Appeal No. UKEAT/0276/18/LA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDINGS, 7 ROLLS BUILDING, FETTER LANE, LOND0N EC41 1NL

At the Tribunal
On 2 August 2019

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR R JAKKHU — APPELLANT

NETWORK RAIL INFRASTRUCTURE LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID STEPHENSON (of Counsel) Instructed by: TMP Solicitors 30th Floor 40 Bank Street Canary Wharf London E14 5NR
For the Respondent	MISS GEORGIA HICKS (of Counsel) Instructed by: Dentons UKMEA LLP The Pinnacle 170 Midsummer Boulevard Milton Keynes MK9 1FE

SUMMARY

DISABILITY DISCRIMINATION – Direct disability discrimination

DISABILITY DISCRIMINATION - Section 15

VICTIMISATION DISCRIMINATION

Disability discrimination – direct discrimination (section 13 ***Equality Act 2010****) – discrimination because of something arising in consequences of disability (section 15* ***Equality Act 2010****) – victimisation (section 27* ***Equality Act 2010****)*

The Employment Tribunal ("ET") had rejected the Claimant's various complaints of disability discrimination and victimisation. He appealed against its decision in respect of three issues: (1) his dismissal on 24 September 2014; (2) the failure to offer him a permanent role in February/March 2015; and (3) the Respondent's failure to properly investigate his grievance of 20 April 2015.

Held: allowing the appeal in part

In rejecting the Claimant's claims in respect of his dismissal of 24 September 2014, the ET had found that the dismissal had "vanished" by reason of the Claimant's subsequent reinstatement. By adopting this approach, however, the ET had failed to consider whether the act of dismissal (which was in breach of an agreement the Respondent had reached with the relevant trade unions) had been a detriment; this was not the same question as determining whether or not a subsequent reinstatement had extinguished the dismissal. Although the ET had then gone on to consider whether "the reason why" the Claimant had been dismissed, it had focused on the background context to the original giving of notice (the redundancy situation) rather than on the actual question in issue - why the Respondent had allowed the dismissal to take effect notwithstanding its agreement with the trade unions. To the extent the ET engaged with the question why the Respondent had not sought to retract the notice of dismissal any earlier, (i) there was no indication that it had properly applied the burden of proof (section 136 **Equality**

Act 2010), (ii) it had apparently assumed an explanation for the Respondent (failure of communication/ineptitude) without any indication of the evidential basis for this finding, and (iii) there nothing to suggest the ET had considered whether the Claimant's absence (the "something" arising from his disability) might have been the reason for the Respondent's error. The Claimant's appeal would be allowed on this issue, which would be remitted back to the same ET for reconsideration.

As for the Claimant's complaint about the Respondent's failure to offer him a permanent role, it was necessary to bear in mind the very general case that was before the ET; in particular, the Claimant had not specifically stated that he was relying on the vacancies identified by Mr Lindsell on or about February/March 2015. The evidence before the ET in relation to these positions included a meeting note with the Claimant where he had suggested that the jobs were only a match for his former role "on paper". In the circumstances, the ET was entitled to find that the reason why these positions were not offered to the Claimant was because he had not put himself forward for them.

In relation to the Claimant's grievance of 20 April 2015, the ET had found the Respondent's response had been inadequate: the experienced, senior HR professional dealing with the Claimant's complaints had failed to appreciate that this should have been treated as a grievance rather than merely a complaint about his non-selection for a higher-grade position. Having heard from the HR manager in question, however, the ET was satisfied that this was a genuine error and that she would have adopted the same approach in respect of any employee raising a complaint in this way regardless of disability, absence due to disability and/or any protected act. That was a conclusion open to the ET on the evidence and it was not open to the EAT to go behind that finding.

HER HONOUR JUDGE EADY QC

Introduction

1. In giving this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal against a Judgment of the Employment Tribunal sitting at Cambridge (Employment Judge King, sitting with members Mr Davies and Mrs Smith from 22 January to 26 January 2018, with a further day in chambers for deliberations; "the ET"). By that Judgment, the ET dismissed the Claimant's various claims of disability discrimination and victimisation brought under the **Equality Act 2010**, ("the **EqA**").

2. The Claimant was represented by counsel before the ET, but not by Mr Stephenson, who now appears *pro bono*. Miss Hicks represented the Respondent's interests before the ET, as she does on this appeal.

3. The appeal was permitted to proceed to a Full Hearing after an Appellant-only Preliminary Hearing, before His Honour David Richardson on 4 February 2019. At that stage Mr Stephenson first appeared for the Claimant, and he relied on amended grounds of appeal relating to three aspects of the Claimant's case before the ET, namely:

(1) The 2014 dismissal of the Claimant. The Claimant was dismissed on 24 September 2014, contrary to an agreement with the trade unions, and subsequently reinstated. The Claimant's complaint in this regard was rejected by the ET, applying the law relating to vanishing dismissals. It is the Claimant's case that the ET erred by failing to see the dismissal itself as a detriment and that this undermined its conclusions on his claims of direct discrimination, of discrimination because of something arising in consequence of his disability, and victimisation.

