Appeal No. UKEAT/0274/18/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 7 & 8 March 2019
Judgment handed down on 21 May 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MR C ASTON APPELLANT

THE MARTLET GROUP LIMITED
(FORMERLY JIM WALKER AND COMPANY LIMITED T/A I-RIDE) RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR TOM KIRK (of Counsel) Gaby Hardwicke Solicitors 33 The Avenue Eastbourne East Sussex BN21 3YD
For the Respondent	MR DANIEL TATTON-BROWN (One of Her Majesty's Counsel) DMH Solicitors Griffin House 135 High Street Crawley RH10 1DQ

SUMMARY

VICTIMISATION DISCRIMINATION – Detriment

DISABILITY DISCRIMINATION – Disability related discrimination

PRACTICE AND PROCEDURE – Estoppel or abuse of process

Following a period of long-term sickness absence with depression, and exploration of the possibility of a return to work, the Claimant was dismissed. At a preliminary hearing (PH) a dispute about the EDT was determined. A claim of unfair dismissal was then dismissed as out of time, but time was extended in respect of discrimination claims. At the time of the original dismissal, the Respondent had offered to pay the Claimant £4000 as a goodwill payment. That payment was never made and was later withdrawn. During the course of giving evidence at the PH, a Director of the Respondent reiterated that offer. In subsequent correspondence it was stated that this was conditional upon the claims being withdrawn, and no payment was made.

At a full hearing the Employment Tribunal dismissed claims of failure to comply with the duty of reasonable adjustment, and disability-related discrimination (section 15 **Equality Act 2010**) relating to the handling of the sickness absence and the dismissal. It also dismissed a claim of victimisation relating to the non-payment of the £4000 following the PH. The Claimant appealed in respect of certain of the section 15 complaints and the victimisation complaint.

Held:

(1) The Tribunal had erred in not applying the correct legal test when considering the victimisation complaint. But that complaint was outwith the scope of section 108 **Equality Act 2010** and the evidence given at the PH attracted judicial proceedings immunity. As this was a necessary factual element of the victimisation complaint, it was bound to fail and the dismissal of it therefore stood. **Derbyshire v St Helens MBC**

[2007] ICR 841, **P v Commissioner of Police of the Metropolis** [2018] ICR 560 and **Rowstock Limited v Jessemey** [2014] ICR 550 considered.

(2) The Tribunal was wrong to treat itself as bound, at the full merits hearing, by a finding of fact made at the PH which had not been necessary to the determination of the PH issues. **Foster v Bon Groundwork Limited** [2012] ICR1027 applied.

(3) The Tribunal erred in concluding that in not warning the Claimant that if he did not accept a particular alternative post, he would be dismissed, he had not been treated unfavourably for section 15 purposes. **Trustees of Swansea University Pension and Assurance Scheme v Williams** [2019] ICR 230 applied.

(4) The Tribunal wrongly failed to determine whether, for section 15 purposes, the dismissal was a proportionate means of achieving a legitimate aim. **York City Council v Grosset** [2018] ICR 1492 considered.

The dismissal of the relevant section 15 complaints was therefore quashed and those complaints would be remitted.

HIS HONOUR JUDGE AUERBACH

Introduction

1. This is an appeal by the Claimant before the Employment Tribunal ("ET"), from a reserved decision of the ET sitting at London South (Employment Judge Martin and unidentified members), in which all of his claims of disability discrimination were dismissed.

2. The Respondent before the ET, and now to this appeal, supplies bikes, bike parts and accessories to the retail market. It has around 40 employees. It was formerly called Jim Walker and Company Limited. It trades under the name i-Ride. The Claimant, now the Appellant, was employed by the Respondent from 2005. He became Operations Manager in 2011. I shall refer to the parties as they were in the ET, as Claimant and Respondent.

3. The Claimant presented a claim form on 20 March 2017 claiming unfair dismissal and discrimination by reference to the disability of depression. The discrimination claims were of direct and indirect discrimination, discrimination arising from disability and failure to comply with the duty of reasonable adjustment. It was his case that his employment had ended on 4 January 2017.

4. The claims were defended. It was the Respondent's case that the employment had ended on 17 May 2016. Accordingly, the grounds of resistance included time points. The Respondent did not, at that initial stage, admit the Claimant's disabled status, and all the claims were also otherwise defended on their merits.

5. On 11 August 2017 there was a Preliminary Hearing ("PH") before EJ Martin. In a reserved decision, she held that the Claimant had been dismissed and that the effective date of termination was 17 May 2016. She did not find it not reasonably practicable for the Claimant to have presented the unfair dismissal claim in time. So that claim was dismissed. However, she considered it just and equitable to extend time for presentation of the disability discrimination claims to the date when they were presented. Those claims alone, therefore, went forward to a full merits hearing.

6. I need to set out some of the Judge's findings and reasoning in that PH decision.

7. The Claimant went off sick in June 2015. There had been a home visit in September 2015. There were then meetings in February and April 2016 during which the possibility of a return to work had been discussed, and then there were exchanges of emails in May.

8. In paragraph 6 of her decision the Judge wrote:

> **"It was common ground that from February 2017[1] the Claimant and Respondent were in discussion about a possible return to work. The Claimant did not want to return to the same role he was undertaking previously because of his disability. The Respondent is a small organisation and there were limited options available to them in terms of alternative work for the Claimant. The initial suggestion they made was refused by the Claimant and after the meeting on 14 April 2016, the Respondent tried to find another alternative but were unable to. There were then several email communications."**

9. She then set out the email exchanges in May 2016, beginning with one from Paul Butler, a Director of the Respondent, to the Claimant, of 6 May 2016:

> **"Dear Chris**
>
> **Following out recent discussions and meetings related to your application for a different role here at I-ride to the original Operations Manager role, it is with regret that I am afraid to say that we will be unable to offer you a different role to the one I outlined in my previous job specification to you. As you know last summer before your period of absence, you told us that you did not want a managerial role and those responsibilities and that you wished to resign.**

[1] The Judge plainly meant "February 2016."

Subsequently, earlier this year you asked us to consider a reduced role for you. Consequently, we met with you and then prepared the role set out in my last job specification to you.

However, in our last meeting you said that you were not happy about doing some of the things mentioned there, like monitoring the Wiggle website etc and helping with the preparation of CPO spreadsheets, sales offers etc.

Therefore, unfortunately, after much consideration, I am afraid we are not able to see a way to offer you a role working with us.

Chris, this decision has been reached after much thought and with much regret on our part as we value you as a friend and wish you and your family all the best for the future we would like to offer you an amount of £4,000 as a gesture of goodwill on our part for your future."

10. The Claimant replied on 10 May 2016:

"Hi Paul I am obviously very disappointed to hear this. Having worked for the company for over a decade, it's going to take a bit of time to fully process. I'm unclear on exactly what you are saying though. When we had our meeting a few weeks ago, I thought that everything seemed to have been discussed and we had a plan going forwards. The last thing I mentioned to you was getting a new bike sorted and now I don't know whether you're firing me, or am I redundant or what? Regards Chris".

11. On 16 May 2016 Mr Butler replied:

"Dear Chris

Thank you for your message

What has been clear to myself and Ian is that firstly, you did not want your original role with us….

Therefore, you asked us to consider finding a less responsible role for yourself within the company. So secondly, this we did: however, in your message to me and at our subsequent meeting with Ian and myself you made it quite clear to us that you did not want this role…..

So following our last meeting, and at your request, we have considered very carefully whether there is a third option of scope to offer you another role within the company doing exclusively purchasing and along the lines we discussed with you: and unfortunately, I am afraid to say that we are unable to come up with another option for you.

Accordingly, we are of the view …. that you have left us.

However, Chris you should appreciate that we have come to this point only after much consideration and a great deal of thought to see if we can make a suitable role here for you within the company which will be acceptable to you: and unfortunately, try as we might, we are just unable to do so. Therefore it is with much regret that it seems that our working relationship with you has come to an end: but we do value your contribution over the years and as a friend, which is why we were prepared to give you some money out of our own good will to help you with your new family."

12. Then on 17 May 2016 the Claimant responded:

"Dear Paul

Thank you for your email.

> **Thank you, too for your gesture of goodwill of a £4,000 payment which I am happy to accept. I will require a P45 in order to pursue work in the future and would be grateful if this could be sent.**
>
> **Regards Chris."**

13. EJ Martin's primary findings about what happened thereafter, were set out at paragraphs 11 to 13 of her Reasons, as follows:

> **"11. Following this were a series of emails regarding the £4,000 payment and how it should be categorised to minimise any tax payable; without prejudice commutations [*sic*] between solicitors and one payslip sent to the Claimant (for a nil amount) which the Respondent said was sent in error. On 6 December 2016, the Claimant sent via his solicitor a grievance. The Respondent replied saying that as the Claimant was not an employee as his contract of employment had ended in May 2016 and consequently it would not respond to the grievance.**
>
> **12. The Claimant then sent a letter to the Respondent on 7 January 2017:**
>
> ***"My solicitors, Lawson Lewis Blakers, have informed me you have refused to deal with my grievance because you claim I have left. Obviously, this is not the case, hence the ongoing communications.***
>
> ***However due to your refusal to deal with my grievance you have left me with no alternative than to resign my employment. Because of the way you treated me, I do not consider I am obliged to give you any notice and accordingly will you accept this letter a notification of termination of my employment as from the date of this letter".***
>
> **13. The Claimant's P45 was not sent to him until January 2017 and at the date of the hearing the £4,000 had not been paid."**

14. After discussing the arguments about the Effective Date of Termination ("EDT"), the Judge's conclusion about that (at paragraph 22 of her Reasons) was this:

> **"I find that the EDT was on 17 May 2016. I find that looking at the emails objectively a reasonable person would conclude that the Claimant's employment had terminated. I find that the Respondent terminated the Claimant's employment and that this was understood by the Claimant as he asked for his P45 thereby clearly demonstrating his understanding. The fact that the P45 was not sent until January 2017 and that one payslip was sent is not determinative. Although I accept that the wording of the email of 16 May 2017 could have been better written, I find the wording of sufficiently clear that objectively it should be understood that the Claimant's employment had ended."**

15. She went on to adjudicate the extension of time issues with the outcome that I have described.

16. Because of how the issues on appeal were argued out before me, I need to set out more fully than did EJ Martin, one aspect of how events unfolded between the May 2016 email

exchanges and the March 2017 issuing of the ET claim. This is that another director of the Respondent, Ian Wilson, sent the Claimant a reply to his letter of 7 January 2017, dated 13 January 2017. A copy was tabled by Mr Tatton-Brown during the hearing before me.

