal is required to make its factual determinations having heard all the evidence applying the civil standard of proof of the balance of probability. It should reach those determinations on the basis of all the evidence (including that adduced by the respondent). Its task at that stage is simply to determine what happened: for example what was said; who made which decisions. It can also make decisions about whether the alleged discriminatory conduct or conduct complained about took place at all, or, if it did, whether, in fact it was less favourable treatment of the claimant; whether the comparators chosen, or the situations with which comparisons are made are truly like the claimant or his or her situation. See the Court of Appeal's decision in *Madarassy*, at paragraph 71, per Mummery LJ with whom Laws and Maurice Kay LJJ agreed. It is, in my judgment, important to read that Judgment in full and I refer to it further below at paragraph 48. At paragraphs 57-8 Mummery LJ stated:

> "57. "Could conclude" in section 63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. *Subject only to the statutory "absence of an adequate explanation" at this stage* (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment. (My italics, see paragraph 47 below).
>
> 58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."

In paragraph 71 Mummery LJ noted that the predecessor legislation to s.136 EqA 2010 did not:

> "71. …expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; *or that, even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy*." (italics added)

44. Importantly, however, as those passages emphasise, the focus of the Tribunal at that point must not be determination of whether the conduct complained of was on the prohibited grounds or not. The Tribunal must take care to leave out of its analysis any adequate explanation regarding the reason for the treatment. It might consider that there is some evidence of an explanation, but it must exercise intellectual rigour, and leave that to one side at this, the first stage. As set out above, the issue at this stage is whether there are 'facts' upon which, in the absence of an explanation, a tribunal *could* conclude that the relevant prohibited conduct had

occurred. The burden of proof remains with the Claimant to prove those facts. If there is doubt about whether the required facts to establish that 'could' have been proved, it is resolved against the Claimant.

45. Discrimination is hard to prove. There will rarely be direct evidence to support it, and so a tribunal will often be required to consider, at this first stage, what inferences it is proper to draw from the primary facts found by the tribunal. There are two important points. First, the critical word is still *"*could". As set out in paragraph 65 of *Laing,*

> "the onus lies on the employee to show potentially less favourable treatment from which an inference of discrimination **could** properly be drawn." (My emphasis.)

46. Secondly, at this stage, the Tribunal, *"*must assume that there is no adequate explanation for those facts", including any inferred determination regarding explanation. As set out in paragraph (5) of the Revised Barton Guidance in paragraph 76 of *Igen:*

> "it is important to note the word 'could' … the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary facts *could* be drawn from them."

47. This can, at times, be particularly difficult. As noted above (paragraph 43, passage in italics) in Mummery LJ's Judgment in *Madarassy* in the Court of Appeal, he stated that, at the first stage, a tribunal may consider evidence which shows that,

> "… even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy". (Paragraph 71).

In my judgment, particular care must be taken by tribunals venturing into that territory. First, in paragraph 57 Mummery LJ prefaced what followed with the words, "Subject only to the statutory "absence of an adequate explanation". (See the full quotation at paragraph 43 above and the words in italics). He therefore expressly stated that his words were subject to the requirement to exclude consideration of adequate explanation. Further, Lord Leggatt in *Efobi* made the following specific observation regarding that final passage in paragraph 71 in *Madarassy*:

> "I comment in passing that [this possibility] mentioned in this passage must refer to facts which indicate that, even if there has been less favourable treatment of the complainant, this was not on the ground of her sex or pregnancy. **It should not be**

> **read as diluting the rule that evidence of the reason for any such less favourable treatment cannot be taken into account at the first stage.**" *Efobi* at paragraph 23. (Emphasis added).

48. At paragraph Lord Leggatt stated as follows:

> "… the claimant has the burden of proving, on the balance of probabilities those matters which he or she wishes the tribunal to find as facts from which the inference could properly be drawn (in the absence of any other explanation) that an unlawful act was committed. This is not the whole picture since, as discussed, along with those facts which the claimant proves, the tribunal must also take account of any facts proved by the respondent which would prevent the necessary inference from being drawn. But that does not alter the position that, under s.136(2) of the 2010 Act … the initial burden of proof is on the claimant to prove facts which are sufficient to shift the burden of proof to the respondent."

