

Neutral Citation Number: [2026] EAT 28

Case No: EA-2022-001290-NK and EA-2023-001272-NK

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 20 February 2026

**Before:**

**HIS HONOUR JUDGE JAMES TAYLER**

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**Between:**

**Mr H Fullah**

**Appellant**

**- and -**

- (1) Medical Research Council**
- (2) Professor Susan Gathercole**
- (3) Mrs Michelle Barthelemy**
- (4) Dr Tony Peatfield**
- (5) Ms Julie Kemp**

**Respondents**

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The **Appellant** in person  
**Michael Salter** (instructed by Evershed Sutherland International) for the **Respondents**

Hearing date: 29 January 2026  
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**JUDGMENT**

## **SUMMARY**

### **Victimisation**

The Employment Tribunal failed properly to determine the specific issue, about causation in a victimisation complaint, remitted to it from the EAT. The appeal is allowed and the matter is remitted to the Employment Tribunal again. The role of the Employment Tribunal on remission, briefly considered.

## **HIS HONOUR JUDGE JAMES TAYLER:**

### **Issue**

1. The issue in this appeal is whether the Employment Tribunal properly determined the question remitted to it by the Employment Appeal Tribunal after a hearing before His Honour Judge Shanks on 24 June 2021. The Employment Tribunal was required to determine the issue of causation again in a complaint to victimisation.

### **The judgment appealed**

2. The appeal is from a judgment of the Employment Tribunal sitting at Cambridge; Employment Judge Ord sitting with lay members. The remitted matters were considered in chambers on the basis of written submissions on 19 and 20 July 2022.

### **The outline facts**

3. HHJ Shanks set out the relevant background:

3. The Claimant was employed by the Medical Research Council (“the MRC”) from 22 May 2001 until he was dismissed on 8 May 2017 as a computer officer in the IT department of the Cognitive and Brain Services Unit. He is black British.

4. In June 2010, he brought ET proceedings raising complaints of discrimination relating to his then line manager, Prof. Marslen-Wilson. The hearing took place in January and February 2012. His complaints were rejected by the ET. He appealed to the Employment Appeal Tribunal (“EAT”) and that appeal failed in 2013.

5. By 2016, his ultimate manager was Prof. Gathercole, who is a Respondent to the Claim in this case. In 2015, he raised to complaints which led to a meeting with Prof. Gathercole on 29th March 2016. Prof. Gathercole invited him to explain the basis for allegations of discrimination and to explain his disability and referred to difficulties working as a team in high levels of stress which were causing her concern. The Claimant simply replied by asking if she had been contacted by ACAS.

6. In May 2016, the Claimant issued a second ET claim for race and disability discrimination and for victimisation, which raised specific allegations against Prof. Gathercole and against his immediate line manager, Dr Thompson. It raised matters not previously raised, which were then investigated as a grievance and dismissed by the MRC. The second ET case was heard in February 2017. The complaints were dismissed orally at the conclusion of the hearing on 25 February 2017. The Written Reasons, which were before the ET in this case, were sent out after the Claimant had been dismissed on 12 June 2017.

7. On the Claimant’s return to work after the ET hearing in February 2017, on 1 March 2017, Prof. Gathercole informed him that he was suspended. He was told that he was suspended pending an investigation into the employer’s concern that, in the light of events after May 2015, the relationship of trust and confidence between the Claimant

and his colleagues, and the employer more widely, had deteriorated to the extent that it was no longer possible to continue any viable employment relationship. She then wrote a letter confirming the suspension which stated:

We are concerned that in light of events since you returned to work in May 2015 after your illness, the relationship of trust and confidence between yourself and your colleagues, and more widely the Medical Research Council, has deteriorated to the extent that it is no longer possible to continue any viable employment relationship. You have made numerous and serious unsubstantiated allegations of discrimination and victimisation, showed marked non-engagement with us and/or Occupational Health around your medical conditions, and displayed uncooperative attitudes and behaviours that are damaging the IT team environment for others working there. As I explained in our meeting, an independent third party will be appointed to investigate this issue and produce a report for the Council that would be considered by senior management in terms of reaching a decision on the way forward. Your suspension does not constitute disciplinary action.