17. The body of the letter from Mr Wilson read as follows:

> **"Dear Chris**
>
> **Thank you for your letter dated 4th January which I received on Monday.**
>
> **I see that you are not purporting to resign from your employment with Jim Walker & Co Ltd. As the Company's lawyers explained to your lawyer in their letter last month, your employment with the Company ended many months ago last May.**
>
> **This was clearly explained to you more than once in Paul's exchange of emails with you in May 2016 and to which you clearly agreed at the time in your email of 17th May 2016. In that message you also specifically asked for your P45 indicating your clear understanding of the position.**
>
> **Paul replied asking you to where he should send your P45 but you did not get back to him. I am therefore attaching your P45 for you.**
>
> **After your message of 17th May 2016 we then did not hear from you for many weeks and months until we received a letter from your lawyers. In this period you did not attempt to call any of us or to contact us in any way – you did not make any attempt to work or to otherwise follow the provisions of your contract of employment. Chris, you knew full well that your employment with us had ended; and your actions were not of someone who believed that they were still employed by our company.**
>
> **Chris the facts are these.**
>
> **In the summer of 2015 you resigned in front of many people in the company.**
>
> **Our reaction was only to try and help you and Paul told you to think about it and you were then signed off sick by doctors notes every 2 weeks for a period of time.**
>
> **At the beginning of 2016 you advised us that your doctor had signed you as healthy to return to work and you asked us to consider a role for you. However, you specifically made it very clear to us that you did not want the same role as you previously held – in particular you did not want any management responsibility and you wanted a lighter workload.**
>
> **Therefore, Paul and I spent considerable time with each other and with you to try to find a role that was right for both you and the business. Indeed, we did offer you one role, which you refused – therefore, we spent more time meeting and consulting with you to try to find another role acceptable to you, but unfortunately that was not possible, hence the exchange of emails between yourself and Paul of last May.**
>
> **You now write to me in December suddenly alleging you are disabled under the Equality Act. However, (1) you previously gave us a doctor's note saying you were healthy, and (2) as you know, we then sought Occupational Health advice whose professional report also said you were healthy and you were not disabled under the Act.**
>
> **Chris, as our lawyers have said, you are now well outside the 3 months' time limit to bring any claim for unfair dismissal or discrimination (which in any case is most certainly denied for the reasons set out above amongst other things).**
>
> **And your letters are contradictory and inconsistent with what you have done. On a personal note, I find this very disappointing when in the past all we have done is try to help and to**

support you. I can only think that someone else is giving you bad advice and pressuring you to come up with these suggestions.

Despite all of this I still like you – and the offer we made last May to give you a goodwill payment was made out of our own kindness because we wanted to give you a gesture, a gift, to help you with your new family. Initially, it seemed you accepted this – but then all we hear from you afterwards is through your lawyers – again, this is very disappointing.

Chris, I can assure you that we have treated you very fairly. Our lawyers advise that you are out of time to bring any claim in a tribunal; and we owe you nothing – despite this, as a gesture of the warmth and the regard that we still have towards you, we are still prepared to hold open the original goodwill offer to you of £4000. However, if this is not accepted by the end of the next working week, by close of business on the 20th of January, then I am afraid that no more offers will be made at all."

18. I now need to say something about events at the PH in the ET on 11 August 2017. During the course of it, both Mr Butler and Mr Wilson gave evidence. Both were asked questions during cross-examination, about the £4000 offer. In my bundle was the Judge's typed note of the relevant parts of the hearing, which the parties accepted as a fair record.

19. The note records the following exchanges during the course of the cross-examination of Mr Butler about the 6 May 2016 letter:

"Q: Then in next paragraph, you offer him £4000 good will gesture

A: Yes

Q: Your ET3 say agreement for C to leave. Has to be offer and acceptance, you say ended by agreement. Are you saying that [t]his offer of £4000 offer to terminate

A: No separate it was a gift."

20. Then, a little further on, the following is recorded:

"Q: We are agreed £4000 is not contingent on anything, nothing has to be performed

A: That is correct"

21. A little further on, in the course of questions about the May 2016 emails, these exchanges are recorded:

"Q: Then you reoffer £4000

A: As a gift, yes

Q: Claimant's response p100. You say this is acceptance of his termination

A: Yes. Asked for P45 to pursue work in the future

Q: You offered £4k, no strings attached and he accepted

A: Yes

Q: Did you pay him this

A: No

Q: Can see why in what happened afterwards on 5 June. Got accountant advice

A: Yes, wanted it to be tax efficient as possible so Ian contacted the accountants

Q: You asked him to sign a letter

A: And his bank account details and home address for P45

Q: You have his bank details as paid his wages

A: Asking him to confirm, could have changed banks

Q: So only reason is did not give bank details

A: Yes

Q: So would give it to him today

A: Yes"

22. Further on, the Judge records the cross-examination of Mr Wilson about the £4000 offer, and a June 2016 letter from the Respondent's accountants relating to it. In the course of his answer Mr Wilson said:

> **"… when came to an end, wanted to give him something, not redundancy, knew this would be about £4k tax free, wanted to give tax free and asked how to do it tax free. They came up with letter, whatever last paragraph is no compromise agreement not signed so knew he could still bring a claim against us. Still wanted to give him something. So thought were giving him a good benefit in terms of what tax efficient to move on."**

23. Then, in her notes of Mr Wilson's cross-examination, the Judge recorded this:

> **"Q: Reason you did not pay him £4k was because did not sign letter**
>
> **A: Absolutely not, I did reiterate would pay him £4k. (witness told not to say more as would be part of the without prejudice communications)."**

24. The note then records the following intervention from the Judge:

> **"Considering Mr Wilson saying wanted to pay the £4k and what he said about the relationship between him, Mr Butler with the Claimant, EJ said that parties are here, and**

before hear from Mr Aston (who is very anxious) perhaps they could have an initial chat to see if could settle this claim. Adjourned 15 mins (C needed a break anyway) at 11.40. Lunch 12.30."

25. The hearing continued after lunch with the Claimant giving evidence. There were then closing submissions and the Judge reserved her decision.

26. Following that hearing, but prior to promulgation of the Judge's decision, the Claimant's solicitors wrote to the Respondent's solicitors on 13 September 2017:

"We write in relation to the Preliminary Hearing which took place on 11 August 2017.

As you are aware your client's witnesses gave evidence on oath to the effect that the open offer of an unconditional ex-gratia payment of £4000 made by email on 6 May 2016 was still on the table.

Is this the case? Is so please can you confirm this in writing by return so that our client may consider the same?"

27. The Respondent's solicitors replied on 19 September 2017:

"Your letter is inaccurate. A discussion around the £4000 offer took place in open court at the Hearing. It was during the evidence of Mr Butler, who was under oath at that stage. It was then Mr Wilson who added a comment whilst he was not under oath.

Your counsel has reported back to you inaccurately.

It is not accepted that an unconditional offer of £4000 was made and was intended to be binding."

28. On 21 September 2017 the Claimant's solicitors replied enclosing their counsel's note of evidence, asking for the Respondent's counsel's note, and indicating that, if they could not agree, an application might be made for notes of evidence.

…

"Furthermore, we may apply to amend the claim to add a victimisation claim on the basis of your client's evidence at the Preliminary Hearing on 11 August 2017 followed by their refusal to pay the £4000 sum."

…

29. Subsequently, at a Case Management PH, the Claimant's solicitors applied for, and were granted, permission to amend. Amended grounds of complaint were tabled on 24 November 2017, including a claim of victimisation expressed as follows:

> **"The Respondent has victimised the Claimant by subjecting him to a detriment because the Claimant did a protected act. The detriment the Claimant has suffered is not receiving £4000 on or after 11 August 2017. The Claimant avers that he has been subjected to this detriment because he brought proceedings under the EqA 2010 and gave evidence or information in connection with proceedings pursuant to section 27(2)(a) and 27(2)(b) EqA 2010."**

30. Amended grounds of resistance tabled in December 2017 defended the victimisation claim in this way:

> **"… It is denied that the Respondent unconditionally offered the Claimant £4000 on 11 August 2017. It is denied that the Claimant has suffered a detriment. It is denied that any alleged detriment was because the Claimant brought these proceedings or because he has either given evidence or information in connection with these proceedings."**

31. On 6 March 2018 there was a further PH before EJ Crosfill. Case management orders, including a narrative summary and reasons, were subsequently promulgated. The Judge recorded that the Respondent had conceded the Claimant's disabled status. He determined an application for specific disclosure. He also heard an application by the Claimant for a deposit order relating to the section 15 claim concerning dismissal. An issue about the aim relied upon by the Respondent in its justification defence to that claim was resolved by it being agreed that the Respondent's pleading should be amended. It was then argued that the Respondent had little prospect of success on proportionality. But the Judge refused to make a deposit order.

32. In the course of his reasons he said this:

> **"I cannot say that the Respondent has little reasonable prospects of success on the particular issue identified. A great deal will turn on the disputed accounts of the meeting of 14 April 2016. In particular whether it was the Claimant's position <u>at that stage</u> that he would not undertake his original role. In addition, the availability of alternatives remains a live issue. These are fact sensitive matters that can only be properly determined after the evidence is heard."**

33. EJ Crosfill also ordered the Respondent to provide further information, including:

> **"[i]n the event that the Respondent relies on the offer of £4000 being conditional, what those conditions were."**

34. On 23 March 2018, in compliance with that direction, the Respondent's solicitors sent an email, including the following:

> **"In relation to the "offer" of £4000 in the August preliminary hearing, the Respondent's primary position in relation to the s.27 claim remains that there was no connection between the alleged protected act and the alleged refusal to pay the £4000.**
>
> **The Respondent will further say that:**
>
> **Our witnesses have the protection of judicial proceedings immunity;**
>
> **The alleged offer was conditional on the Claimant then withdrawing his claims. That is what prompted EJ Martin to then suggest the parties take some time to explore settlement, as a result of which there was an adjournment of around 30 minutes."**

35. The final hearing took place in April and June 2018, before EJ Martin and two lay members (although the decision unfortunately does not identify who they were). Following further days in chambers their reserved decision was promulgated on 3 September 2018.

36. Claims of direct and indirect discrimination having been withdrawn during that hearing, the claims to be determined were of failure to comply with the duty of reasonable adjustment, discrimination arising from disability (within section 15 **Equality Act 2010**) and victimisation (section 27). All of those claims were dismissed.

37. The decision records that the issues were set out in agreed document, a copy of which was also in my bundle. There was an issue as to whether or when the Respondent had actual or constructive knowledge of the Claimant's disabilities. The claims of failure to comply with the duty of reasonable adjustment were all concerned with aspects of the Respondent's handling of the Claimant's sickness absence and the question of a possible return to work. As for the

section 15 claims, there were three "somethings" said to arise from the Claimant's disability, but only one is relevant to this appeal, being his sickness absence. The Respondent did not dispute that such absence arose from his disability. He was said to have been treated unfavourably because of that, by various treatment concerned with the handling of the absence, and of the question of a possible return to work and, ultimately, the dismissal. There were issues as to whether there had been unfavourable treatment *because of* the somethings relied upon, and, if so, as to the justification defence.