(2) The failure to offer the Claimant a permanent role. The Claimant complains that, on the ET's findings of fact it was apparent that, in or about February/March 2015, there was a vacant role which could have been allocated to him and the failure to make him aware of this was a detriment for the purposes of his claims of direct discrimination, discrimination because of something arising in consequence of his disability, and victimisation. The Claimant contends that the ET's dismissal of his claims in this regard fails to properly engage with his case and its own primary findings of fact.

(3) Failure to properly investigate the Claimant's concerns raised by email of 20 April 2015. Having found that the Respondent's response in this regard was inadequate, the Claimant contends that the ET then failed to properly apply the burden of proof and, alternatively, reached a decision which was not open to it on the evidence.

4. The Respondent resists the Claimant's appeal, essentially relying on the reasoning provided by the ET.

The Factual Background

5. The Claimant had been employed by the Respondent from 22 March 2004, initially working as IT helpdesk support but, in August 2008, taking up a band five role as a Support Analyst. In 2012, there was a country-wide reorganisation following which the Claimant's place of work moved from London to Milton Keynes. The Claimant continued to live in London and commuted to his new place of work in Milton Keynes.

6. At an earlier ET hearing, it had been found that the Claimant was disabled for the purposes of the **EqA** by reason of the fact that he suffered from ulcerative colitis, something with which he had been diagnosed in 2004 and of which the Respondent was aware from 2008.

By the time of the events with which the ET was concerned, the Claimant had had a number of days absent from work. By any standard, the Claimant's absence record was high, for both disability and non-disability related reasons.

7. In 2011, given his level of sickness absence, the Claimant had been referred to occupational health and it had been advised that his condition was likely to be covered by the **EqA** and that reasonable adjustments could thus be requested. Specifically, it had been advised that the Respondent might need to consider occasionally giving the Claimant the opportunity to work from home.

8. Thereafter, during the course of 2012 and 2013, the Claimant attended a number of meetings with the Respondent relating to his sickness absence and further advice was sought from occupational health and from the Claimant's GP.

9. In January 2014, the Claimant raised a grievance complaining of a failure to make reasonable adjustments and of race discrimination. He specifically complained about his Practice Manager, Ian Hindler (the person with responsibility for matters outside normal daily work matters), but that grievance was not upheld, albeit a number of recommendations were made for adjustments for the future.

10. Subsequently, on 11 March 2014, Mr Hindler raised a grievance about the Claimant, essentially complaining about what he saw as unjustified accusations of discrimination made by the Claimant against him. Mr Hindler's grievance was also not upheld, a decision confirmed by letter of 29 June 2014.

11. Meanwhile, going into 2014, a reorganisation within the Respondent saw the Claimant's role relocated to Manchester and the Claimant was put at risk of redundancy. As the ET noted, the Claimant did not wish to relocate to Manchester. Indeed, on 25 March 2014, he attended a redundancy notice meeting and confirmed that he would wish to take redundancy rather than be considered at an alternative role at Waterloo Station. During that meeting the Claimant was served with notice of redundancy to take effect on 24 September 2014.

12. On 24 September 2014 the Claimant's notice expired while he was off sick. He had been absent from work on sick leave since 6 May 2014.

13. In fact, the Claimant's dismissal on 24 September 2014 was in breach of a national agreement the Respondent had reached with the trade unions, the TSSA and RMT, during the course of 2014. This provided that no compulsory redundancies would take place in bands five to eight until 31 December 2014. Having apparently become aware of its error in this respect, on 22 October 2014, the Respondent informed the Claimant that it was extending his notice period to 31 January 2015, a decision confirmed by letter of 31 October 2014.

14. On 7 January 2015, the Claimant attended a return-to-work meeting where he said that he would look at alternative roles or voluntary redundancy. At a subsequent meeting on 20 January 2015, he confirmed that he would choose to look at other roles rather than accept redundancy.

15. On 3 February 2015 the Respondent wrote to the Claimant retracting the notice of redundancy and confirming that he would return to work and seek alternative employment, albeit that he remained at risk of redundancy. On 4 February 2015, the Claimant duly returned

to a role with the Respondent, carrying out temporary project work. At that point, the Claimant was permitted to work from home during a flare up of his colitis condition. On 6 February 2015, the Claimant indicated that he was interested in being considered for a vacant position as a system support assistant. Two such vacancies had been identified by a Mr Dan Lindsell, one of the Respondent's Business Support Managers.