8. An independent third-party HR consultant was then appointed to investigate and report, a Ms Emma Allchurch. She was asked to consider whether the relationship of trust and confidence between the Claimant and his colleagues had deteriorated to such an extent that it was no longer possible to continue any viable employment.

9. The ET in the judgment under appeal recites at paras. 35 to 43 details of the evidence collected by Ms Allchurch and, most importantly, that she interviewed Dr Thompson who was the main alleged discriminator in the ET proceedings. Dr Thompson made a number of comments relating to the ET which were cited at para. 37. He said that he had found the situation very stressful and had made efforts to introduce one-to-one meetings within the team when the Claimant launched his second tribunal claim. He said that having the tribunal claim hanging over him was stressful and had had an impact on the ability of the team to work together going forward. He said that to do so would need some form of mediation. He did not think the team could still work effectively together, as things stood, and he, personally, would need some form of guarantee that he was not put through another tribunal and, finally, going forward, Dr Thompson said he would need to watch everything he said or did for fear of further allegations and that it would be very stressful.

10. Ms Allchurch recommended that there was “a case to answer” with regard to the Claimant’s relationship with the MRC and whether it had irretrievably broken down. A hearing took place before a Dr Peatfield on 8 May 2017. Dr Peatfield concluded that the relationship between the Claimant and his colleagues, and with the MRC more widely, had deteriorated so that the employment relationship could not continue. The basis for this decision was that the Claimant worked as part of a very small team and had, over time, since June 2010 raised serious allegations of racial discrimination or prejudice, disability discrimination and victimisation, including allegations against two successive line managers and the Unit Director. None of these allegations had been shown to be well-founded. The Claimant had not engaged in internal procedures, but raised matters externally first to ACAS and then the ET without a willingness to engage in internal procedures. He considered the Claimant had been unreasonably difficult in ignoring the Occupational Health advice. Dr Peatfield’s view was that the relationship between the Claimant and his line manager had broken down and was nonfunctioning.

11. Dr Thompson's evidence to the investigation was that he felt unable to manage Mr Fullah because he was in fear of further personalised allegations being made against him, even in relation to routine line management actions. The issues raised by the Claimant were not true and went directly to the character and integrity of Dr Thompson. Dr Peatfield's conclusion was that the Claimant was unwilling to accept having a line manager in a position which he felt he deserved and was willing to raise unjustified issues to undermine the line manager.

12. Dr Peatfield, at para. 49, continued to say that he considered the situation so dire that there was a very genuine concern that Dr Thompson would choose to leave the organisation due to the stress of the circumstances he was working under, reminding himself that the First Respondent had a duty of care for all its employees. He also found that the team was working in a situation of heightened nervousness and was concerned that the Claimant had persisted with allegations after they had been dismissed and was thus unwilling to accept the findings of the tribunal. As I mentioned a number of times in the course of the hearing, that seems to me a puzzling statement, given that the Claimant had been suspended immediately after the tribunal reached its decision in February 2017.

13. But anyway, the decision by Dr Peatfield was put into a letter the same day, which is at pg. 98 in my documents bundle, and states:

I am writing to confirm the outcome of the formal hearing held by myself and Julie Kemp from HR on Monday 8th May 2017.

There are thanks for attending. There is reference to the report from Emma Allchurch and then it states:

Based on the outcome of the investigation report and your responses during the Hearing, it was clear to me that:

- The relationship between you and other staff in the Unit and with the MRC more broadly had broken down and that this was irretrievable;
- You had not followed the MRC procedures to resolve grievances and two consequent employment tribunals have not upheld your complaints;
- You declined mediation in the past. We were not persuaded you would engage fully if this were offered again.

In conclusion, we were not confident that things would change. We have a duty of care to all our staff and believe that your continuing employment would affect them negatively and would likely lead to further claims against them or the MRC with the consequent impact on staff and the ability of the Unit to function cost-effectively.