38. The issues in relation to the victimisation claim were described as follows:

> **"Did the Claimant do a protected act? The protected act relied on is:**
>
> **a Bringing proceeding against the Respondent in the Employment Tribunal under the Equality Act 2010, and/or**
>
> **b. Giving evidence or information in connection with those proceedings? (cf GOV para 40[2])**
>
> **Did the Respondent subject the Claimant to a detriment? The Claimant relies on the Respondent by not paying him £4000 on or after 11 August 2017? The Respondent's case is that not paying the Claimant £4000 does not constitute a detriment (GOR para 29).**
>
> **Did the Respondent refuse to pay £4000 because of the protected acts? The Respondent denies that this was the reason; the Respondent's case is that the offer to pay £4000 was not unconditional and was subject to the Claimant coming to a global settlement by which the Claims would be withdrawn. This was what prompted EJ Martin to suggest both parties explore settlement as a result of which there was an adjournment of around 30 minutes.**
>
> **Does the doctrine of judicial proceedings immunity affect the claim for victimisation?**
>
> **Are any of the claims that are brought which relates to acts or omissions that post date the effective date of termination such that they fall within the ambit of section 108 EqA 2010?"**

39. As I have said, all of the complaints were dismissed. The Claimant appealed that decision. I will come to the relevant parts of the Tribunal's reasons later in this decision.

[2] I reproduce the text as typed, omitting paragraph numbers. "GOV" appears to be a typo for "GOC", the cross-reference here being to the particulars, or grounds, of claim.

The Appeal – The Legal Framework

40. There were six numbered grounds of appeal. Upon initial consideration of them on paper, HHJ Katherine Tucker permitted five of them (grounds 1, 2, 3, 5 and 6) to proceed to a Full Hearing, which, in due course, came before me. Mr Kirk of counsel appeared for the Claimant, as he did before the ET. Mr Tatton-Brown QC appeared for the Respondent, Mr Self of counsel having appeared before the ET. I had the benefit of extensive written and oral submissions from them both, and was referred to a number of authorities. This included the preparation of further submissions, overnight between day one and two after I drew both counsel's attention to **P v Commissioner of Police of the Metropolis** [2018] ICR 560 (SC). I thank them both for the diligence and quality of their arguments.

41. Grounds 1 and 2 both relate to the victimisation (section 27) claim. Grounds 3, 5 and 6 all relate to the section 15 claims. This is a convenient point to set out the relevant parts of those sections, as well, in view of what is to come, as sections 39, 108 and 136.

> **"15 Discrimination arising from disability**
>
> **(1) A person (A) discriminates against a disabled person (B) if --**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**
>
> **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.

39 Employees and Applicants

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

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

108 Relationships that have ended

(1) A person (A) must not discriminate against another (B) if—

(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and

(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.

…

(7) But conduct is not a contravention of this section in so far as it also amounts to victimisation of B by A.

136 Burden of Proof

(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.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;"

42. It is established that section 108 must be construed as capable of applying, in principle, to a claim of victimisation in respect of alleged conduct after a relationship has ended, which meets the tests in section 108(1)(a) and (b). That is both to secure compliance with EU law and to correct a plain drafting error. See: **Jessemey v Rowstock Limited** [2014] ICR 550 (CA).

43. In relation to the section 15 claims, it was common ground that the particular conduct, said to amount to unfavourable treatment, with which this appeal is concerned, was that identified at sub-paragraphs 37 (e), (f) and (k) of the amended Grounds of Claim. The substance of these complaints taken together was that the Claimant had not been warned at the end of the meeting on 14 April 2016 that the possible next steps might include his dismissal, that he was not offered the opportunity to accept the revised role before it was concluded that there was no role available to him, and that he was dismissed (which, as I have explained, had, by the time of the Full Merits Hearing been found to have occurred in May 2016).

44. It was not contentious before me that, for those claims to have succeeded, the "something" because of which the conduct occurred would have to be the sickness absence, and that that absence *did* arise in consequence of the disability. Nor was any issue taken with the Tribunal's finding that the knowledge requirement of section 15 had been satisfied.

The Tribunal's Reasons

45. I now describe and set out the relevant passages in the Tribunal's Reasons.

46. First, a matter arose concerning paragraph 6 of the decision arising from the PH on 11 August 2017 (extracted by me at paragraph 8 of this decision, above). For the Claimant it was argued that the Tribunal at the Full Merits Hearing was not bound by the findings made in that paragraph; for the Respondent that it was. The Claimant's position was that the finding that he had not wanted to return to his previous role was particularly contentious, though he also sought to take issue with the following sentences in that paragraph.

47. The Tribunal set out the competing arguments, revolving principally around the scope and application of **Foster v Bon Groundwork Limited** [2012] ICR 1027 (CA). Then, it set out its conclusion on this matter, at paragraphs 16 – 19, as follows:

> **"16. The issue at the August preliminary hearing was whether the claims were in time and whether to extend time. Both parties provided witness statements for that hearing. The matters pertaining to paragraph 6 of the preliminary hearing judgment were addressed in the witness statements before the Tribunal and both parties must have thought this was a necessary ingredient for understanding the later emails which determined the time point. Consequently, the Tribunal finds that the findings at paragraph 6 were an integral part of the issue on time limits.**
>
> **17. In coming to this conclusion, the Tribunal considered the case law referred to by the parties and in particular the Foster case. In Foster, the issue of dismissal not part of first ET1 presented which expressly said he was still in employment. By the time the Foster claim was heard the Claimant had been dismissed and in giving judgment the Tribunal made findings in relation to the Claimant's dismissal which was not part of that claim. His claim was dismissed. Mr Foster then brought subsequent proceedings including unfair dismissal for making a protected disclosure. The tribunal hearing the second claim considered itself bound by the first tribunal's judgment that the Claimant was dismissed for retirement and for no other reason.**
>
> **18. On appeal the EAT overturned that decision on the basis that the first tribunal did not have the jurisdiction to adjudicate on the issue in question. The claim in the first set of proceedings did not raise the issue of dismissal (Mr Foster was seeking redundancy payment by reason of lay off). In those circumstances it was held that the doctrine of issue estoppel did not apply as findings in relation to the dismissal were not a necessary ingredient in determining redundancy payments. In this case, the matters in para 6 of the 11 August 2017 judgment were part of the claim before Tribunal and evidence was advanced by both parties.**
>
> **19. The Tribunal's findings were clearly based on evidence from both the Claimant and Respondent as can be seen from the cross-examination and the witness statements provided for the hearing with evidence given under oath. The Tribunal considers both that the findings were a necessary ingredient and were based on evidence from both parties and stand as findings of fact to be relied on."**

48. The Tribunal then set out its findings of fact. After giving some context and background, it referred to the Claimant having, on 8 June 2015, an outburst at work, which, it said, led to a breakdown, and him going off sick. It described a series of exchanges of emails and texts thereafter in which Mr Butler was supportive and sympathetic. It then described further exchanges at the end of August, by which time the Claimant and his partner had a new baby, leading to a home visit by Mr Butler and Mr Wilson on 18 September 2015.

49. Thereafter the Respondent continued to receive doctor's notes "stating low mood, depressive mood, with no external cause." The Claimant attended the office Christmas party,

though still off sick. Then, in January 2016, the Claimant's SSP entitlement ended. He made contact seeking a meeting; and on 22 January "the Claimant submitted a fit note which said he may be able to return to work. All four boxes were marked: phased return, amended duties, altered hours and workplace adaptations with no further details provided."

50. The Tribunal then set out the following findings (at paragraph 37):

> **"37. The Claimant met with Mr Butler and Mr Wilson on 5 February 2016. The Claimant admitted in cross-examination that he was hazy on the detail of those meetings. By contrast Mr Butler and Mr Wilson seemed clear and consistent about what took place. The Respondent commissioned an occupational health report which was completed on or about 4 April 2016. It was common ground that this report was short and not very helpful. A meeting took place to discuss the report on 14 April 2016 with the Claimant, Mr Wilson and Mr Butler. The report was discussed, and the Respondents evidence was that the Claimant said he was interested in looking after the Respondent's own brand. The Respondent said this would only take an hour or so per week. There were discussions about an altered role and the pay for the altered role. The meeting ended with the Respondent saying it would discuss whether they could create an alternative role which me the Claimant's preferences."**

51. The decision then sets out the text of the emails of 6, 10, 16 and 17 May 2016 (which I have already reproduced) and then that from the Claimant of 7 January 2017. It records that the P45 was not sent until January 2017 and that as at that date the £4000 had not been paid.

52. Under the heading "The Tribunal's Conclusions" paragraphs 39 and 40 state:

> **"39. The Tribunal considered the relationship between the parties at the relevant times. It noted that the Claimant was a long-standing employee who had worked his way up in the company. He was clearly well liked and highly regarded by Mr Butler and Mr Wilson. This is demonstrated in the sympathetic and compassionate way they dealt with his sickness absence. When he asked to be left alone, they did that, and even in the communications before that their clear message to the Claimant was that he should get better. There was no pressure on him to return to work at any stage. It was the Claimant who started that process when his statutory sick pay was about to run out. There was no suggestion at any stage of capability proceedings being started. Both Mr Butler and Mr Wilson empathised with the Claimant and revealed their own personal issues and how they had got through them by way of encouragement. The Claimant's suggestion that the Respondent company had *"a culture that was unfriendly toward mental health*" is rejected. The evidence showed a sympathetic reaction to the Claimant's mental health issues.**
>
> **40. It is only when the Claimant's entitlement to SSP ran out that he mentions the possibility of returning to work even though he was still not completely better by this stage as demonstrated by him not wanting to return to the Operations Manager role because it was too stressful. Perhaps not surprisingly, the Claimant's recollection of the meetings in 2016 is not clear, he described his recollection as hazy. The meetings were a long time ago and the Claimant was still unwell. By contrast Mr Butler and Mr Wilson say that they recall the meetings well and they corroborate each other. The Tribunal found all witnesses to give**

> **credible evidence but prefer the evidence of Mr Butler and Mr Wilson in relation to the meetings in 2016 as their memory is on balance stronger."**

53. The Tribunal then records the Respondent's concession as to the Claimant's disabled status. On the knowledge issue in paragraph 42 it says this:

> **"42. …The Tribunal's finding is that the Respondent knew or should reasonably have known that the Clamant was a disabled person in 2016. The Claimant had been continually off sick from 8 June 2015 and only mentioned returning to work when his SSP ran out. The Claimant was not professing to be at full health during the period January to May 2018.[3] He did not want to return as Operations Manager but wanted something less stressful. All the indicators were there that the Claimant's medical issues would last for at least twelve months – it was only a few months to go until the anniversary of him going on sick leave. Both Mr Butler and Mr Wilson had experience of these types of medical situations and on balance I find they were aware that the Claimant condition would continue for a period of time longer to take him over the 12-month period required."**

54. There is then a section concerned with the complaints of failure to comply with the duty of reasonable adjustment, which are not the subject of this appeal, as such. However, I need to refer to two passages in this section. First, the Tribunal's consideration of the conduct said to have involved a breach of that duty included the following, at paragraph 48:

> **"48. <u>Not offering his original role back following his absence</u>: The Tribunal's finding from the August preliminary hearing is that the Claimant said could not do his original role and did not want to do it. Therefore, even if this was a valid PCP the Claimant has not made his case out."**

55. Secondly, at paragraph 57 there is this:

> **"57. The Claimant has sought to amend the issues in his submissions following the decision of the Tribunal at the preliminary hearing to read not allowing the Claimant to return to his original role minus his line management duties. This was not discussed at the outset of the hearing when an agreed list of issues was handed to the Tribunal. Both parties have been professionally represented throughout and the agreed list is what the Tribunal has considered not this alternative version brought up at the last moment. In any event, the Claimant did not suggest this option. He said he did not want his original role of Operations Manager."**

56. The Tribunal then turned to the section 15 claims. It recorded that it was accepted that the sickness absence arose from the disability. It found that two other "somethings" relied upon did not. There is no appeal in that regard. The Tribunal continued (at paragraphs 63 and 64):

[3] Clearly this was meant to refer to January to May 2016.