16. On 2 March 2015, however, Mr Lindsell confirmed that, *"Urvish did not feel that the Claimant's skillset would suit his team"* (that was a reference to a Mr Urvish Panya). It seems that Mr Lindsell also indicated that he (that is, Mr Lindsell), *"was happy to allocate one of the vacant posts in performance analyst systems to the claimant."* (see the ET, at paragraph 80).

17. There is some dispute between the parties as to whether the Claimant's case had properly identified these positions as being in issue in terms of his complaint about the failure to offer him a permanent role. For his part, the Claimant says he knew nothing about the internal communications within the Respondent about these positions until the relevant documentation was disclosed, shortly before witness statements were due to be exchanged. The Respondent points out, however, that at a meeting with one of the Practice Managers (Miss Petitt) on 12 May 2015, these roles were discussed with the Claimant, but when it was suggested that they had similar job descriptions to the Claimant's position, he had responded that this was, *"only a match on paper"*. In any event, the ET apparently understood these roles to be included within the Claimant's claim in this regard; that is, as part of his general complaint that the Respondent had failed to offer him a permanent role, although its findings of fact were limited, with the ET recording: *"It is not clear what happened to this role as the Claimant does not appear to have applied for it."*

18. On 2 March 2015, the Claimant applied for the role of Senior IT Support Analyst, a band four role (higher than band five), but was unsuccessful. The ET accepted the Respondent's evidence that the person carrying out this selection exercise did not know of the Claimant's attendance record or disability, but had made his decision on the basis that the Claimant had the least qualifications and experience for this role.

19. On 20 April 2015, however, the Claimant complained about not getting the Senior IT Support Analyst position and, more generally, about not being offered a permanent role. He said he felt he was "*being discriminated against and victimised*". Although the Claimant's complaint was not specifically labelled as a grievance, the ET accepted that it was clear that was what the Claimant intended and that he was raising allegations of race and disability discrimination and victimisation.

20. The Respondent - acting through its Senior HR Business Partner for Group Business Services, Ms Rakhi Jethwa - did not, however, treat the Claimant's complaints as a grievance. Ms Jethwa looked into some of the allegations raised and responded by email on 22 April 2015, providing feedback on the Claimant's application for the Senior IT Support Analyst position. The Claimant did not accept that response and a series of emails followed, going into July 2015, regarding the process that had been followed in the selection exercise.

21. Meanwhile, in mid-April 2015, adjustments were made to the Claimant's role so he could work from his home in London three days a week and only work in Milton Keynes for two days. In May 2015, the Claimant met with his manager and was able to confirm that this adjustment had helped with his condition. Notwithstanding that positive feedback, however, on 20 July 2015 the Claimant went off work and remained off on sick leave thereafter, presenting

his ET claim on 31 July 2015. Thus, at the date of the ET hearing, the Claimant remained in the Respondent's employment but had still not returned to work from sick leave.

The ET's Decision and Reasoning

The dismissal of 24 September 2014

22. The Claimant had complained that his dismissal on 24 September 2014 was an act of direct disability discrimination, and/or that it was unfavourable treatment because of something arising in consequence of his disability, and/or that it was an act of victimisation. The ET found that the Claimant had accepted the extension to his notice period communicated to him on 22 October 2014 and continued to treat himself as employed by the Respondent. The ET noted that, when an employee is reinstated after an appeal, this serves to extinguish the dismissal and continuity is restored, see **London Probation Board v Kirkpatrick** [2005] IRLR 443 EAT. Although there was no appeal in the Claimant's case, the ET considered the Respondent had put right a bad decision - a decision reached in breach of the agreement with the trade unions - and the Claimant had remained oblivious throughout. In the circumstances, the ET held that the Claimant had effectively been reinstated, reasoning as follows:

> **"99. We consider that he has in effect been reinstated. We consider this to be a question of fact for the tribunal to answer. He was regarded by the respondent as not having been dismissed, was paid during this period (as required given he was off work sick in any event) and all his employment rights were restored. The claimant considered himself to be an employee."**

23. The ET did not consider the gap between 24 September and 22 October to be fatal to this finding: the Claimant treated himself as not having been dismissed thereafter and the ET concluded that there had thus been no dismissal on 24 September 2014 - it had been extinguished by the subsequent reinstatement. In any event, the ET was unable to see that there was any less favourable treatment: the comparators identified by the Claimant were either employed at a different grade or at a different location where there was no risk of redundancy.