49. Therefore, whilst requiring a degree of intellectual rigour, possibly gymnastics even, the Tribunal, when considering its factual conclusions at this point (the first stage), must assiduously leave out of its analysis any evidence regarding a proffered adequate explanation. To do otherwise, and to include the explanation at this stage runs the risk of inadvertently and, wrongly, requiring the claimant to disprove the validity of that explanation.

50. Tribunals are entitled to draw inferences from primary facts. However, the statutory demarcation around 'explanation' remains. Without doubt, therefore, at the first stage, the question the tribunal must ask is: on these facts, *could* we conclude that discrimination/victimisation took place? The question is not *would* we so conclude, or *should* we so conclude. It is simply *could* we so conclude from the proven primary facts or from inferences we *could* draw from those primary facts?

51. If the answer to that question is negative, that is the end of the matter: the complaint has not been made out. If, however, the answer to that question is in the affirmative, the complaint *may* succeed (albeit he or she may not). That is because the Tribunal can now consider any explanation provided. Importantly, however, at this point, the Tribunal must recall that the burden has shifted to the alleged discriminator/victimiser. That means that doubt should be resolved against the Respondent and in favour of the Claimant. The Respondent's task is to prove (on the balance of probabilities) that no discrimination whatsoever occurred. If, having considered all the evidence, including the proffered explanation, the Tribunal has doubt about that issue, the complaint succeeds. That is the consequence of the shifting burden of proof. If,

however, the Tribunal is satisfied, on the balance of probabilities, that the respondent has proved that there was no discrimination whatsoever, again the claim fails. As set out in *Laing*:

> **"71. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race.**
>
> **72. The Courts have long recognised that this would be unjust and that there will be circumstances where it is reasonable to infer discrimination unless there is some appropriate explanation. *Igen v Wong* confirms that, and also in accordance with the Burden of Proof directive, emphasises that where there is no adequate explanation in those circumstances, then a Tribunal must infer discrimination, whereas under the approach adumbrated by Lord Justice Neill, it was in its discretion whether it would do so or not. That is the significant difference which has been achieved as a result of the burden of proof directive, as Peter Gibson LJ recognised in *Igen*.**

52. In some instances, the key decision maker/ actor, may not give evidence. The Supreme Court in *Efobi* considered whether, and if so, how, a Tribunal could, or should, draw any inference from that fact and the absence of evidence. In *Efobi* the Respondent employer did not adduce anyone who had been responsible for rejecting any of the Claimant's job applications (the conduct complained of). It was submitted that the Court of Appeal had wrongly held that drawing an adverse inference from that matter was impermissible. Lord Leggatt cited paragraph 58 of Mummery LJ's judgment in *Madarassy:*

> **"the absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage.**

Lord Leggat stated:

> **"40. I think that care is needed in interpreting these statements. At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account. It follows that …. no adverse inference can be drawn at the first stage from the fact that the employer has not provided an explanation. Insofar as the Court of Appeal in *Wong v Igen Ltd* at paragraphs [21]-[22] can be read as suggesting otherwise, that suggestion must in my view be mistaken. It does not follow, however, that no adverse inference of any kind can ever be drawn at the first stage from the fact that the employer had failed to call the actual decision makers. It is quite possible that, in particular circumstances, one or more adverse inferences could properly be**

> **withdrawn from that fact.**
>
> **41. The question of whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria … I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decide to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are interrelated and how these and any other relevant consideration should be assessed cannot be encapsulated in a set of legal rules."**

53. Finally, as set out above, determining discrimination claims is a difficult task. Adopting a structured approach may well assist, particularly in more complex cases. It may be beneficial to methodically set out and consider the proven facts, stand back and rhetorically ask the question *"*could this Tribunal, properly directed, conclude unlawful conduct has taken place". Then, and only then, go on to look at the evidence regarding any explanation.