> **"63. Following on from this, the Tribunal finds that there was no evidence to substantiate the claim that the Claimant was unstable and/or incapable of performing work (or the role of Operations Manager). It was the Claimant who said he was unable to undertake the role of operations manager not the Respondent. The Respondent reacted to the situation they were presented with.**
>
> **64. In relation to the allegations of unfavourable treatment, the Tribunal considered each in turn. The Tribunal has considered whether unfavourable treatment alleged was because of the Claimant's absence on sick leave and whether the Respondent had a legitimate aim. The legitimate aim the Respondent relies on is the need to have a workforce that is able to undertake the job that they are contracted/required/asked to do and are capable of doing and that is required to be done by the Respondent at a wage level commensurate with that role. The proportionate means by which the Respondent says achieved that aim was to offer the Claimant a role that was suitable for his needs and required by the business and in the absence of such acceptance and any other role being available dismissing him."**

57. I need to describe the structure of the next part of the decision, before setting out the relevant passages. Starting at paragraph 65, the decision worked through the list of the various matters, said to involve a contravention of section 15, and set out its conclusions in relation to each in turn. In the list of issues these were assigned letters (a) to (k). In the decision that ground is covered by paragraphs 65 – 77. As I have explained, it is only the decision in respect of complaints (e), (f) and (k) that is challenged on appeal. The Tribunal's conclusions in relation to those section 15 complaints appear at paragraphs 69, 70 and 77.

58. However, another section 15 complaint concerned the non-payment of the "£4000 ex gratia payment promised: from May 2016 onwards." I interpose that *that* complaint was in the original claim, and, as stated, related to the failure to pay that sum following the original exchange of emails in May 2016. There was no victimisation claim in the original particulars of claim. That, as I have described, was added after the 11 August 2017 hearing, and related to the non-payment of that sum in the period after that hearing. It needs to be borne in mind that this appeal is not concerned with the section 15 complaint relating to the non-payment after May 2016, but with the distinct victimisation complaint relating to the non-payment after 11 August 2017. In its decision, the Tribunal refers to that victimisation complaint in the course of its discussion of the section 15 complaint, at paragraphs 71 – 73.

59. I now set out the relevant paragraphs of the decision, being 69 – 73 and then 77.

> **"69. <u>Not informing the Claimant in the meeting on 14 April 2016 of the potential adverse consequences to follow that meeting: 14 April 2016 onwards</u>: The Tribunal has found that Claimant was told in the meeting of 14 April 2016 that the Respondent would try to find another role for him as he had rejected the proposed revised position. The Respondent accepts it did not spell out what would happen if it could not find another role, however the Tribunal finds that it was implicit that if a role could not be found then the Claimant's employment was at risk. It was not until 6 May that the Respondent wrote to the Claimant as set out above, saying it could not find another role and giving its proposals regarding the termination of employment. It was open to the Claimant at that time to say that if that was the case he would accept the revised role. He did not do this. He did not say that he could now do the Operations Manager role. The Tribunal does not find this to be unfavourable treatment.**
>
> **<u>70. Not offering the Claimant the opportunity to accept the revised role before concluding that there was no role available for the Claimant: 14 April 2016 onwards:</u> As set out above the Tribunal finds that there was opportunity between the letter of 6 May and 17 May for the Claimant to say he would in the circumstances accept the revised role. The Tribunal does not find this to be unfavourable treatment.**
>
> **<u>71. Not paying the Claimant the £4,000 ex gratia payment promised: from 10 May 2016 onwards</u>: The Tribunal is troubled that the Respondent made an offer to the Claimant (paragraph 37 above) with no conditions and then did not pay the sum as it wanted a letter from the Claimant saying he had resigned. The Tribunal is also troubled that the Respondent said it did not have the Claimant's bank details when it had been paying directly into the Claimant's bank for some time and is troubled that the Respondent said in evidence it still wanted to pay this sum but then imposed conditions on this (namely withdrawing his claim). However, The Tribunal must consider whether the non-payment was something arising from the Claimant's disability.**
>
> **72. The Respondent made the offer of £4,000 in the knowledge that the Claimant was unwell and that he was disabled (or reasonably should have known this). Therefore, it seems unlikely that they would refuse to pay because of the Claimant's disability. The evidence from the Respondent is that the £4,000 was not paid on advice from their accountant who they contacted after the offer was made. The Respondent said that the advice was that the payment could be tax free provided certain wording was used but that the Claimant did not sign the relevant paperwork sent to him and did not provide his bank details. The Tribunal does not understand why in those circumstances the Respondent did not simply pay the money to the Claimant on the basis it would be taxed into the bank account it always had paid the Claimants wage's. It does not make sense. Even though the Tribunal is troubled by this it does not find that the reason for non-payment was something arising from the Claimant's disability.**
>
> **73. Similarly, in relation to the victimisation claim regarding the offer apparently made in the Tribunal. The Respondent made this offer knowing of the protected act (the Tribunal proceedings). It does not make sense that the reason it rescinded it was because of something arising from the Claimant's disability. The Respondent said it was because it would pay the sum only on the basis the Claimant withdrew his claim. The Tribunal does not find this to be something arising from the Claimant's disability.**
>
> **…**
>
> **<u>77. The Claimants dismissal of 4 January 2016, Alternatively, the Claimant's dismissal by virtue of the Respondent's conduct in May and June 2016</u>: The Claimant's dismissal arose as the Claimant was unable to continue his role as operations manager and the Respondent was unable to find alternative role which was suitable to both the Claimant and the Respondent. Clearly dismissal is unfavourable treatment, and the reason for it was that because of the Claimant's disability. This is something arising from his disability. The Respondent relies on a legitimate aim which is set out workforce that is able to undertake the job that they are contracted/required/asked to do and are capable of doing and that is required to be done by the Respondent at a wage level commensurate with that role. The proportionate means by which the Respondent says achieved that aim was to offer the Claimant a role that was[sic] suitable for his needs and required by the business and in the absence of such acceptance and any other role being available dismissing him."**

60. There is no other discussion of the victimisation claim. In the final paragraph, 78, the Tribunal simply states that in all the circumstances the claims are dismissed.

61. I can turn, now, to the substantive grounds appeal.

Grounds 1 and 2 – Victimisation Complaint

62. Both these grounds concern the victimisation complaint. Ground 1 contends that the Tribunal erred in paragraph 73 because it did not ask itself, as required by section 27, whether the Respondent subjected the Claimant to a detriment because he had done a protected act. Rather, it talks of whether there was conduct because of something arising from the Claimant's disability, using the language of section 15.

63. Ground 2 goes on to contend that the Tribunal erred in relation to the victimisation claim, with respect to the application of the burden of proof under section 136 of the **2010 Act**.

64. The Respondent, sensibly, admitted ground 1, as such – that is, that the Tribunal had erred in failing to apply the right legal test when considering the victimisation claim. But it disputed ground 2, and in fact, the answer postulated that, rather than remitting this complaint for fresh consideration, I should dismiss it. That was on the basis that there was no jurisdiction to entertain it because (a) an essential component of it was covered by judicial proceedings immunity; and/or (b) it was not within scope of section 108 of the **2010 Act**; and/or on the basis that (c) as a matter of law, *continuing* to pursue proceedings, as opposed to bringing or instigating proceedings, was not a protected act. The first two points had been live issues before the ET, but received no substantive consideration by it.

65. Mr Tatton-Brown confirmed during the course of argument that the third point was not a pleading point, but one about the scope of section 27. He argued that the reference in section 27(2)(a), specifically to "bringing proceedings" under the **2010 Act**, cannot be construed as embracing continuing with proceedings, which have already begun. This point did not appear in the ET's list of issues, and I do not know whether it was run before the ET. But, either way, Mr Kirk raised no objection to it being argued before me, and joined battle on it.

66. Both counsel agreed that these were all questions that I both could and should determine rather than remitting them to the Tribunal for further consideration, and both of them in terms invited me to do so. What scope exists for the EAT to determine issues, rather than remitting them, has been settled, following some debate in the earlier authorities, by the Court of Appeal in **Jafri v Lincoln College** [2014] ICR 920. Laws LJ (at paragraph 21, Underhill LJ and Sir Timothy Lloyd concurring on this aspect) said:

> **"I must confess with great respect to some difficulty with the "plainly and unarguably right" test elaborated in *Dobie*. It is not the task of the Employment Appeal Tribunal to decide what result is "right" on the merits. That decision is for the employment tribunal, the industrial jury. The appeal tribunal's function is (and is only) to see that the employment tribunal's decisions are lawfully made. If therefore the appeal tribunal detects a legal error by the employment tribunal's, it must send the case back unless (a) it concludes that the error cannot have affected the result, for in that case the error will have been immaterial and the result as lawful as if it had not been made; or (b) without the error the result would have been different, but the appeal tribunal is able to conclude what it must have been. In neither case is the appeal tribunal to make any factual assessment for itself, nor make any judgment of its own as to the merits of the case; the result must flow from findings made by the employment tribunal, supplemented (if at all) only by undisputed or indisputable facts. Otherwise, there must be a remittal."**

67. There is an important proviso, however. That appears from the observations of Underhill LJ (with which Lloyd LJ specifically agreed) at paragraph 47 of the decision:

> **"47. The disadvantages of this ruling can be mitigated to some extent if the Employment Appeal Tribunal always considers carefully whether the case is indeed one where more than one answer is reasonably possible: there are plenty of examples in the authorities of a robust view on that question being taken. Further, even where more than one outcome is indeed possible, there is in my view no reason why the appeal tribunal cannot still decide the issue if the parties agree; and in an appropriate case they should be strongly encouraged to do so. It is important to appreciate that the requirement to remit enunciated by the authorities referred to by Laws LJ is not based on a formal problem about jurisdiction. Section 35(1) of the Employment Tribunals Act 1996 reads:**

> **"For the purpose of disposing of an appeal, the Appeal Tribunal may –**
>
> **(a) exercise any of the powers of the body or officer from whom the appeal was brought, or**
>
> **(b) remit the case to that body or officer."**
>
> **A determination by the Employment Appeal Tribunal of an issue in respect of which the employment tribunal had erred in law would plainly be made "for the purpose of disposing of the appeal". Rather, the issue concerns, as Sedley LJ expressed it in the *Bennet* (see para. 30, at p. 892E), the correct use of that power. The point made in the authorities is that it is wrong in principle for the appeal tribunal as a reviewing tribunal to make a decision which falls within the scope of the fact-finding (and that includes fact-assessing and discretion-exercising) tribunal. But there can be no such objection where the parties consent."**

68. There was and remains, it must be noted, a dispute if there be jurisdiction to consider the victimisation claim, as to the merits of that claim, including the import of the evidence given at the 11 August 2017 PH and whether the stance taken in the correspondence which followed that hearing was, in the requisite sense, *because* the Claimant had continued with his claims and/or given evidence at that hearing. However, given the other facts found by the ET, and that I have the agreement of the parties to do so, I am satisfied, applying **Jafri**, that I can and should determine these three questions as part of my decision on the disposal of ground 1.