Moreover, the ET was unable to see that any difference in treatment was due to the Claimant's disability, explaining its reasoning in this regard as follows:

> **"155. If the dismissal was because of the claimant's disability we do not consider that the respondent would have voluntarily reinstated him in circumstances where the claimant had not complained and not appealed, if they had dismissed him because of his disability. He had had the disability for a number of years and not been recently diagnosed with it, equally the respondent did offer him alternative employment which again is contrary to the suggestion that the respondent wanted to dismiss the claimant because of his disability.**
>
> **156. As we have set out above the respondent should not have dismissed the claimant as this was contrary to the agreement with the unions. The way this was handled was poor, with the time elapsing before it was noted and then taking some time to set out the error in writing. The fact it happened at all suggests that one part of the organisation does not know what the other is doing and is disorganised with poor communication skills. Notwithstanding this we do not find that this conduct was because of the claimant's disability but rather inept management."**

24. Turning to consider this issue in relation to the Claimant's section 15 claim, the ET concluded that even if there had been a dismissal - contrary to its primary finding that the dismissal had been extinguished by the Claimant's reinstatement - it was not because of a reason arising in consequence of his disability; that is, his need to take time off from work and/or work from home, reasoning:

> **"178. We would have found as a matter of fact that his dismissal was by reason of redundancy and that the claimant did not want any of the other roles which we do not consider in the case of the Manchester role to be suitable alternative employment. It therefore follows that the dismissal would have been for this reason not for a reason arising in consequence of his disability."**

25. As for the victimisation claim, the ET accepted that the Claimant had performed a protected act in raising his grievance in January 2014. Even if the 24 September 2014 dismissal amounted to a detriment (although given its finding that the dismissal had been extinguished, the ET did not consider it did), the ET concluded that it was not because the Claimant had performed a protected act, but rather:

> **"220. ... It was because his role was redundant and he did not wish to take the alternative roles which were not suitable alternative employment."**

Failure to offer the Claimant a permanent role

26. The ET rejected this complaint on the facts. It found the Claimant had been offered various permanent roles. He had declined the role at Waterloo Station and had not wanted to relocate to Manchester. The ET acknowledged that, in February 2015, it had been said that the Claimant's skillset would not suit a particular team but ultimately concluded that a post had still been allocated to the Claimant for which he had failed to apply (see the ET at paragraph 103). For completeness, the ET further rejected the comparators relied on by the Claimant, finding that their circumstances were materially different to his (see paragraphs 136 to 139).

Failure to address the Claimant's concerns raised in April 2015

27. The ET accepted that the Respondent ought to have treated the Claimant's email of 20 April 2015 as a grievance, but had failed to do so. Although the Respondent had addressed some of the concerns raised, it had not dealt with the allegations of victimisation and discrimination and this had prolonged the correspondence on the issue; it had thus failed to provide an adequate response to the Claimant (see paragraphs 108 and 109). That said, the ET did not find this amounted to an act of direct disability discrimination reasoning:

> **"162. We have found that the respondent did not handle this matter appropriately. We do not consider that this was because of the claimant's disability. We have considered the thought processes of the decision maker. She made some efforts but there was a whole scale failure to realise the severity of the allegation and follow process. Given the claimant had previously used the grievance process and he was disabled, we would have expected Rakhi Jethwa to have recognised that this was a grievance. She should have appreciated that. The claimant was clearly aggrieved. However, it is not a case that she ignored the grievance altogether, she did make some attempts to provide feedback which whilst not impressive over a prolonged period it cannot be said she did nothing.**
>
> **163. We do not however find that this was because of the claimant's disability but merely a lack of the understanding of the claimant's concerns and a failure to recognise the matter as a grievance despite her HR background. One could certainly criticise the respondent in this regard but we do not believe that the treatment was because of the claimant's protected characteristic namely disability. We do not consider her failures to be because of any disability but a training need. We believe that she would have failed to spot an email complaining about anything in this manner as a grievance and her treatment of it was not because of the claimant's disability. The claimant did not refer to a grievance and whilst it should have done so given her role, it put simply did not cross her mind that it was a grievance but merely someone asking for feedback from an unsuccessful application."**

28. The ET also rejected the Claimant's claim in this regard under section 15 **EqA**, holding:

> **"183. We do not consider that this was because of the claimant's need to take time off work for disability related illness or because of his need to work from home. Whilst he was absent for some of that period the inadequate handling of this by the respondent was not for disability related reasons but merely a lack of the understanding of the claimant's concerns and a failure to recognise the matter as a grievance despite her HR background. Rather it is a training need. We believe that she would have treated any such complaint in this way as set out above and the claimant's sickness absence or need to work from home were immaterial to this."**

29. Similarly, in considering this as a complaint of victimisation, the ET held that the Respondent's failure was a training issue and not related to any protected act.

30. For completeness, because it is referred to in the Claimant's submissions, I note that the ET did find - as an entirely separate act of discrimination - that the Claimant had suffered section 15 discrimination in relation to his bonus for the years 2010 to 2011 and 2011 to 2012, but held that his claims in these respects had been lodged out of time and that it was not just and equitable to extend time.