Protected Act

54. Section 27 of the EqA 2010 provides as follows:

> ***27 Victimisation***
> *(1)A person (A) victimises another person (B) if A subjects B to a detriment because—*
> *(a) B does a protected act, or*
> *(b) A believes that B has done, or may do, a protected act.*
> *(2)Each of the following is a protected act—*
> *(a)bringing proceedings under this Act;*
> *(b)giving evidence or information in connection with proceedings under this Act;*
> *(c)doing any other thing for the purposes of or in connection with this Act;*
> *(d)making an allegation (whether or not express) that A or another person has contravened this Act…….*

55. In *Waters v Metropolitan Police Commissioner of the Police* [1997] IRLR 589, in relation to the equivalent wording under the Sex Discrimination Act 1975, Waite LJ stated:

> "86. ……. True it is that the legislation must be construed in a sense favourable to its important public purpose. But there is another principle involved — also essential to that same purpose. Charges of race or sex discrimination are hurtful and damaging and not always easy to refute. In justice, therefore, to those against whom they are brought, it is vital that discrimination, including victimisation, should be defined in language sufficiently precise to enable people to know where they stand before the law. Precision of language is also necessary to prevent the valuable purpose of combating discrimination from becoming frustrated or brought into disrepute through the use of language which encourages unscrupulous or vexatious recourse to the machinery provided by the discrimination Acts. The interpretation proposed by Mr. Allen would involve an imprecision of language leaving employers in a state of uncertainty as to how they should respond to a particular complaint, and would place the machinery of the Acts at serious risk of abuse. It is better, and safer, to give the words of the subsection their clear and literal meaning. The allegation relied on need not state explicitly that an act of discrimination has occurred — that is clear from the words in brackets in section 4(1)(d). All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer within the terms of section 6(2)(b)."

56. I accept the submissions of the Respondents that this passage contains the following principles:

(1) Words should be given their clear and literal meaning.

(2) The language relied upon need not state explicitly that an act of discrimination has occurred.

(3) All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer within the terms of section 27(2).

(4) Discrimination, including victimisation, should be defined in language sufficiently precise:

i. to enable people to know where they stand before the law; and,

ii. to prevent the valuable purpose of combating discrimination from becoming frustrated or brought into disrepute through the use of language which encourages unscrupulous or vexatious recourse to the machinery provided by the discrimination Acts.

e. Imprecision of language creates uncertainty about a complaint and how to respond to it – and places the legislation at risk of abuse.

The parties' submissions

The conclusions on the burden of proof

57. The Claimant submitted that the Tribunal erred in its application of the provisions of s.136 of the EqA 2010 to the factual conclusions it reached in its analysis in paragraphs 686-693 of its Reasons and in its conclusion that the Claimant had not proved facts from which it could conclude that victimisation had taken place. In particular, the Claimant drew attention to paragraph 690 of the ET Judgment: the ET decided that a detriment had occurred in that the Claimant's specific complaints had not been properly addressed. Further, reading the Judgment and Reasons as a whole, it was important to note the passages at paragraphs 201 to 203: the failure of Ms Formby to address the Claimant's complaints properly is apparent from those findings. It was submitted that Ms Formby's outcome letter simply failed to address the allegations of disability discrimination which were matters of express complaint set out by the Claimant.

58. It was submitted that these were clearly factual findings from which the ET could have concluded that victimisation had taken place. The ET had made its findings as to the inadequacy of the outcome letter at paragraph 201, but did not address them at paragraph 691. It also did not refer to its earlier finding of fact about Ms Formby's lack of contact with the Claimant, nor the fact that after he expressly raised that her outcome letter had not addressed the issues of disability discrimination in his complaint, she did not reply but immediately referred the letter to others with the words 'over to you …'.