69. It is convenient to consider first, the point about whether continuing with proceedings can amount to a protected act. Mr Tatton-Brown did not abandon this argument, but neither did he pursue it with much vigour. I can deal with it fairly shortly.

70. Whilst Lord Hoffman, in **Chief Constable of the West Yorkshire Police v Khan** [2001] ICR 1065 (drawing on **Cornelius v University College of Swansea** [1987] IRLR 141 (CA)), highlighted the distinction between the fact that someone has *brought* proceedings and the fact of the *existence* of proceedings, the distinction he sought to make there was between a reaction to a decision to bring proceedings, and a reaction to the practical implications of the *existence* of the proceedings. A reaction to a decision to *continue* with, rather than abandon or

A settle, proceedings is, in my judgment, akin to the former, not the latter. Nor did **Khan** decide that a decision of that sort would not be within scope of a discrimination claim.

B 71. Secondly, and in any event, our understanding of the correct approach to issues of the sort with which **Khan** grappled was illuminated by **Derbyshire and others v St Helens Metropolitan Borough Council** [2007] ICR 841 which invites attention to the question of whether actions having to do with the conduct of litigation can be properly viewed as a C detriment. Lord Hope of Craighead (at paragraphs 22 and following) opined that where the employer was not merely acting on a desire not to prejudice itself in litigation, but was seeking to dissuade the employee from pressing a claim to adjudication, the **Cornelius** and **Kahn** test D was passed. Ultimately, the question was whether the employer's conduct crossed a line, such that it should be viewed as a detriment. Baroness Hale of Richmond said (at paragraph 41) that the tribunal was "right to point out that the reason for the adverse treatment could be the E continuation as well as the commencement of proceedings. It would make no sense to prevent an employer from treating an employee badly because she had brought proceedings but not to prevent him from treating her badly if she continued them." Lord Neuberger (paragraph 55) opined that the respondents were "reacting, if not to the commencement of proceedings, F certainly to their continuance."

72. Accordingly, I conclude that the concept of bringing proceedings found in section G 27(2)(a) should be construed as embracing a decision to continue with proceedings.[4] (I add that I am inclined to think that the wording of section 27(2)(c) would embrace a decision to continue

H [4] Though it was not cited to me, I note that in **Pothecary, Witham Weld v Bullimore** [2010] ICR 108 the EAT observed (at paragraph 19): "In the case of an act done by an employer to protect himself in litigation involving a discrimination claim, the act should be treated straightforwardly as done by reason of the protected act, i.e. the bringing/continuance of the claim; and the subtle distinctions advanced in **Khan** as to the different capacities of employer and party to litigation should be eschewed."

with, or not abandon or settle, proceedings, in any event.) In light of these authorities, where a victimisation claim relates to conduct during the course of litigation, the guidance which they offer on the concept of detriment is likely to come into play; but that is a different point; and, whatever destination a Tribunal may arrive at, it must get there by the right legal route.

73. I turn to the judicial proceedings immunity (JPI) issue.

74. In summary, Mr Tatton-Brown's argument was this. The premise of this claim is (a) that an unconditional offer to make the Claimant an ex gratia payment of £4000 was made by a witness giving evidence at the hearing on 11 August 2017[5]; (b) the Claimant then did the protected acts of continuing to pursue his claim, and giving evidence at that hearing; and (c) because of that, the Respondent then, subsequently, decided not to make the payment unconditionally, but to attach conditions to it, amounting to detrimental treatment.

75. As to (a), whether what occurred was described as the making of a fresh offer or the renewal of the original offer, what was said by the witness under oath was an essential element of this claim, because it was the alleged *change* of position from what was said by the witness on 11 August 2017, to what was said in the later correspondence, that constituted the alleged detriment. But anything said by a witness in the course of giving evidence was covered by JPI. So (a) could not be relied upon, and without that essential element, the claim was bound to fail.

76. Mr Kirk initially argued that as a matter of law, JPI could only apply to certain limited causes of action, such as defamation, which fasten on the nature of what a witness had actually

[5] During the course of argument Mr Kirk confirmed that the Claimant did not seek to rely on anything that may have been said by Mr Wilson "ringside" when he was not giving evidence.

said; but in the course of argument he accepted that dicta in various authorities suggest that, rather, it can provide a defence potentially to any cause of action or legal process, save for various recognised and established exceptions, such as perjury and malicious prosecution, or a costs award. It is therefore not necessary to lengthen this decision by exploring the various authorities on this point.[6]

77. A second line of argument was that, in any event, the claimed detriment, and hence the cause of action, arose from the content of the correspondence subsequent to the 11 August 2017 hearing, attaching conditions to the offer of the £4000 payment. *That*, said Mr Kirk, did not occur during the course of giving evidence.

78. However, as to that, in my view being able to rely on what was said in evidence *is* essential to this claim. Without that, there is no basis for the case that there was an adverse *change* of position thereafter, amounting to a detriment. I note again here that, as I have described, the original offer had long since been expressly withdrawn, and there was no claim of victimisation at all relating to that. In my judgment, the application of JPI cannot turn on whether what is said to attract it forms the whole, or only an essential part, of the factual matrix of the putative claim. Either JPI applies to it, and it cannot be relied upon, in the service of that putative claim, or it does not, and it can.[7]

[6] Nor do I need to explore the topic with which most of the authorities on JPI are in fact concerned, namely the extent to which the immunity may or may not cover various activities more or less closely connected with the conduct of actual or potential litigation, since it is plain that what goes on as part of a trial, and in particular, the giving of evidence by witnesses at a trial, is at the very core of activity that is covered by JPI.

[7] It was not argued, and so I do not consider, whether, in any event the subsequent correspondence might itself have been covered by JPI. Nor is whether it might or might not have amounted to a detriment (per **Derbyshire**) something that it falls to me to consider for the purposes of this appeal.

79. Ultimately, this point turned on what were or were not the implications of the decision in **P v Commissioner of Police of the Metropolis** [2005] ICR 329 (SC). Mr Kirk's position was that the consequence of that decision was that, because the present claim was one of victimisation, which was underpinned by EU Law, JPI could not apply to preclude reliance on the witness-box evidence. Mr Tatton-Brown disagreed. This was the point that, having drawn counsels' attention to this authority on day one, I heard argued out on the morning of day two.

80. Prior to **P** in the Supreme Court the authorities were clear: where JPI in principle applies, it applies no less because the claim is one of discrimination, or indeed victimisation. EU law does not trump, or require the disapplication of, the doctrine of JPI. See: **Heath v Commissioner of Police of the Metropolis** [2005] ICR 329 (CA) and, specifically in relation to victimisation: **Parmar v East Leicester Medical Practice** [2011] IRLR 641 (EAT) and indeed **P** in the Court of Appeal: [2016] IRLR 301.

81. In **P** a police officer was dismissed by a police misconduct panel which was a creature of statutory instrument. She sought to complain that this amounted to disability discrimination. The Employment Tribunal dismissed her claim on the basis that the proceedings before the panel had the trappings of judicial or quasi-judicial proceedings, such that its decisions attracted JPI. That was upheld by the EAT and the Court of Appeal, which, following **Heath**, held that the fact that the claim was one of discrimination did not preclude the application of JPI.

82. However, the Supreme Court held that the combined effect of articles 3 and 9 of **Council Directive 2000/78 EC** (the Equal Treatment Directive) was that all persons in the UK, including police officers, had the right to be treated in accordance with the principle of equal treatment in relation to employment and working conditions; and the principles of equivalence

A and the right to an effective remedy, meant that police officers must have the right to present claims of infringement of that principle to an ET. The right to appeal the police misconduct panel's decision to the Police Appeals Tribunal did not suffice. The fact that the panel's proceedings might arguably attract JPI could not bar a claim alleging treatment by them contrary to the Directive being considered by an ET. **Heath** was overruled.

B

C 83. Mr Kirk argued that the reasoning in **P** means that JPI must be disapplied wherever it may conflict with the effective enjoyment of EU rights. **Heath**, and the various generalised statements in it to opposite effect, have been swept away. **Parmar** can no longer be relied upon either, since it applied, and depended on the correctness of, the approach in **Heath**.

D

84. Mr Tatton-Brown argued that **P** was distinguishable. First, the factual context was starkly different. Ms P wanted to complain to a Tribunal that her dismissal was discriminatory. It was inherently and obviously unsatisfactory if she could not do so. There was nothing unsatisfactory about the present Claimant being unable to bring a claim of victimisation relying on remarks made by a witness in live evidence given during a hearing some fifteen months after his employment had ended.

E

F

85. Secondly, Article 3(1)(c) of the Directive was concerned with "employment and working conditions, including dismissal." The present complaint was not covered by that phrase. Thirdly, Article 9, concerned with the right to an effective remedy, related to the principle of equal treatment. That principle is that there shall be no direct or indirect discrimination: see Articles 1 and 2. Victimisation is different. Similarly, the **Charter of Fundamental Rights of the European Union 2012** refers to discrimination, but not victimisation.

G

H

86. Mr Tatton-Brown was bound to acknowledge that Article 11 of the Directive, headed "Victimisation", provides:

> **"Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment."**

However, he argued, while that no doubt necessitated that domestic law include some provision along the lines of section 27 of the 2010 Act, giving Member States a proper margin of appreciation, it was not necessary for this to extend to the ouster of JPI where the proposed claim is of victimisation based on evidence given in Tribunal proceedings.

87. Finally, said Mr Tatton-Brown, the principles of equivalence and effectiveness do not apply in the same way as they did in **P**. Police officers were peculiarly disadvantaged by comparison with other dismissed workers. There is no equivalent differential here: JPI applies to evidence given in all judicial proceedings by or against anyone.

88. Mr Kirk, in reply, made the following points. First, the prohibition on victimisation in the Directive should not be treated as materially different from that on discrimination; and Article 11 must apply equally to acts done after, as well as during, the currency of the employment relationship. See **Rowstock** (above) at paragraphs 8, 23 and 33 (citing **Coote v Granada Hospitality Limited** [1999] ICR 100 (ECJ)).