The Parties' Submissions

The Claimant's Case

(1) The 24 September dismissal

31. The Claimant contends that the ET erred by importing and applying the vanishing dismissal principle found in unfair dismissal cases. It thus failed to consider whether the dismissal amounted to a detriment for the purpose of section 39(2) **EqA**, a concept that is to be broadly construed. This amounted to a failure to properly determine the Claimant's claim, which put this as an act of detriment. The ET had been critical of the Respondent for allowing the state of affairs to occur in the first place and for taking almost a month to realise its error (see the ET at paragraph 98). The fact that the Claimant had been oblivious to what was going on did not mean that this could not be a detriment (**Gary v London Borough of Ealing** [2001] IRLR 681 CA). Had the ET adopted the correct approach to determining the issues raised in

this case (see **Qureshi v Victoria University of Manchester** [2001] ICR 863 CA), it would have had to engage with the fact that there had been a dismissal of the Claimant on 24 September 2014, while he was absent from work due to ill health.

32. On the question of direct discrimination and victimisation, the ET had failed to examine the conscious or unconscious thought processes of the putative discriminators. Although it had expressed its concern that the dismissal had been allowed to occur and as to the time it had taken for the error to be rectified, the ET had apparently concluded that this simply arose from "*inept management*", although that had not been part of the Respondent's pleaded case nor did the ET hear evidence from the manager who the Claimant believed took the decision to dismiss (the Claimant's then line manager, Mr Nick Barrett). It had been the Claimant's case that redundancy was a convenient excuse used to get rid of him. In the circumstances, it was incumbent upon the ET to look behind the reasons for the Claimant's redundancy and carefully examine the facts giving rise to this dismissal, particularly when he was the only person made redundant in such circumstances. The ET had wrongly adopted a fragmented approach, contrary to the guidance laid down in cases such as **Qureshi** (see also **Rihal v London Borough of Ealing** [2004] EWCA Civ 623) and had failed to take into account, for example, that it had found he had faced section 15 discrimination in respect of bonus payments. The ET had further failed to make the proper findings of fact needed (see **Anya v University of Oxford** [2001] ICR 847 CA) and thus failed to take into account evidence of animus towards the Claimant on the part of Mr Hindler (and possibly Mr Barret, who was also mentioned in Mr Hindler's grievance). The ET had then assumed a case - "*inept management*" - not pleaded by the Respondent (contrary to the guidance in **Chandhok v Tirkey** [2015] IRLR 195 EAT); and had then apparently assumed that was a sufficient explanation, which it was not (see **X v Y** [2013] UKEAT/0322/12, per His Honour Judge Serota QC at paragraphs 60 to 61), and had

failed to look for cogent evidence to support a finding that this was not tainted by discrimination (see **Anya** at paragraph 14). It was not an answer to say the Respondent was prepared to reinstate the Claimant - the ET not even having found who took the decision to reinstate and whether that was the same person who had taken the original decision to dismiss.

33. As for the approach to the claim under section 15, the ET had failed to consider this in terms of the breach of the collective agreement - the failure to stop the Claimant's dismissal taking effect on 24 September 2014. It had not engaged with the question whether that was because of the Claimant's absence from work - the "*something*" arising in consequence of his disability.

(2) The failure to offer the Claimant a permanent position in 2015

34. In this regard, the Claimant complains that the ET failed to properly engage with his case and make the required findings. In relation to the vacancy within the performance analysis system team, the ET had merely found that the Claimant did not appear to apply for the role (see paragraph 80). That, however, failed to engage with his complaint that he had not been informed of these positions and had only learned of the concern that he would not fit within the skillset of the team when he saw the Respondent's internal emails on disclosure. In the circumstances, there was no evidential basis for concluding that the position had been allocated to the Claimant, but he had not applied for it.

(3) The failure to deal with the Claimant's concerns in April 2015

35. Having found that the Respondent's response in this regard was inadequate - specifically, that it failed to address the Claimant's complaints of discrimination and victimisation - the Claimant contends that the ET then failed to properly apply the burden of

proof, alternatively, it reached a decision that was not open to it on the evidence. It had not been part of the Respondent's case that Ms Jethwa needed further training - indeed, her evidence had stressed her equal opportunities and HR training and experience - and the Respondent had asserted that it had adequately addressed the Claimant's complaint. Having rejected that explanation, it was not for the ET to make good the Respondent's case. On the application of the burden of proof, it ought to have found that this was an act of discrimination and/or victimisation.