59. It was submitted that the Tribunal failed to give any, or any adequate consideration, to the well established principles, including the need to be live to the fact that it is unusual for there to be direct findings of discrimination/victimisation. It was submitted that the Tribunal did not appear to give any, or any adequate consideration to that which it could properly infer from its earlier findings including: the lack of any express reference to the allegations of discrimination; the failure to refer to those senior persons named in the complaint by position or title; the paucity of the outcome letter overall; the fact that Ms Formby was usually known to be thorough. It was submitted that these were among the findings from which the ET could infer that there had been victimisation. Wrongly, it was submitted, the Tribunal appeared to seek to explain away findings from which an inference could be drawn that victimisation had occurred, thereby giving the impression of going somewhat out of its way <u>not</u> to make that inference. For example, as regards that evidence that Ms Formby was usually very thorough, the Tribunal stated "even if Ms Formby is very thorough in the way she considers things, that does not necessarily mean that she would express her conclusions in a detailed way". It was submitted that if someone is known to be very thorough, she would not normally have made glaring omissions in expressing her findings (or, in the wording of the Tribunal, she would be

expected to have addressed the specific complaints properly); therefore, the ET could infer from this that she had victimised the Claimant. Further, in adopting this approach, the Tribunal failed to assume, at the first stage, an absence of any adequate explanation.

60. The Claimant submitted that the Tribunal, could, indeed should, given its conclusion at paragraph 693, have drawn an inference from the fact that the actual alleged wrongdoer, Ms Formby, did not give evidence, at the first stage. It was submitted that the views of the Tribunal at paragraph 691 were at odds with the conclusion at paragraph 693. It was submitted that the Tribunal was not precluded from drawing such an inference by *Efobi*.

61. The Respondent submitted that properly analysed, it was clear that the Tribunal had not erred: there were no facts or evidence that would enable a Tribunal to conclude Jennie Formby was acting in a discriminatory manner. It was submitted that the documentation and the evidence given by the respondent witnesses demonstrated that the First Respondent was seeking to assist the Appellant in his complaints against the RMT rather than being indicative of any prohibited conduct.

62. The Respondents submitted that the focus must be on whether the Tribunal had erred in law in finding that the Claimant had failed to prove relevant facts. In respect of facts it was important to note the following. First, the Tribunal found that it would be very unusual to interview a complainant. Whilst the Tribunal found that Ms Formby had not interviewed the Claimant, the Tribunal also found that Ms Formby stated it would be unusual to interview the Appellant, but she would do so if necessary. In addition, Ms Formby had only a brief phone call with Mr Passfield, not an interview. Finally, there was no comparative evidence of how Ms Formby had dealt with other complaints, and in particular whether she had interviewed complainants. In fact, this was the first complaint she had dealt with.

63. Secondly, in respect of the allegation that Ms Formby's expressed view that he had failed to particularise his complaints was not a bona fide view, it was clear that, on the facts, the Tribunal was not persuaded that Ms Formby was being disingenuous. Rather, it accepted Ms Cartmail's evidence that Ms Formby acts in good faith. In addition, Ms Cartmail's evidence that she was methodical was not sufficient proof that in this instance the nature and form of her decision pointed in the direction of victimisation.

64. It was submitted that speculation regarding the nature of Jennie Formby's investigation and the reasons why she conducted her investigation in the manner she did,

and/or why she provided the decision in the succinct form that she did, did not provide a valid evidential basis to engage the burden of proof provisions.

65. As to the conclusions set out by the Tribunal at paragraph 693, it was submitted that the Tribunal was correct not to take the absence of an explanation into account at the first stage, as set out in *Efobi* (paragraphs 10-11). This was because, at the first stage, the Tribunal must assume that there is no adequate explanation. The failure to explain a disputed fact adequately or at all, because a witness is unavailable, of itself does not provide evidence to satisfy the first stage. Further, the burden of proof provisions of s.136(2) of the EqA2010 do not establish a mechanism of findings of prohibited conduct by default. Rather, an evidential basis for such a conclusion, based upon inference or otherwise, is still required. In this case, the Claimant failed to establish that evidential basis.