89. Secondly, while accepting that Article 9 of the Directive does not apply to claims of victimisation, Article 47 of the Charter provides that everyone must have an effective remedy in respect of rights and freedoms guaranteed by the law of the Union. Thirdly, the wide language of Article 21/1 referring to "[a]ny discrimination based on" any of the proscribed grounds

should be treated as embracing victimisation – applying **Coote**. Finally, the Justices in **P** did not suggest any restrictions on the application of the principles that they enunciated.

90. My conclusions on this point are as follows.

91. Firstly, I cannot see any sufficient basis for saying that the position should be different in relation to protection against victimisation than it is in relation to, say, direct discrimination. On that point, the constellation of arguments deployed by Mr Kirk is persuasive.

92. Secondly, it is clear from the reasoning in **Coote** and **Rowstock** that the protection of, and required by, EU law does not fall away the moment the employment ends, because the employment relationship, or its incidents, may continue. That was indeed the conclusion in **Rhys-Harper v Relaxation Group plc** [2003] ICR 867 (HL) and such protection is now embodied in section 108 of the 2010 Act. Section 108 must of course itself be interpreted and applied consistently with the dictates of EU law. But this insight does not take us any further on the question of the interplay between JPI and EU law: if section 108 applies, that interplay must be confronted. If section 108 does not, then there is no jurisdiction for that reason in any event. The contention that this complaint is not within the reach of section 108 is, of course, the third of Mr Tatton-Brown's arguments in this group, to which I will come.

93. Next, there are a number of significant features of the facts, and decision, in **P**. First, it was, specifically, about whether JPI could bar a *police officer* from bringing a claim of *discriminatory dismissal*, underpinned by the 2000 Directive, *to an Employment Tribunal*. (See Lord Reed, the other Justices concurring, at paragraph 1). It is perhaps not surprising that the

conclusion was that it could not.[8] Indeed it was at least arguable, in my view, that the police misconduct panel's decision should not have been regarded as attracting JPI at all; but given its view that JPI, *if* it potentially applied, would have to give way to EU law, the Supreme Court indicated that it did not have to (and it did not) decide that question.[9]

94. Secondly, there was – again unsurprisingly – no dispute in **P** that the claim which Ms P wanted to bring – a claim of discriminatory dismissal – was, as such, plainly within scope of Article 3(1)(c) of the Directive, concerning "employment and working conditions, including dismissals." Thirdly, a problem peculiar to the relevant tiers of police officers, was that, on a strict construction of the relevant provisions of the **2010 Act**, they did not have the right to complain of a decision of this type to an Employment Tribunal at all. The necessary solution, to give effect to EU law, held the Supreme Court, was to interpret the relevant sections as including acts within the scope of the Directive, by persons conducting a misconduct hearing. So interpreted, the Act then overrode any common law JPI that might otherwise apply.[10]

95. In summary, the ratio of **P** can perhaps be captured in this way. Any person must have the right to present to an Employment Tribunal (as the judicial body that can provide an effective remedy, and is the one to which others have access) a claim of infringement of a right within scope of the Equal Treatment Directive. That plainly applies to the right of a police officer seeking to claim discriminatory dismissal. To the extent that the peculiar nature of a

[8] As Lord Reed noted, at paragraph 4, in **Heath**, Laws LJ had been troubled that the Court of Appeal's decision appeared to deprive police officers of a right Parliament appeared to have intended them to have.
[9] Paragraph 24. The argument that police misconduct panels do not attract JPI proceeds by parity with the reasoning that found favour with the Court of Appeal in **Mattu v The University Hospitals of Coventry and Warwickshire NHS Trust** [2013] ICR 270 and **Christou v LB Haringey** [2013] ICR 1007 concerning whether the disciplinary processes of the public bodies in those cases were within scope of, respectively, Article 6 and the doctrine of *res judicata*. The Court of Appeal in **P** felt neither had any impact on **Heath**.
[10] **P** at paragraph 33.

police misconduct panel means that JPI might otherwise be said to apply to such a decision, it cannot preclude the exercise of that right.

96. I do not think that it *necessarily* follows from this that JPI cannot be relied upon to undermine the ability of this Claimant in this case to pursue his victimisation claim. That depends on whether this particular claim is itself within the scope of the Directive. I have come to the conclusion that it is not, for the following reasons.

97. First, while it is obvious that a discriminatory dismissal is within scope of the Directive, it is not obvious that a claim of the present sort is. While, for reasons I have given, I do not think it makes any difference, as such, that the claim is of victimisation, it is not obvious that a claim with this factual basis falls within the scope of Article 3(1)(c): "employment and working conditions, including dismissal and pay" (or any other part of Article 3(1)(c)). On balance, I do not think statements made by an employer, through the medium of a witness giving evidence on oath at a hearing of a claim against it, are within scope of that provision. But even if I am wrong in so saying at that level of generalisation, I am reinforced in that conclusion in this case by my consideration of the significance of the post-employment context. That is, there is, I have concluded, an interaction between the JPI point and the section 108 point in this case.

98. I turn, therefore, to the section 108 point, and its relation to the underlying EU law principles. I repeat that there is a dispute about the significance to be attached to what was said in evidence and, in particular, about why the Respondent adopted the stance that it did in the correspondence following the 11 August 2017 PH. But I can, for the purpose of this jurisdictional decision, assume those points in the Claimant's favour. The parties have, to reiterate, agreed that I should decide the section 108 point rather than remitting it.

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99. The existence of section 108 does not, of course, mean that there is jurisdiction to entertain any and every claim of discrimination or victimisation presented by an ex-employee. It must meet the test of section 108(1)(a) that the impugned conduct "arises out of and is closely connected to" the past employment relationship, as well under (b), of being of conduct that would be actionable had it occurred during the relationship. I am persuaded by Mr Tatton-Brown's submissions that this alleged conduct does not meet the section 108(1)(a) test.

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100. In particular, he draws attention to the fact that Parliament has not merely stipulated that the conduct must be something that "arises out of" the past relationship, but also that it must be "closely connected" to it. Both tests must be satisfied, and the second must add something to the first, further narrowing the field. Further, Parliament has deliberately added the word "closely" to the word "connected". There must be not merely *a* connection, but a close one.

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101. It is the words of the statute which must always be applied in every case, and my observations should not be treated as substituting for them, or qualifying them in any away. But it is clear that both "arises out of" and "is closely connected with" must be satisfied. It is also, I think, clear, that those tests will not by themselves be satisfied merely by a "but for" test being passed, nor by a finding that the impugned conduct was done, as it were, in the capacity of ex-employer. Those are necessary, but not sufficient findings. In particular, the "closely connected" test requires something more. Mere passage of time is also, plainly, not a determinative consideration (either way), though it may be a relevant one to go into the mix.

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102. It was not argued by Mr Kirk that the wording of section 108 is not, as such, sufficient to secure compliance by domestic law with EU law; but I should record that I do not consider it to fall short, having regard, for example, to the discussion in **Jessemey**, **Rhys-Harper**, and

Coote. His argument was simply that the facts (and/or assumed facts as claimed) point to the conclusion that the words of the section 108(1)(a) test *are* satisfied in this case.

103. In this case the following particular factual features are in my judgment relevant. Firstly, the original May 2016 offer was not by way of an offer to settle any actual or potential claims arising out of the termination of the employment; it was unconditional and expressed to be a matter of personal goodwill. Secondly, that offer was unequivocally withdrawn in January 2017, many months before the August 2017 hearing, and there was no such offer that was live in the period immediately prior to that hearing.[11] Thirdly, there was no claim of victimisation relating to the original offer. Fourthly, this victimisation claim is predicated, as I have said, as an essential factual element, on something said by a witness in response to cross-examination during the course of giving evidence at an Employment Tribunal hearing.

104. Having regard to all those features, I do not find the section 108(1)(a) test to be met. The offer *was* made in the capacity of ex-employer. Though there was plainly a personal element, it was not suggested that the payment would have been offered, had the Claimant been a good friend of Messrs Wilson and Butler, with a baby on the way, who had lost his job in similar circumstances, but not with the Respondent, but with some other company.

105. In a but-for sense, and in the sense of the capacity in which it was made, I think it arose from the former employment, and was connected with it; but it was not, in my judgment conduct which arose from and was *closely* connected with it. Not only are there simply too

[11] I am referring, of course, to open offers. Neither the ET, nor I, know anything of the substance of any without prejudice communications.

many links in the chain[12]; but the clear water between the original, later withdrawn offer, and the fresh and distinct context in which the offer relied upon (whether viewed as new or renewed) was elicited, and specifically, the fact that the context was cross-examination during the course of the giving of live evidence under oath at a Tribunal hearing, mean that the test of close connection is not satisfied.

106. This means that this claim must fail, because it is not within the jurisdiction conferred on the ET by section 108. In light of my overall reasoning, I also conclude that this is not, given its particular (actual or assumed) factual features, including in particular that it hinges on what was said in evidence in this context at an ET hearing, a complaint within scope of the Equal Treatment Directive. Hence the principles emerging from **P** do not require the application of JPI to be overridden. The giving of evidence by a witness in the course of a judicial hearing is, of course, incontrovertibly, in principle, a context to which JPI applies.

107. I add, though it forms no necessary part of my reasoning, that I consider this conclusion sits comfortably with the particular powerful policy considerations which lie behind the application of JPI to things said in evidence by witnesses in Court, with only specific exceptions, a topic which simply did not arise for consideration in **P**.[13] While that part of the reasoning in **Parmar** which drew on **Heath** has been overtaken by **P**, the discussion in **Parmar** of that particular aspect of JPI (at paragraph 14) remains illuminating and invaluable.

[12] A contrast may be drawn with the "in consequence" test of section 15(1)(a) in respect of which there may be multiple links in the chain, as long as the chain is unbroken.
[13] Lord Hughes, at paragraph 38, notes that Ms P had said in terms that she was not complaining about anything said or done at the disciplinary hearing, only about the outcome.

108. Accordingly, I conclude that what was said by the witness at the 11 August 2017 hearing could not be taken into account by the ET, when considering this victimisation claim, and, without that, the claim would be bound to fail.

109. For all of those reasons, and notwithstanding that ground 1 is well founded, the victimisation claim does not need to be remitted, but must be dismissed.

110. That means that ground 2 falls away; but I will say something briefly about it.

111. As framed in the Notice of Appeal, this ground contended that the Tribunal ought to have concluded, on the facts found, that the burden shifted to the Respondent to explain why it had withdrawn or attached conditions to the offer made by the witness on 11 August 2017. In submissions, Mr Kirk went further and argued that the Tribunal was bound, given its findings in paragraphs 71 and 72, and observations there about things that troubled it, or that it did not understand, to conclude that the burden had not been discharged.

112. However, had I concluded that the Tribunal had jurisdiction to consider this claim, I would have remitted the matter to it for fresh consideration, without tying its hands in relation to the burden of proof. That is for the following reasons.