The Respondent's Case

36. The Respondent reminded me of the limitations on the EAT's jurisdiction. As an appellate tribunal it is limited to determining questions of law arising from decisions of the ET. As such, the EAT has no power to interfere with an ET's decision unless it has misdirected itself in law or misunderstood or misapplied the law, if it reached a particular conclusion or finding absent any evidential foundation, or if the decision could properly be characterised as perverse (see **British Telecommunications Plc v Sheridan** [1990] IRLR 27 CA). Moreover, in considering whether the ET had so erred, the EAT should not subject the judgment of the first-instance Tribunal to, "*unrealistically detailed scrutiny*" (see per Elias J in **ASLEF v Brady** [2006] IRLR 576 EAT). It should further be wary of a selective presentation of the evidence (see **Fage UK Ltd and Another v Chobani UK Ltd and Another** [2014] EWCA Civ 5) and must avoid determining what weight should be attached to particular facts or evidence (see **Eclipse Blinds Ltd v Wright** [1992] IRLR 133 EAT). It was also necessary for the EAT to be alive to the issues that were contended for before the ET (see **JJ Food Service Limited v Zulhayir** [2013] EWCA Civ 1226).

37. As for the ET's approach to the burden of proof, it was not wrong for the ET to go straight to the "*reason why*" question (see **Shamoon** and **London Borough of Islington v Ladele** [2009] IRLR 154 EAT). The explanation for less-favourable treatment did not have to be a reasonable one (see **Ladele** at paragraph 40.4). In particular, a mere difference in treatment without more would not be sufficient to shift the burden to the employer (see **Madarassy v Nomura International PLC** [2007] IRLR 246 CA, at paragraph 46 per Mummery LJ). In particular, the mental processes of individuals would only be relevant if forming part of the Claimant's case before the ET; the burden of proof did not operate to extend the issues to be determined (see **CLFIS (UK) v Reynolds** [2015] IRLR 571 CA).

(1) The 24 September dismissal

38. Turning then to the first issue addressed by the appeal, the ET had been entitled to look at the entirety of the history, including the subsequent reinstatement, when determining the question whether the Claimant had suffered any detriment. On the facts of this case, it was not possible to look at the act of dismissal in a vacuum. In determining whether or not it was a detriment, it was permissible for the ET to look at all the circumstances. Based on its findings, there was no detriment.

39. The ET had then gone on to consider the Claimant's case in the alternative: even if there had been a detriment, it permissibly rejected the comparators he had named. There was no challenge to this finding. In the yet further alternative, the ET had considered whether the dismissal had been because of the Claimant's disability (direct discrimination), because of something arising in consequence of his disability (section 15), or because of any protected act (victimisation). Given that the ET had accepted the Respondent's case on the background to the dismissal (the redundancy situation, and the fact that the Claimant had initially rejected

alternative employment or relocation and had expressed a preference for redundancy) and given that there were no relevant comparators, there was no basis for finding that the burden of proof had shifted and the Respondent would not have been required to provide particularly cogent evidence given that background. Ultimately, the ET had been entitled to find there was a coherent and non-discriminatory reason for the treatment in question, namely internal communication problems, (see the ET at paragraph 156) and it was not for the EAT to seek to substitute its own evaluation or inference for that of the ET in this regard.

(2) The failure to offer the Claimant a permanent position in 2015

40. The second issue raised by the appeal related to the alleged failure to offer the Claimant a permanent role, with specific reference to the positions addressed by the ET at paragraph 80. First, this had not been part of the Claimant's case before the ET. Even if it was open to the Claimant to say that he did not know about the specific details when pleading his case or particularising the Scott Schedule, (although the Respondent says that in fact he did, as made clear by the note of his meeting with Ms Petitt on 12 May 2015), he ought properly to have applied to amend his claim to specifically rely on these positions if putting a positive case in this regard. Even if that was not correct, the ET was, in any event entitled to find (as it did, see paragraph 103 of the ET's Judgment) that the Claimant had not applied for the position in question. That was a permissible finding given the evidence (see the note of Ms Petitt's meeting with the Claimant on 12 May 2015).

(3) The failure to deal with the Claimant's concerns in April 2015

41. Finally, turning to the third issue challenged on appeal - the way in which the Respondent had dealt with the Claimant's April 2015 complaint - the ET heard from Ms Jethwa and was entitled to form its own view as to what had taken place. There had been no evidence of hostility on her part towards the Claimant, and the fact that the ET had found that there had

been discrimination in respect of former bonus payments was entirely unrelated to her and could not assist the Claimant's case. Ultimately, the ET's finding was limited to the fact that Ms Jethwa had failed to appreciate the Claimant was raising a grievance, albeit she had addressed his complaint in other respects. The fact that Ms Jethwa had received training in 2014 did not mean this did not demonstrate an error or training need, and it was not fatal that this was not the Respondent's pleaded case. This was the inference drawn by the ET arising from the evidence that Ms Jethwa had given as to how she had dealt with the grievance, i.e. that she had made an error. That was a permissible conclusion on the evidence; it was not for the EAT to take a different view.