### **The first Ord tribunal Judgment**

4. It was accepted that the claimant's two Employment Tribunal claims were protected acts. The Employment Tribunal held that the suspension was not detrimental and the dismissal was not an act of victimisation. The Employment Tribunal concluded that:

72.... we have unanimously concluded that the reason for the Claimant's dismissal was the breakdown of a working relationship between the Claimant and his line manager, his other working colleagues and the senior management within the first Respondent generally, including Professor Gathercole. The relationship was unworkable in March 2016, but the First Respondent generally, and the line manager in particular, felt unable to take any steps pending the outcome of the second Employment Tribunal claim. Once that was concluded, an external analysis took place to determine whether the relationship could proceed and it was recommended that there was a case to answer in that regard so that a hearing should take place.

73. Accordingly, the Claimant was not dismissed as a result of his having carried out a protected act. The reason for his dismissal was a fundamental breakdown of the working relationship he had with his line manager which the Respondent concluded, reasonably, was beyond repair.

### **The HHJ Shanks judgment**

5. HHJ Shanks decided that the suspension of the claimant was a detriment. HHJ Shanks remitted the question of whether the dismissal was an act of victimisation.

6. Having considered the relevant law, HHJ Shanks held:

27. I look back to para. 73 of the decision where it states in terms:

The Claimant was not dismissed as a result of his having carried out a protected act. The reason for his dismissal was a fundamental breakdown of the working relationship he had with his line manager which the Respondent concluded, reasonably, was beyond repair.

**It seems to me that that that summary position really begs the question whether the breakdown was in substantial part because the Claimant had brought ET proceedings naming, in particular, his line manager, or whether the breakdown resulted only from the manner (or other features) of those proceedings which were properly separable from the fact of the bringing of the proceedings. It seems to me that that question was something that the Tribunal ought really to have expressly addressed.**

28. I have considered the matter anxiously because there is a lot in the Judgment, and I have borne in mind that the ET's reasoning should not be over-analysed, and that there is no attack on the findings of fact and no perversity appeal. But in the end, with some hesitation, I have come to the view that the ET did not sufficiently focus on the question which Underhill P says needs to be considered. And, if they did focus on it, it does not seem to me that they gave any sufficient explanation as to the conclusion they reached.

**29. I have therefore decided to allow the appeal and to remit to the ET the question of whether the detrimental acts of suspension and then dismissal were because of the protected acts.** It seems to me there may be some merit in this question going back to the same ET, although there are always problems with such an approach. On balance, I am going to say that it should be remitted to the same tribunal who should reconsider it specifically in the light of the authority I have referred to. [emphasis added]

7. The sealed EAT Order remitting the matter was in the following terms:

(2) The issue whether the Appellant was suspended and/or dismissed because he had done a protected act should be remitted to the Employment Tribunal for them to reconsider in the light of the Appeal Tribunal's judgment; and **for them to consider in particular, whether, in so far as the reason for his suspension and/or dismissal involved features related to or arising from any protected act, those features were "properly separable" from the protected act.** [emphasis added]

### The judgment on remission

8. The Employment Tribunal stated of the remission:

4. On Appeal, the Employment Appeal Tribunal held that:-

4.1 the Claimant's suspension was a detriment; and

4.2 the question of whether the detrimental act of suspension and dismissal were because of the protected acts carried out by the Claimant, should be remitted to the same Tribunal.

5. The Employment Appeal Tribunal in particular referred this Tribunal to the findings in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL11, and the decisions of the Employment Appeal Tribunal in *Martin v Devonshires Solicitors* [2010] UKEAT0086/10, *Woodhouse v West North West Homes Leeds Limited* UKEAT/0007/12/SM, and *Page v The Lord Chancellor* [2021] EWCA Civ.254.