113. First this claim, if justiciable, would I think, require particularly careful analysis and care in the approach to taken to evidence relevant to it. There were two Directors of the Respondent who gave evidence for it on 11 August 2017. Mr Wilson, who was called to give evidence after Mr Butler, was asked about this matter, but was stopped in mid-answer because

he was straying in to without prejudice territory. Whilst it was, of course, correct as such, that a witness should be stopped from inadvertently waiving privilege, the clear implication is that Mr Wilson had something to say about without prejudice communications, or the possibility of settlement, that he regarded as relevant to his stance on the question of paying £4000. Given that, the Tribunal might have had to grapple with whether the parties were prepared to waive privilege about that, or whether, if not, the claim could be fairly determined.

114. Further, with respect to the Tribunal, paragraphs 71 to 73 are severely muddled. Not only did it apply the wrong test to the victimisation claim in paragraph 73, but it mingled, in paragraphs 71 and 72, discussion of events in the period after May 2016, and events at and after the 11 August 2017 hearing, going from the first to the second, and then back to the first; and indeed, much of the material on which Mr Kirk relied related to the events which followed the May 2016 exchanges, not the 11 August 2017 evidence and its aftermath.

115. Had there been jurisdiction, I would therefore have concluded that nothing in paragraphs 71 to 73 of the original decision could be relied upon to support the necessary fresh consideration of the victimisation claim, in relation to which the Tribunal (whether or not the same panel) would need to make fresh and focussed findings of fact and, as appropriate, give consideration, without prior restraint from me, to how section 136 might assist it to reach its conclusion.

Ground 3 – Issue Estoppel

116. Ground 3 concerns the merits Tribunal's decision that the findings of fact made in paragraph 6 of the PH decision could not be reopened, because the doctrine of issue estoppel

applied. That was said to be erroneous, because the findings made in that paragraph were not necessary to the disposal of the substantive time issues which were the subject of the PH.

117. The underlying legal principle was concisely restated by the Court of Appeal in **Bon Groundwork Limited v Foster** [2012] ICR 1027. Elias LJ (Arden and Pill LJJ) concurring, put it this way, at paragraph 4:

> **"… The principle of *res judicata* can be summarised as follows: where an issue has been litigated before a judicial body and determined as between the parties it cannot be re-opened. It is binding as between them, and the parties are estopped from re-opening it. The issue may be one of fact or of law. However, the parties are only bound by an issue which it was necessary for the court to determine in the earlier claim."**

118. Mr Kirk also asserted and Mr Tatton-Brown did not dispute, as such, that the principle is equally applicable where the previous finding arose from an earlier decision in the course of the same claim: **Pugh v RT Electrics Limited**, UKEAT/0177/16/DM.

119. The nub of Mr Kirk's submission was that the only legally correct view was that none of the findings in paragraph 6 of the PH decision[14] was a necessary ingredient of that decision. The determination of the EDT revolved simply around a construction of the May 2016 emails. Nor were any of the paragraph 6 findings necessary to the decision on whether to extend time. The fact that the parties had addressed these background matters in their witness statements, and that their respective witnesses gave evidence at that hearing, did not alter that. The Tribunal's assertion (paragraph 19) that the findings had been a "necessary ingredient" of the earlier decision was wrong. The factual issue remained live after that PH; and the parties also had a legitimate expectation that these points would be open to argument at the final hearing – see the remarks of EJ Crosfill at the later PH before him (quoted by me above).

[14] As I have noted, the first sentence was not regarded as contentious.

120. Mr Tatton-Brown submitted that the Tribunal had been entitled, as the fact-finding body, to find that these matters were a necessary ingredient of the PH decision, and it had specifically identified that evidence had been adduced on the point. In any event this ground was, he said, academic. It had no bearing on the victimisation claim, nor was it material to the remaining grounds of appeal in relation to the section 15 claim. Further, the Tribunal at the merits hearing had, in any event, made its *own* findings that the Claimant had stated that he did not wish to return to his old Operations Manager role.

121. My conclusions are these:

122. As to the law, it is correct – see **Pugh** – that the doctrine applies equally in respect of previous findings made in the same litigation, as in respect of findings made in a previous case involving the same parties. In **Pugh** itself, its application meant that a decision to extend time made at an earlier PH could not be revisited in the decision arising from the final hearing.

123. However, in **Pugh** the issue was not whether a previous finding of fact had been "necessary" to the previous decision but, more straightforwardly, the core question of whether the previous *decision itself* could be reopened. Where the issue is, as here, whether a previous finding of fact was necessary to a previous decision made in the course of the life of the same claim, matters may be more complicated. That is for the following reasons.

124. Firstly, at a hearing the purpose of which is to determine a certain issue or issues, it is not uncommon for litigants, or witnesses, to nevertheless stray in their evidence or arguments into matters that feature as factual or legal issues in that same case overall, but which are not

relevant to the particular issue to be determined at that particular hearing. It is, in such a case, the task of the Tribunal to properly set the boundaries, and decide what is relevant, both in its management of the hearing, and presentation of evidence and argument and in its decision.

125. Secondly, a Tribunal may itself wish to refer in its decision on a preliminary point, for narrative purposes, to some background facts, to set the scene or give some explanatory context, to the specific matters at issue. That is not problematic where those matters are not factually controversial and/or not material, or potentially material, to any other issues in the case. But if there is a material dispute, it should refrain from making a finding, and/or flag up that there is a dispute about that aspect, which it is not deciding and/or, depending on the nature of the point, consider whether to approach the matter some other way, such as by making an assumption for the purposes of the PH decision, but without determining the issue.

126. Conceivably, the parties might agree that a particular additional issue should be addressed at a PH, because evidence has been prepared, and they are in a position to present arguments, and it can usefully be added, as it were, to the agenda for the PH. But the mere fact that one or more witnesses has referred to the matter in evidence, and/or are asked about it in cross-examination is not, by itself, enough to amount to such an agreement or understanding.

127. I turn, then, to what happened in this case.

128. First, we need to be clear, with a little more precision, what the factual issue was. While Mr Kirk indicated that only the first sentence of paragraph 6 was uncontentious, the chief bone of contention was the second sentence, containing the proposition that the Claimant did not

A want to return to his old role of Operations Manager. Mr Tatton-Brown submitted that what the Claimant subjectively wanted, or privately thought, did not matter. What mattered was what he had said to Mr Butler and/or Mr Wilson. I agree, but it seems to me that paragraph 6 *was* making a finding about what he had *communicated to them*. That the substantive dispute was about that is, I think clear, for example from the amended grounds of claim, and the Claimant's witness statement for the merits hearing.

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129. Further, the substantive dispute was about what the Claimant's stated position was, not when he had what the Tribunal called his "outburst" and "breakdown" when he first went off sick, in June 2015, but by the time of and/or, at the meeting on 14 April 2016 – the last meeting before he was dismissed. His case was that he had not said *at that meeting* that he did not want to return to that role, but rather that, despite an OH report indicating that he was (now) fit to do it, Messrs Butler and/or Wilson had ruled it out. The Respondent's case was the opposite.

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130. The paragraph 6 finding, which refers to the position from February 2016 through the 14 April 2016 and prior to the May emails, was to the effect that the Claimant had conveyed in that period that he (still) did not *at that point* want to return to the Operations Manager role. That was what the merits Tribunal took that paragraph to mean (for example at paragraphs 48 and 65) and it was the finding that, as at 14 April 2016 the Claimant did not want (or still did not want) to return to that role, which it held could not be reopened.

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131. Whether that was right depended on whether the paragraph 6 findings were a necessary ingredient of the PH decision. The merits Tribunal asserted (at paragraph 19) that those findings were necessary ingredients of the PH decision, but did not explain why. The observation (at paragraph 16) that "both parties must have thought this was a necessary

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ingredient for understanding the later emails" does not support the Tribunal's own conclusion that "consequently … the findings were an integral part of the issue on time limits."

132. In the PH decision itself (a full copy was in my bundle) the Tribunal did not appear to draw specifically on the paragraph 6 findings in giving its reasons for deciding the time points in the way that it did. Mr Tatton-Brown did not suggest any particular basis for concluding that they plainly were necessary ingredients of the decision on those points, nor can I see any. I am bound to conclude that the merits Tribunal did err in making that finding – it was simply not supported by the PH decision, or the reasoning which it contained.

133. Nor, do I think it sufficient to support the merits Tribunal's decision on this point that the parties had referred to the background leading up to the May 2016 emails in their witness statements for the PH, nor that there was some cross-examination about it at that hearing. That is not sufficient to amount to an *agreement* that it was one of the factual matters that would be determined at that PH. (Nor was there any such ruling by the Tribunal.)

134. Nor do I think it relevant that no application for reconsideration had been made following the PH in question, nor that the status of this paragraph had not been raised in terms at the subsequent PHs. Either it was bindingly determined at the time of the PH (because it was necessary to the decision on time points, or agreed, or ruled, that it would be determined as an additional matter in any event) or it was not. The Claimant did not need to rely on the remarks of EJ Crosfill at his PH (cited by me at paragraph 32 above) as creating an expectation that this issue would be considered and decided at the merits hearing; but they do tend to show that it was in fact identified as being an important live issue at that further PH.

135. Nor do I think that the statements, in later parts of the merits decision, to the effect that the Claimant had said he did not want to return to the Operations Manager job, or could not do so, (for example at paragraphs 48, 57 and 63, which I have cited above) support the conclusion that the merits Tribunal in any event made its own independent findings of fact to that effect on the basis of the evidence before it. The merits Tribunal had ruled, in terms, that the point had been decided already and *could not* be reopened. Consistently with that, paragraph 48 refers back, in terms to the "the Tribunal's finding from the August preliminary hearing", and the other passages must be taken to be drawing on that previous finding as a given, as well.

136. Accordingly, ground 3, as such, succeeds. Mr Tatton-Brown, however, submitted that this ground was actually academic, because it had no bearing on the victimisation claim, nor on the remaining live grounds of appeal relating to the section 15 claims.

137. I do not agree. In paragraph 77 of its decision, concerning the section 15 claim relating to the dismissal, the Tribunal refers to the Claimant being "unable to continue in his role as operations manager". Even if it meant here to refer to that being the Respondent's view, one cannot exclude that it considered that they held that view because the Claimant had stated that that was (or was still) his own position. Accordingly, this ground is not in my view, academic.

Ground 5 - section 15 complaints (e) and (f)

138. Ground 5 was to the effect that the Tribunal erred in its findings, in paragraphs 69 and 70, that failing to inform the Claimant in the meeting of 14 April 2016 that he could be dismissed if he did not accept a revised role, and not offering him the opportunity to accept that role before concluding that there was none available for him, was not unfavourable treatment for the purposes of the pertinent section 15 claims.

139. Mr Kirk submitted that the starting point – not controversial as such – was that the Claimant did not want his employment to end. Further, the Tribunal accepted that Messrs Butler and Wilson did not "spell out what would happen" if they could not find another role. The Claimant's evidence was that, had he understood that a point had been reached where the Respondent's position was that the *only* role open to him was the revised, lower paid role, and if he did not accept it, he would be dismissed, he would have accepted it. The Tribunal's finding that it was *implicit* that if a role could not be found, his employment was at risk, does not assist, because it does not address that concrete scenario. The finding that the 6 May 2016 email represented proposals regarding the termination of his employment, to which he could have responded by indicating that he would accept the revised role, was not sustainable.