The protected act

66. In respect of the second ground of appeal, the Claimant referred to the following extract from the relevant email:

> *"Ms Charlett advised me to withdraw allegations against a senior officer of the RMT but I could not as I was telling the truth and because the advice caused me a disabled individual further anxiety, I requested another representative but Vince Passfield and Peter Kavanagh refused my reasonable request and I had to attend the hearing without Unite representation. Refusal to provide alternative representation placed a disabled member of Unite under further strain"*.

67. It was submitted that it was clear from this extract that the Claimant:

(1) Identified himself as a disabled person;
(2) Expressed the anxiety he had felt with Ms Charlett's advice;
(3) Identified his request for a different representative;
(4) Set out how the refusal to provide alternative representation placed him under further strain.

Consequently, it was submitted that this amounted to an implied (if not express) allegation that the Union had failed to make a reasonable adjustment, in refusing the Claimant alternative representation, and in finding otherwise the Tribunal misapplied s.27 of the Equality Act 2010.

In any event, the full email made it clear that the Claimant was asserting that he was disabled, vulnerable, taking medication and that he was asserting that the refusal of his "reasonable request" was a failure to make a reasonable adjustment and therefore a contravention of the EqA 2010. The Claimant also submitted that the Tribunal erred in failing to conclude that the same email fell within the scope of s.65(2)(c) TULRCA.

68. The Respondent submitted that relevant conclusions were set out by the Tribunal at paragraphs 49 to 104, (particularly paragraphs 95-98) and at paragraphs 630 to 883. Notably, the email stated that, "refusal to provide alternative representation placed a disabled member of Unite under further strain". It was submitted that simple identification as a disabled person, combined with an expression of anxiety regarding Mr Charlatt's advice, making a request for alternative representation, and stating that a failure to grant that request would cause further strain, was insufficient to amount to a protected act. It was submitted that the EAT must give the words their clear and literal meaning: whilst the Claimant was not required to expressly state that there had been discrimination, the words used had to indicate facts capable of amounting to an allegation of discrimination and must be sufficiently precise. It was submitted that this document was not. However the allegation must be sufficiently precise.

69. It was submitted that there was no express allegation of discrimination. Further, it was submitted that the complaint was that he was already being caused 'anxiety' by reason of the advice he had received and the refusal to provide alternative representation caused him further 'strain'. That was to set out an explanation of the consequences of the refusal and to catalogue an allegation of injury / exacerbated injury, but fell short of an allegation of discrimination. Further it was notable that in 2016 he did make a specific allegation of a reasonable adjustment failure, whereas this email did not and, significantly, the Claimant was an employment solicitor. It was not accepted that it would have been obvious to the Union that this was a protected act. Rather, the Claimant set out his thoughts with clarity and precision. Further, the language used was, at best, imprecise and would not readily indicate to a reasonable reader that a protected act was being alleged.

70. Further and in the alternative, it was submitted that it was wholly unclear what significance a favourable appeal finding on the second ground would have because there is no nexus between any such alleged protected act and any detriment found by the Employment Tribunal.

71. Moreover, the Tribunal accepted the non-discriminatory explanation for the all alleged detriments save in respect of the issue discussed above in respect of the first ground of appeal, i.e. in relation to Jennie Formby and the failure to properly address his specific complaints.

Conclusions

72. I consider that the first ground of appeal is made out. In my judgment, the Tribunal, in respect of its analysis of the victimisation claim arising from the proven detriment that Ms Formby did not investigate the complaints he made about the way in which his serious complaints had been addressed by the First Respondent, erred in its approach to the burden of proof.

73. The Tribunal correctly identified the relevant statutory provisions. Its fact finding was detailed. However, its analysis of the case law regarding the application of s.136 of the EqA 2010 was limited. The Tribunal did not set out or consider how the statutory provision should be applied. That would not, or itself, present any difficulty if, read as a whole, it was clear that the correct legal principles had been applied. In my view, that is not the case.