The Legal Framework

42. The Claimant was (relevantly) pursuing claims of direct discrimination, because of something arising in consequence of disability, and of victimisation.

43. Direct discrimination is defined by section 13(1) of the **EqA** as follows:

> **"A person (A) discriminates against another (B) if, because of a protected characteristic,**
>
> **A treats B less favourably than A treats or would treat others."**

44. By section 15, **EqA**, it is provided:

> **"(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."**

45. As for whether an employee has been treated unfavourably for the purposes of section 15(1)(a), that would mean that he or she has been put at a disadvantage. That may be obvious -

because the employee has been treated less favourably than another person - but it also can be more subtle; even where an employer thinks it is acting in the best interests of a disabled person, the treatment might still be unfavourable for these purposes; see the guidance provided in the **Equality Act 2010 Statutory Code of Practice** at paragraph 5.7 and the observations of Lord Carnworth in **Trustees of Swansea University Pension Scheme v Williams** [2019] ICR 230 SC.

46. As for victimisation, that is defined by section 27 **EqA** as follows:

> **"(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."**

47. By Part 5 of the **EqA**, conduct made unlawful where, relevantly, an employer subjects the employee to *"any other detriment"*, see section 39(2)(d) and 4(d) **EqA**.

48. As the case law makes clear, detriment for these purposes is to be broadly defined; it will protect against any disadvantage and should be found to exist if *"a reasonable worker would or might take the view that the [treatment in issue] was, in all the circumstances, to his detriment,"* see Brightman LJ at page 104 of **Jeremiah v Ministry of Defence** [1979] QB 87 CA, cited with approval by Lord Hoffman at paragraph 53 **Chief Constable of West Yorkshire Police v Khan** [2001] ICR 1065 HL; see also **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 HL, at paragraphs 104 to 105.

49. In determining the factual issues arising in a complaint of discrimination, guidance is provided by Mummery LJ in **Qureshi** (there dealing with a claim of race discrimination) at pages 873G to 874B, as follows:

> **"…..**

> **As the industrial Tribunal has to resolve disputes of fact about what happened and why it happened, it is always important to identify clearly and arrange in proper order the main issues for decision, for example:**
>
> **(a). Did the act complained of actually occur? In some cases, there will be a conflict of direct oral evidence. The tribunal will have to decide who to believe. If it does not believe the applicant and his witnesses, the applicant has failed to discharge the burden of proving the act complained of and the case will fail at that point. If the applicant is believed, has he brought his application in time and, if not, is it just and equitable to extend the time?**
>
> **(b). If the act complained of occurred in time, was there a difference in race involving the application?**
>
> **(c). If a difference in race was involved, was the applicant treated less favourably than the alleged discriminator treated or would treat other persons of a different racial group in the same, or not materially different, relevant circumstances?**
>
> **(d). If there was a difference in treatment involving persons of a different race, was that treatment "on racial grounds"? Were racial grounds an effective cause of the difference in treatment? What explanation of the less favourable treatment is given by the respondent?**
>
> **….."**

To answer each of those questions, the ET must make findings of primary fact, either on the basis of direct or positive evidence or by inference from circumstantial evidence, see also Sedley LJ in **Anya v University of Oxford** [2001] ICR 847 CA, at page 854F to 855F.

50. Moreover, in determining complaints under the **EqA**, an ET is bound to apply the shifting burden of proof under section 136(2), which relevantly provides:

> **"(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."**

51. Although section 136 thus identifies two separate questions in applying the burden of proof, the ET does not err in focusing on *"the reason why"*. Indeed, in cases involving a hypothetical comparison, that may be the most appropriate course (see **Shamoon**). More detailed guidance, derived from an overview of the relevant authorities, was provided by Elias J (as he then was) in **Ladele v London Borough of Islington** [2009] IRLR 154 EAT (applied and approved in **McFarlane v Relate Avon Ltd** [2010] IRLR 196 EAT, affirmed by the Court of Appeal at [2010] IRLR 872). The crucial question in every case will be *the reason why* the

A complainant was treated as she was. If the ET is satisfied that the prohibited ground is one of the reasons for the treatment, that will be sufficient – it need not be the only reason, provided it is significant, in the sense of being more than trivial. The application of section 136 **EqA** means that if a complainant proves such facts from which inferences *could* (not necessarily *would*) be drawn that the reason for the treatment is the prohibited ground, the ET *must* draw that inference unless the employer provides a satisfactory non-discriminatory explanation. The explanation does not, however, have to be a reasonable one: the case-law recognises that employers may treat employees unreasonably irrespective of a protected characteristic and, in general, the mere fact that a complainant is treated unreasonably, without more, will not be sufficient to shift the burden of proof. That said, in some cases evidence of unreasonable treatment may be evidence of discrimination such as to call for an explanation from the employer and the absence of any satisfactory, non-discriminatory explanation may then require the inference of discrimination to be drawn. Inevitably, the answers to these questions will be case-specific. Where an ET seeks to infer (or declines to infer) discrimination from surrounding facts, however, it must set out in some detail what those relevant factors are.