9. The Employment Tribunal did not further analyse the relevant authorities.

10. Having referred to the background the Employment Tribunal held:

14. Against that background, we have considered the remitted points,

14.1 It is correct that the Respondent has always accepted, as is set out in the Tribunal's decision, that the two Employment Tribunal claims brought by the Claimant were protected acts within the meaning of Section 27 of the Equality Act 2010;

14.2 It is correct that it was immediately following the outcome of the second of those Tribunal claims that the Claimant was suspended and thereafter dismissed; and

14.3 Dismissal was a detriment and, as has been found on appeal, suspension was a detriment.

15. The Tribunal is astute to the fact that employers might well say that a suspension and/or a dismissal were not carried out because of any protected act but because of some other matter involving the relationship between the parties and that a Tribunal should be cautious before accepting that argument so that the employees' rights under Section 27 of the Equality Act 2010 are not lost.

16. We have been referred to the case of *Madarassy v Nomura International Plc* [2007] ICR 867, pointing out that a difference in status (here the making of a protected act) and differing treatment (here the Claimant's suspension and / or dismissal) is not sufficient to reverse the burden of proof in Section 136 of the Equality Act 2010.

**17. The question is whether the protected acts contributed to the Claimant's suspension and later dismissal.**

18. Looking at the findings of fact which we originally made, we are satisfied that they did not. **What the second Employment Tribunal claim did was to set the timetable for the Respondent's acts. The Respondents, for reasons which were both sensible and understandable, did not take any action in relation to the Claimant's employment whilst the second set of proceedings were on foot and subsequently being heard. The Claimant was absent from work through illness at that time and they waited for the Claimant to return to work when fit to do so and after the conclusion of the Tribunal Hearing before taking any steps.**

19. On behalf of the Respondent Mr Salter, rightly drew our attention to the need to look to see if there was unreasonable and unexplained material which could reasonably provide a platform to draw inferences of discrimination. In answer to that, he makes seven specific points:-

19.1 that **the relationship between the Claimant and the Respondent was toxic;**

19.2 **that this is an obviously potentially fair reason for dismissal;**

19.3 **that there is little (if any) challenge** made by the Claimant to the key evidence of the Respondent's witness **as to their beliefs** or the reasons for them;

19.4 the Tribunal was clear that every step that the Respondents undertook were reasonable ones;

19.5 there was no finding that any action was in breach of any policy or practice by the Respondent;

19.6 the Tribunal made no criticism of the Respondent in the procedure it followed in dismissing the Claimant; and

19.7 there was no criticism made of the evidence given by the Respondent's witnesses.

20. We then ask ourselves why was the Claimant suspended, and was his suspension because of the protected acts?

20.1 **The Claimant was suspended because the relationship between himself and the Respondent had broken down and in particular the relationship in his working environment was detrimental to the efficient work of the Respondent's Team in particular;**

20.2 The Claimant himself accepted that the working relationship had broken down;

**20.3 The previous Employment Tribunal considered that the Claimant was willing to cast around to make allegations of discrimination however ill founded;**

**20.4 The Claimant demonstrated an unwillingness to resolve issues in the work place. He refused to even give details of alleged (and subsequently found to be ill founded) allegations of discrimination to his employer or ACAS during early conciliation;**

20.5 The Claimant had not co-operated with regard to the disclosure of Occupational Health advice whilst complaining about a lack of reasonable adjustments in relation his work; and

20.6 the Claimant had responded to a reasonable management decision not to allow him to adjust his working hours, due to business needs, by making (subsequently found to be unfounded) allegations of discrimination against the Line Manager.

**21. Having sensibly and reasonably waited for the outcome of the Claimant's second Tribunal claim and for him to return to work from sickness absence before taking any act to suspend the Claimant, those matters set out at paragraph 20 above were the reasons for the Claimant's suspension. There was a mutual acceptance of a breakdown in the working relationship which the claimant felt he had no need to contribute to restoring.**

**22. The reasons for dismissal were that the relationship between the Claimant and other staff in the unit and with the First Respondent more broadly had broken down. This was irretrievable, the respondent reasonably concluded. The Claimant had not followed internal procedures to resolve grievances and had declined mediation in the past, with the Dismissing Officer not being satisfied that he would engage fully if this was offered again.**