74. The Tribunal initially (at the first stage) was not required to find that victimisation had occurred. As set out above, what it was required to do at that stage was to consider whether, having regard to the evidence it had heard and seen, and the factual determinations it had made, facts had been proved upon which it could conclude that victimisation had taken place. The key word at this point was 'could'. The Tribunal had found that Ms Formby had subjected the Claimant to detriment because she had not investigated the complaints he made. Further, it found that, on the evidence, this was somewhat out of character for her: her colleague described her as someone who acted in good faith and was usually thorough. Further, the Tribunal had found that four of the seven protected acts which the Claimant asserted led to that detriment had taken place. The Tribunal therefore had concluded that, for the purposes of s.27 of the EqA 2010 that:

a. Ms Formby had subjected the Claimant to a detriment (not investigating the complaints)

b. The Claimant had done a protected act (his emails of 9th September 2016, 9 October 2017, 2 February 2018, 19th February 2018).

c. Ms Formby knew about those protected acts. The email of 2 February 2018 was the complaint she was tasked with investigating. The email of 19th February 2018 was the email the Claimant sent directly to her, repeating some of his allegations and

asking that she interview him. No express conclusions about the emails of 9th September 2016 and 9 October 2017 were set out by the Tribunal. However, it appears to have been a realistic possibility that those emails were included in the large file Ms Formby was tasked with reading.

Those were the some of the key primary facts established on the evidence and found by the Tribunal. In addition, the Tribunal found that:

d. Ms Formby appeared to have acted out of character in the manner in which she carried out her task: she was known to be thorough. On this occasion she did not investigate allegations of discrimination (i.e., she did not do that which she was tasked to do). See in particular [691].

e. The allegations the Claimant made involved serious allegations against the First Respondent which it had already strongly and unequivocally denied.

f. The Claimant expressly asked Ms Formby to interview him because of the disability and the impact upon him and understand his complaint (paragraph 24 above).

g. Whilst it would have been unusual for a complainant to be interviewed, and Ms Formby stated she would consider the request after she had read the file, she did not act as she said she would, and never responded to the Claimant, and then failed to properly investigate the complaints.

h. Ms Formby did not interview the Claimant.

i. She then stated that her complaints were not particularised, notwithstanding the fact that she knew that he wished to be interviewed for the reasons he set out in writing.

j. Ms Formby spoke, briefly, to one of the individuals against whom the Claimant complained. No notes of that conversation were put before the Tribunal, or in respect of any other aspects of the investigation.

k. On receipt of the Claimant's response which set out his dissatisfaction with what she had done and complained (accurately, as the Tribunal found) that she had not investigated that which she had been asked to, Ms Formby forwarded the email to others and said "over to you …". She did not reply to the Claimant

l. Ms Formby was not called to give evidence.

75. The Tribunal's analysis in paragraph 691 of its Reasons set out, in the first sentence, an initial correct self direction: had the Claimant proved facts from which it could conclude that the reason, or one of the reasons for Ms Formby not investigating allegations of discrimination was because of one or more of the protected acts relied upon? Then, however, in my judgment, it fell into error in its analysis and application of s.136 of the EqA 2010. It failed to apply that correct self direction.

76. The Tribunal was entitled to determine that the fact that Ms Formby did not interview the Claimant did not assist, because, on the facts it would have been unusual to do so, and that the telephone conversation with Mr Passfield was brief. In addition, it was fully entitled to conclude that this complaint was the first which Ms Formby had investigated. There was no evidence available as to how she had approached other complaints.