140. Mr Tatton-Brown's position was that what amounts to unfavourable treatment is a question of fact for the Tribunal. It had made findings of fact in these paragraphs with which the EAT should not interfere. In any event, even if the Tribunal was wrong not to find that this conduct amounted to unfavourable treatment, it could not properly have found it to be *because of* the sickness absence (which was the "something" arising from disability relied upon).

141. Mr Kirk disagreed with that last point. To determine whether the conduct was "because of" the something required the Tribunal to consider, and make findings about, the thought processes of the relevant decision-maker, and the conclusion on that question could not be assumed or pre-empted by the EAT.

142. My conclusions on this ground are as follows:

143. First, in light of its findings of fact about events at the 14 April 2016 meeting (and even if, contrary to my conclusion on ground 3, those include the finding that the Claimant said he did not want to return to the Operations Manager role) and the subsequent email exchanges, I do not think the Tribunal's conclusion, that the conduct in question was not unfavourable treatment, was legally correct.

144. As to the law, in **Williams v The Trustees of Swansea University Pension and Assurance Scheme** [2018] UKSC 65, [2019] IRLR 316 the Supreme Court was referred to passages in the **Equality And Human Rights Commission's Code of Practice on Employment** (2011), which suggest that unfavourable treatment involves putting the disabled person at a disadvantage, which would include "denial of an opportunity or choice". Lord Carnwath (at paragraph 27, the other Justices concurring) agreed with a submission

> **"…that in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. While the passages in the Code of Practice to which she [counsel] draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section."**

145. Here, the Tribunal found as a fact that the Claimant was not told at the meeting that if they could not find another role for him he would be dismissed. It had found as a fact that, in the May email exchanges he *was* dismissed. The Tribunal's finding, that it was implicit that if another role was not found, his employment was "at risk" is not a finding that it was implicit that, in that case, he would be dismissed.

146. Nor do I think the Tribunal's conclusion that this was not unfavourable treatment can be sustained by its description of the 6 May 2017 email as "proposals" regarding the termination of his employment and its assertion that the Claimant had the opportunity, at that point, to say

that he would accept the other role. On the Tribunal's own findings, the Claimant read the 6 May email as conveying that a decision had been taken to dismiss him, prompting him to ask if that was right. Given the content of the 6 May email, wishing the Claimant well for the future, and in light of the low legal threshold of the concept of unfavourable treatment, I do not think the Tribunal's finding that there was no unfavourable treatment, as the Claimant could still have responded that he now wished to accept the previously offered role, is sustainable.

147. As to whether this was a treatment "because of" the Claimant's sickness absence, the law is clear. The concept of "because of" in section 15 is no different from the concept in section 13. To determine this particular question (in a non-obvious case) therefore requires a consideration of the motivation of the decision-maker, and whether the "something" in the particular case materially influenced them. See: **City of York Council v Grosset** [2018] ICR 1492 (CA) at paragraphs 36 – 37; **Dunn v Secretary of State for Justice** [2018] EWCA Civ 1998, at paragraph 18.

148. Here, in paragraphs 70 and 71, the Tribunal did not make any finding about why the Respondent acted as it did, because it considered that its finding that there was no unfavourable treatment disposed of these particular complaints. Given the nature of the "because of" concept, the determination of this question may require a particularly careful and nuanced finding of fact, in order to determine, specifically, whether the lengthy sickness absence influenced this conduct or not. I cannot say that there is only one finding (either way) on that question that it would be open to the Tribunal to make.

149. Nor, for reasons to which I come and although I am inclined to think that, complaints (e), (f) and (k) are closely bound up together, do I think that this question is resolved by the findings that the Tribunal went on to make in paragraph 77 about the dismissal.

150. Ground 5 therefore succeeds and, subject to ground 6, the section 15 complaints to which it relates must be remitted.

Ground 6 – section 15 complaint (k)– dismissal – proportionality

151. This ground maintains that the Tribunal erred because, having found in paragraph 77 that the dismissal was because of something arising from the disability, the Tribunal failed to determine whether the proportionality defence succeeded, before simply going on to dismiss this claim along with all the others.

152. That criticism of the Tribunal's decision is, in my view, plainly well-founded. In paragraph 77 the Tribunal sets out the Respondent's case as to the legitimate aim and the proportionate means, but says nothing at all about what it made of that case.

153. However, Mr Tatton-Brown submitted that the dismissal of this complaint could and should still be upheld, without remission, for either or both of two reasons.

154. First, the Tribunal found at the start of paragraph 77, that the dismissal "arose as the Claimant was unable to continue his role as operations manager and the Respondent was unable to find [an] alternative role which was suitable for both the Claimant and the Respondent." It went on to find that that was "something arising from disability" and that was the basis on which this complaint succeeded. However, said Mr Tatton-Brown, that was not how the

section 15 complaint relating to the dismissal was pleaded. The "something" that had been pleaded was the sickness absence. But the Tribunal had found that what had influenced the decision to dismiss the Claimant was the fact that there was (or was in the decision-makers' view) no job that he could do, which was a different thing from the sickness absence, and it had implicitly thereby also concluded that it was *not* the sickness absence.

155. The Tribunal had, he said, therefore found for the Claimant on the basis of a complaint that was not pleaded, which it should not have done: **Chapman v Simon** [1994] IRLR 124; and in the process it had effectively rejected the basis which *was* pleaded. Accordingly, regardless of the position in relation to the proportionality defence, this finding in favour of the Claimant could not stand.

156. Alternatively, submitted Mr Tatton-Brown, it was plain and obvious that dismissing the Claimant in circumstances where he had been absent sick for as long as he had, and there was no job available that he was fit to do, *was* a proportionate means of achieving the Respondent's legitimate aim. This was the only conclusion that the Tribunal could have properly reached. So, there was no reason to remit this complaint in any event.

157. My conclusions are these:

158. Firstly, I do not agree with Mr Tatton-Brown that the Tribunal's finding in paragraph 77 about the reason for dismissal carries the implication that it had concluded that his dismissal was not, in the requisite sense, because of his sickness absence. The Tribunal has simply not addressed the question directly, of whether the sickness absence itself influenced the decision.

A It would be tempting to in fact draw the opposite conclusion, namely that Mr Tatton-Brown was seeking, in his **Chapman v Simon** argument, to make a distinction without a difference, on the basis that the ill health, incapacity and absences were all bound up together. However, I think that is a matter I must leave to the Tribunal to consider afresh on remission.

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159. Turning to the proportionality defence, as the Court of Appeal recently confirmed in **Grosset**, whether it is made out is an objective question for the Tribunal, and the standard is a higher one than applies when considering whether a dismissal was or was not unfair. It said:

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> **"54. In my judgment, the Employment Tribunal and the Employment Appeal Tribunal have made a lawful assessment of the position in relation to this defence and the appeal in respect of this issue should also be dismissed. Contrary to Mr Bowers' submission, and as the appeal tribunal rightly held, there is no inconsistency between the Employment Tribunal's rejection of the claimant's claim of unfair dismissal and its upholding his claim under section 15 EqA in respect of his dismissal. This is because the test in relation to unfair dismissal proceeds by reference to whether dismissal was within the range of reasonable responses available to an employer, thereby allowing a significant latitude of judgment for the employer itself. By contrast, the test under section 15(1)(b) of the EqA is an objective one, according to which the employment tribunal must make its own assessment: see *Hardy & Hansons plc v Lax [2005]* ICR 1565, paras 31-32, and *Chief Constable of West Yorkshire Police v Homer* [2012] ICR 704, paras 20 and 24-26 per Baroness Hale of Richmond JSC, with whom the other members of the Court agreed.**
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> **55. Against this, Mr Bowers pointed to certain dicta by Underhill LJ in *O'Brien v Bolton St. Catherine's Academy* [2017] EWCA Civ 145; [2017] ICR 737 paras 51-55, in which he observed that the tribunal, which had found that the dismissal in question in that case was in breach of section 15 EqA, was also entitled to conclude from this that it had been unfair as well. Mr Bowers' suggestion was that this meant, in our case, that the employment tribunal should have reasoned in the opposite direction, by saying that by virtue of its ruling in relation to unfair dismissal it should also have concluded that there was no breach of section 15 EqA. However, I think it is clear that Underhill LJ was addressing his remarks to the particular facts of that case, and was not seeking to lay down any general proposition that the test under section 15(1)(b) EqA and the test for unfair dismissal are the same. No doubt in some fact situations they may have similar effect, as Underhill LJ was prepared to accept in the *O'Brien case*. But generally, the tests are plainly distinct, as emphasised in *Chief Constable of West Yorkshire Police* v *Homer* [2012] ICR 704."**

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G 160. The starting point has to be a reasoned and robust finding of fact as to the reason or reasons for this dismissal. Given that the Tribunal has not made a clear finding about whether, in principle, the dismissal was, in the requisite sense, because of the sickness absence, and given the nature of the proportionality test, I am not in a position to say that, if the Tribunal

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were, on remission, to conclude that the dismissal was, in the requisite sense, because of the sickness absence, it would be *bound* to find that it was justified.

161. This ground therefore also succeeds, and a remission will be necessary.

Outcome

162. The overall outcome is therefore that the dismissal of the victimisation complaint stands, but the Tribunal's dismissal of the section 15 complaints identified at (e), (f) and (k) of the amended grounds of complaint must be quashed, and those complaints remitted to the Employment Tribunal for further fresh consideration of the outstanding issues relating to them.

163. Having had sight of this decision in draft, counsel have tabled written submissions on whether remission should be to the same Tribunal panel, if possible, or a different one. Mr Tatton-Brown advocated the former course, Mr Kirk, the latter. I have considered those submissions, and have had regard to the guidance in **Sinclair, Roche & Temperley v Heard** [2004] IRLR 763 (EAT).

164. This was not a totally flawed decision, but significant errors were made. I do not doubt that the original Tribunal would professionally seek to bring a fresh eye to the questions which must now be remitted for further consideration; but, given the previous decisions taken at the PH and by the full merits Tribunal including the same Judge, that might, I think, realistically, be difficult for them. Determination of the remitted matters will require further fact-finding. Significant time has passed since the last hearing, so the existing Tribunal will not have the advantage of very recent recollection; and, if the matter is remitted to a different panel, that panel will have the benefit of those background findings which stand, recorded in the previous

decisions. If the matter is heard by a fresh panel, that will not prevent appropriate cross-examination of witnesses by reference to the evidence that they gave last time. The remitted matters include a claim related to dismissal, are capable of self-contained determination, and remission to a fresh panel would not be disproportionate, bearing in mind that one claim relates to the dismissal.

165. Accordingly, I will direct that the matters that fall to be remitted be heard by a differently constituted Tribunal.