**23. The Claimant has not established any facts from which the Tribunal could conclude that the Claimant has been the victim of discrimination. The reasons for suspension and for dismissal have been set out and they are not because of the protected acts but rather because of the Claimant's conduct as set out above. He brought unfounded allegations, had been willing, in the words of the 2017 tribunal judgment to cast about for anything he could think of to put forward as an allegation of discrimination, regardless of his lack of merit. He refused to accept the findings of the previous tribunal[s], referring to "fighting" for a "just cause" and that "just because it wasn't upheld doesn't mean it didn't happen".**

**24. Further, he refused to consider that there was anything which he could or should do to repair the working relationship which was mutually accepted as being broken. He did not engage in internal procedures fully or at all .**

**25. Accordingly the working relationship between the claimant, his managers and the First respondent generally was unviable.**

**26. Even if the Claimant had established any facts sufficient to shift the burden of proof (he did not) we would have been satisfied that the Respondent had demonstrated non-discriminatory reasons for both the suspension and the dismissal.**

27. The claims remain dismissed. [emphasis added]

### The appeal

11. Judge Stout permitted two grounds of appeal to proceed:

(1) The Employment Tribunal erred in law by failing to address the issue of causation in relation to the claimant's victimisation claim that it was directed by HHJ Shanks to address when the last appeal was upheld.

(2) The Employment Tribunal failed to give adequate reasons for its decision in that it did not address the claimant's main point on the causation issue which is that his relations with colleagues were good (or, at least, significantly better) before he brought the ET claims, from which he argued it should be inferred that his protected acts were a material part of the reasons why working relationships between him and his colleagues soured. His submissions on this issue were in particular set out at paragraphs 79-134 of his written submissions to the ET for the remitted hearing and further developed in his reply submissions.

12. Judge Stout explained her reasons:

**Paragraphs 22-27 of HHJ Shanks' judgment set out the law on causation that the Tribunal needed to apply. Paragraphs 27-28 explain why HHJ Shanks considered that the Tribunal's conclusion that the reason for suspension and dismissal was the breakdown in working relations 'begs the question' as to whether that breakdown was 'properly separable' (*Martin v Devonshires*) from the protected acts. Paragraph (2) of HHJ Shanks' order specifically directed the Tribunal to consider that question.**

It is arguable that the Tribunal did not follow the EAT's direction. Although the Tribunal refers at paragraph 5 to the key authorities by name, it does not identify the principles dealt with in those authorities. The only authority in respect of which it sets out a principle is *Madarassy* at paragraph 16. **At paragraph 17, the question the Tribunal sets itself to answer is not the one it was directed by the EAT to consider and also fails to focus on the respondent's conscious/unconscious reasons. Nowhere in the judgment does the Tribunal expressly address the question of whether the matters it finds were the reasons for suspension/termination were 'properly separable' from the protected acts. The reasons given at paragraph 20 arguably still beg exactly the question that HHJ Shanks identified last time.** It concerns me also that at paragraph 26 the ET refers to being satisfied that there are 'non-discriminatory reasons' for the suspension and the dismissal, but this was a victimisation claim not a discrimination claim and the focus needed to be on the protected acts and the part they played (if any) in the respondent's witnesses' thinking.

The reasons challenge is also arguable. [emphasis added]

## The relevant law

13. Section 39(4) **Equality Act 2010** (“EQA”) provides:

(4) An employer (A) must not victimise an employee of A's (B)— ...

(c) by dismissing B;

(d) by subjecting B to any other detriment

14. Section 27 **EQA** provides:

### 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.**

(3) **Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.** [emphasis added]

15. In the relevant complaints of victimisation the question was whether the claimant was suspended or dismissed because he had done the protected acts.

16. The use of the term “because” means that the test is whether the protected acts were an effective cause of the treatment: **Nagarajan v London Regional Transport** [1999] ICR 877. It is not necessary that the protected acts are the sole or principal reason for the treatment.