77. However, the Tribunal's conclusion in paragraph 691 that the Claimant 'had not persuaded us' that Ms Formby's expressed view that he had not particularised his complaints about poor treatment was not a genuinely held view, in my judgment, raised difficulties. The Tribunal had not heard from Ms Formby. Further, the Tribunal in reaching that conclusion, did not appear to consider the significance of her failure, either to interview the Claimant when he had expressly stated that, because of his disability, he would find it easier to explain his complaint that way; to go back to him as she said she would, or, at least, to inform him that he would not be interviewed before reaching her conclusions. In addition, if that sentence and conclusion is postulated to be, as it appears to be, part of an explanation for Ms Formby not investigating the Claimant's complaints, the Tribunal, erred, because, at this, the first stage, it was required to leave that conclusion out of its analysis. The express terms of s.136(2) of the EqA 2010 require that: "If there are facts from which the court could decide, in the absence of any other explanation…"

78. Further error of analysis is revealed in the next passages of paragraphs 691. The Tribunal then stated that, "the only evidence" that Ms Formby might have dealt with another complaint in more detail, was the evidence of Ms Cartmail that Ms Formby was very thorough. It stated that, even if Ms Formby was very thorough in the way she considers things, that did not necessarily mean that she would express her conclusions in a detailed way. This last sentence appeared to be a matter of speculation on the part of the Tribunal. Significantly however, it sets out a proposed explanation as to why Ms Formby did not investigate the

complaints: because, although she was known to be thorough, she may, nonetheless, not express her conclusions in a detailed way. In addition, the Tribunal did not appear to consider other relevant facts which had been established by the evidence, including those set out above at paragraph 74 and consider what, if any, inferences it could have drawn from those facts and then go on to consider how that impacted upon the burden of proof.

79. Whilst any Tribunal must not draw inferences from primary facts unless it considers it right to do so, a Tribunal must explain why it reached the conclusions it did. In this case the Tribunal speculated about why something may have occurred at a point in the analysis where it was prohibited from doing so. Further, it did not explain why it did not consider it should draw any inferences from the primary facts that the Claimant had proved.

80. I consider that the Tribunal fell into error in paragraph 691.

81. I also consider that the Tribunal erred in respect of its analysis of the email of 9th October 2017. I prefer the submissions of the Claimant. The email must be read in its entirety. Read in full, and applying the principles above, I consider that, giving the words he used their plain meaning, it is clear that his complaint was that the refusal of his "reasonable request" for alternative representation was a complaint that the Respondents had failed to make a reasonable adjustment to accommodate the needs of a disabled person, and therefore a contravention of the Equality Act. The following extract illustrates that conclusion:

> *"Ms Charlett advised me to withdraw allegations against a senior officer of the RMT but I could not as I was telling the truth and because the advice caused me a disabled individual further anxiety, I requested another representative but Vince Passfield and Peter Kavanagh refused my reasonable request and I had to attend the hearing without Unite representation. Refusal to provide alternative representation placed a disabled member of Unite under further strain"*.

82. In that part of the email, the Claimant:

(1) Identified himself as a disabled person, the nature of the disability and treatment he received;

(2) Expressed the anxiety he had felt with Ms Charlett's advice;

(3) Identified his request for a different representative, expressly referring to it as a reasonable request;

(4) Set out how the refusal to provide alternative representation placed him under further strain.

(5) In the two last sentences expressly referred to the request being reasonable and that the refusal to grant it placed a disabled person under 'further strain', i.e., created a difficulty for him.

83. In my judgment, this amounted to an implied (very nearly express) allegation that the Union had failed to make a reasonable adjustment, in refusing the Claimant alternative representation. Fairly read it asserted that the First Respondent had failed take reasonable steps to reduce or remove a disadvantage (increased anxiety) experienced by a disabled member of the union because of the application of the union's usual rules and practice. Further, in the Schedule, the Claimant did not simply assert that that email contained an allegation of a failure to make a reasonable adjustment. The way the protected act was described is set out in paragraph 33 above. The Tribunal could, arguably, should, given the Claimant represented himself, have considered whether the email contained an allegation of discrimination arising from disability or direct discrimination.

84. I direct that the parties are to exchange and file written submissions as to disposal within 7 days. If any party considers that there is any need for oral submissions as to disposal, that should be indicated in those written submissions.