17. Being subject of an allegation of discrimination is likely to be upsetting, particularly if the allegation is not made out. However, because of the importance of complaints of unlawful discrimination being properly investigated and determined, there is a broad protection for those who

make such complaints from retaliation, even if the complaints fail, unless the person making the complaint gives false evidence or makes false allegations and in so doing acts in bad faith.

18. There may be circumstances in which there is conduct separable from the protected act. In

**Martin v Devonshires Solicitors** [2011] I.C.R. 352, Mr Justice Underhill stated:

22. We prefer to approach the question first as one of principle, and without reference to the complex case law which has developed in this area. **The question in any claim of victimisation is what was the “reason” that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and if not, not.** In our view **there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable.** The most straightforward example is where the reason relied on is the *manner* of the complaint. Take the case of an employee who makes, in good faith, a complaint of discrimination but couches it in terms of violent racial abuse of the manager alleged to be responsible; or who accompanies a genuine complaint with threats of violence; or who insists on making it by ringing the managing director at home at 3 a.m. In such cases it is neither artificial nor contrary to the policy of the anti-victimisation provisions for the employer to say “I am taking action against you not because you have complained of discrimination but because of the way in which you did it”. Indeed it would be extraordinary if those provisions gave employees absolute immunity in respect of anything said or done in the context of a protected complaint. (What is essentially this distinction has been recognised in principle—though rejected on the facts—in two appeals involving the parallel case of claims by employees disciplined for taking part in trade union activities: see *Lyon v St James Press Ltd* [1976] ICR 413 (“**wholly unreasonable, extraneous or malicious acts**”: see per Phillips J at p 419 c - d ) and *Bass Taverns Ltd v Burgess* [1995] IRLR 596 .) **Of course such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purports to object to “ordinary” unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately made in some cases does not mean that it is wrong in principle.**

25. We conclude, therefore, that the distinction made by the tribunal in reaching its conclusion as to the employers’ reason for dismissing the claimant ought as a matter of principle to be regarded as legitimate. **The distinctions involved may appear subtle, but they are real; and they require to be recognised if the anti-victimisation provisions, important as they are, are to be confined to their proper effect and not to become an instrument of oppression. This is an area of law where, alas, the questions to be answered cannot always be straightforward—not so much because the law is complex as because of the complexities of legislating for the subtleties of human motivation.** [emphasis added]

19. In **Martin** Underhill J doubted that the burden of proof provisions would be of much assistance in cases of this sort:

39. This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination—generally, that is, facts about the respondent’s motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else’s head—“the devil himself knoweth not the mind of man” (per Brian CJ, YB Pas 17 Edw IV f1, pl 2). But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent’s motivation and what is in issue is its correct characterisation in law. In the present case, once the tribunal had found that the reasons given by Mr Hudson and Mr Buckland in their letters reflected their genuine motivation, the issue was indeed how that was to be characterised and the burden of proof did not come into the equation. (Cf our observations in *Hartlepool Borough Council v Llewellyn* [2009] ICR 1426 , 1448 c, para 55.)

20. In **Page v The Lord Chancellor** [2021] EWCA Civ 254, [2021] ICR 912 Lord Justice Underhill applied what he had said in **Martin** and stated:

57. Mr Diamond did not seek to challenge the correctness of the decision in *Martin* , but he did draw our attention to the decision of the Employment Appeal Tribunal in *Woodhouse v West North West Homes (Leeds) Ltd* [2013] IRLR 773 . In that case the respondent’s attempt to rely on *Martin* was rejected. At paras 101–102 of his judgment **Judge Hand QC expressed what he described as “a further note of caution”, saying that the circumstances in *Martin* were “exceptional” and that if it was followed indiscriminately where complainants acted in an irrational way it would undermine the protection provided by the anti-victimisation provisions. I agree with him that it is important that that should not occur; but I do not, with respect, believe that it is necessary to go beyond what I said in paras 22 and 23 of my judgment in *Martin* as quoted above. As I say there, employment tribunals can be trusted to recognise the circumstances in which the distinction there described can be properly applied, and I do not believe that it is useful to apply a requirement that those circumstances be exceptional: I note that Lewis J made the same point in *Panayiotou* (see para 54 of his judgment). [emphasis added]**

21. Where a claim is remitted from the EAT to the Employment Tribunal the jurisdiction of the Employment Tribunal is limited to determining the specific question or questions remitted. In **LTRS Estates Ltd (t/a Orwells) v Hamilton** UKEAT/0230/12 Mr Justice Langstaff (President) stated at paragraph 13:

The Employment Appeal Tribunal is entitled by s 35 of the Employment Tribunals Act 1996 to remit a case to an Employment Tribunal. **It is the remission which gives the Employment Tribunal its jurisdiction. A tribunal which goes outside the scope of the remission is in error of law.** [emphasis added]

## **Analysis**

22. Unfortunately, the appeal is clearly made out. HHJ Shanks stated that the judgment of the Employment Tribunal “begs the question whether the breakdown was in substantial part because the Claimant had brought ET proceedings naming, in particular, his line manager”. In that context he said that the Employment Tribunal should have considered “whether the breakdown resulted only from the manner (or other features) of those proceedings which were properly separable from the fact of the bringing of the proceedings”. The order of HHJ Shanks stated that the issue for the Employment Tribunal was “whether the Appellant was suspended and/or dismissed because he had done a protected act” and that the Employment Tribunal should consider in particular “whether, in so far as the reason for his suspension and/or dismissal involved features related to or arising from any protected act, those features were "properly separable" from the protected act”. The context was that it was a given that relationships had broken down – the remission required the Employment Tribunal to consider whether the breakdown was in substantial part because the claimant had brought ET proceedings or because of other matters that were properly separable.

23. If the respondent disagreed with the basis on which the matter was remitted it should have raised any problem with HHJ Shanks at the earliest opportunity, or appealed his determination. They did neither.

24. The terms and basis of the remission set the limit of the jurisdiction of the Employment Tribunal. Instead of doing what was required by the remission, the Employment Tribunal only asked itself the question “whether the protected acts contributed to the Claimant’s suspension and later dismissal”. The Employment Tribunal did not consider separability. Reading the judgement as a whole it is clear that the main conclusion was that the reason for suspension and dismissal was that relations had broken down between the claimants and his colleagues and manager. That was already taken as a given, and the core issue remitted to the Employment Tribunal was whether that breakdown was solely as a result of matters that were properly separable from the protected acts. As stated above if the respondent thought that was the wrong question they should have challenged the judgment of HHJ Shanks.

25. The remission did not require the Employment Tribunal to apply the burden of proof provisions, which Underhill LJ noted in **Martin** may not be particularly helpful in cases of this nature. In circumstances in which, on any view, the starting point of the breakdown in relations that resulted in the claimant's suspension and dismissal were his allegations of discrimination, it is hard to understand how the Employment Tribunal could have concluded that a *prima facie* case of victimisation had not been made out. The Employment Tribunal held, in case it was wrong in deciding that the burden had not shifted to the respondent, that the respondent “had demonstrated non-discriminatory reasons for both the suspension and the dismissal”. As Judge Stout noted, the Employment Tribunal appears to have been applying the test for direct discrimination rather than victimisation. All that said, the burden of proof is not the subject of a specific ground of appeal, and is not of any great relevance because the matter was remitted primarily to answer the question of whether the breakdown in relations that resulted in suspension and dismissal was only because of matters that could properly be separated from the protected acts.

26. The Employment Tribunal should bear in mind that the fact that the allegations had not been established did not mean that the claimant was not protected by the victimisation provisions. A concern that discrimination claims might be brought in the future could fall within section 27(1)(b) **EQA** as involving a belief that the claimant “may do” a protected act.

27. The matter will have to be remitted once again to the Employment Tribunal. The remission will have to be to a differently constituted Employment Tribunal because the failure to answer the key question that was remitted was a fundamental error. The question the Employment Tribunal asked itself resulted in it making the same error that resulted in the successful first appeal. The remission is on the terms as previously set out by HHJ Shanks which still govern the jurisdiction of the Employment Tribunal.