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10 February 2025 In Chambers Disposal

1. Following the handing down of the Judgment in this matter [2024] EAT 151, I invited further submissions on disposal. Both parties filed further written submissions.

The parties' submissions

2. In respect of the claim of victimisation, the Appellant submitted that the Tribunal should substitute a decision that the burden of proof had shifted to the Respondent, and, that in the light of the unchallenged conclusion of the Tribunal that, had the burden shifted to the Respondent, it would have found that the Respondent had not satisfied it that there had been no victimisation, (para 693 of the Tribunal Judgment) that the complaint of victimisation was

well founded. Alternatively, it was submitted that, if remission were required, that should be a different Tribunal and on carefully prescribed terms.

3. In respect of the complaint of disability discrimination, and the claim under s.65(2)(c) TULR(C)A 1992the Appellant submitted that the Employment Appeal Tribunal should substitute a finding that the email of 9 October 2017 contained an allegation of disability discrimination and, further, that the email amounted to conduct under s.65(2)(c) TULR(C)A 1992. It was submitted that the claims should be returned to the Tribunal for consideration of the impact of those findings, in particular because the Tribunal had not considered the claims of detriment in the context of the statutory language within s.65(2)(c) TULR(C)A 1992. It was submitted that the claims should be remitted to a different Tribunal.

4. The Respondent invited the EAT to adopt a robust and realistic approach. In respect of the claim of victimisation, it submitted that the matter could be reheard either by the same, or a differently constituted Tribunal. I understood it not to oppose the suggestion that the EAT substitute a finding regarding the email 9th October 2017 : that the EAT could and should properly substitute a finding that that email amounted to a protected act (an allegation of disability discrimination) for the purposes of the EqA 2010 and that the same email came within the definition of conduct for the purposes of TULR(C)A 1992. It made submissions as to the consequences which should flow from each of those decisions.

Conclusion

5. Having regard to the principles set out in Jafri v Lincoln College [2014] EWCA Civ 449 I consider that the EAT can, and should, substitute conclusions that victimisation occurred. In its decision, the EAT has found a legal error in the Tribunal's analysis of the burden of proof in respect of its approach to and application of the burden of proof regarding the claim of victimisation. Without that error the result would have been different but, in light of the Tribunal's own findings, and the EAT decision set out at paragraph 74(a) to (l) of its Judgment ,only one result is possible: that the burden of proof had shifted and that the Respondent had failed to discharge it. The same principles apply to the Tribunal's approach to the email of 9 October 2017: the Tribunal fell into legal error. Again, only one possible result can follow: that that email amounted to a protected act for the purposes of a claim under the EqA 2010 and to conduct for the purposes of the claim under TULR(C)A 1992.

6. However, in my judgment, that is the point at which the jurisdiction of this Tribunal ends. The determination as to what impact those substituted outcomes have on the claims before the Tribunal is properly one for the Tribunal to make. It may require further argument and will require the application of the Tribunal's own judgment. It is not for this appellate Tribunal to make judgment of its own on the merits of those underlying claims. It has performed its task in identifying legal error and correcting those errors as far as its jurisdiction permits. The Employment Tribunal will need to consider what consequences flow from that decision including, as it sees fit, determination of remedy.

7. The Tribunal is clearly a professional one: its decision was detailed, lengthy and has only been challenged on the limited grounds of appeal. I considered the factors in Sinclair Roche & Temperley v Heard [2004] IRLR 763. I considered that the balance tips in favour of remission to a different Tribunal. First, there has been a significant passage of time since the Tribunal considered the case. The detail is likely to have faded both in respect of the factual issues, the heads of claims and the many different issues. Any Tribunal will be required to carefully read back into the case. I consider that little time will be saved by remission to the same Tribunal. In addition, whilst the decision was lengthy and detailed, in respect of the application of the burden of proof the Tribunal based its decision upon speculative considerations. It may be difficult for the same Tribunal to view the issues before it wholly free of those matters even if their influence is subconscious. I consider that the case should be remitted to a freshly constituted Tribunal.