52. The assessment to be undertaken in respect of each of the claims the Claimant was pursuing in this case was, of course, for the ET as the first-instance Tribunal of fact, and the EAT must be wary of attacks on findings of fact being dressed up as points of law (see **Hollister v National Farmers' Union** [1979] ICR 542 CA). In particular, the EAT should be careful to note the way the case was run below and to keep in mind the issues that were in contention before the ET; it would not be permissible to interfere with the ET's decision by addressing issues that were not in play before it whilst ignoring findings on issues that were, see **JJ Food Service Limited v Zulhayir** [2013] EWCA Civ 1226.

53. More specifically, the ET can only consider the mental processes of individuals to the extent that it forms part of the Claimant's pleaded case (see **CLFIS (UK) v Reynolds** [2015] IRLR 571 CA, at paragraph 48). The burden of proof does not serve to extend the issues before the ET (**CLFIS (UK)** at paragraph 51).

Discussion and conclusions

(1) The 2014 dismissal

54. The Claimant's case before the ET on this issue was clearly put more widely than as it now is on this appeal. That is not a pejorative observation; inevitably, the appellate process crystallises the issues in a case. It does, however, mean that I should be careful not to fall into the trap of criticising the ET for failing to address a different case than that which was argued before it.

55. The ET plainly rejected the Claimant's broader case that his redundancy was a sham. It permissibly concluded that there had been a genuine reorganisation that had led to his role being relocated to Manchester: there was a diminishing requirement for employees to carry out work of a particular kind in the place where the Claimant worked, such as to give rise to a redundancy situation. More than that, the ET found that the Claimant had himself chosen not to relocate to Manchester and that he had initially declined an alternative position at Waterloo Station, opting instead for redundancy. On the ET's findings, at the time when notice was given, there was no basis on which it could be concluded that the Respondent had acted in contravention of section 13, section 15 or section 27 of the **EqA**.

56. That, however, was not the end of the matter. At some point in 2014, subsequent to the Claimant having been given notice, the Respondent had entered into an agreement with the

trade unions such that (at least in the relevant grades) there would be no dismissals for redundancy that year. That agreement ought to have led to the retraction of the Claimant's notice of dismissal before it could take effect before 24 September 2014 (or, at least, the offer to retract that notice). That did not happen. Instead the Claimant's notice expired on 24 September 2014 and, as of that date, he stood dismissed. The issue for the ET was thus not why had the Claimant been given notice, but why did the Respondent still allow that notice to take effect (or, at least, take steps to try to stop it having that effect)?

57. The ET's primary view was that the question did not need to be answered, because the subsequent reinstatement of the Claimant meant the dismissal vanished. That, however, was to view what had happened through the prism of the case law on "dismissal"; to focus on the reinstatement of the Claimant and what that meant for the continuity of his employment rather than on the actual act of which he was complaining, which was the initial dismissal itself. More specifically, the Claimant did not need to demonstrate that this remained a dismissal; he was entitled to complain of this - the failure to offer to retract the notice - as an act of detriment.

58. The Respondent argues that the ET was entitled to view what had happened in context, which included the subsequent reinstatement and the fact that the Claimant suffered no pecuniary loss. I do not, however, accept that that provided a complete answer in this case. This was a claim under the **EqA**, which allows for compensation to be awarded for non-pecuniary damages, including injury to feelings. Moreover, the ET is required to adopt a broad approach to its consideration of whether a detriment has been established: a dismissal - even if subsequently withdrawn - can give rise to a detriment and I am satisfied that the ET was wrong to hold otherwise.

59. Notwithstanding its primary finding on detriment, the ET did, however, go on to address the question why the Claimant had been treated in this way; why the Respondent had failed to withdraw the notice before it took effect, contrary to the agreement it had reached with the trade unions. In so doing, the ET specifically rejected the comparisons the Claimant had sought to draw with other employees, and there is no challenge before me in that regard. The ET then went on to consider whether there might, however, be less favourable treatment (on the basis of a hypothetical comparison), or, for section 15 purposes, unfavourable treatment. In so doing, the ET then turned to "*the reason why*".

60. Although the ET addressed this question under different subheadings for each of the claims, I accept that I should approach its reasoning holistically. Doing so, it is apparent that the ET considered that the Respondent's handling of the dismissal was poor, but not that it was because of his disability. Rather, the ET concluded that it suggested that one part of the organisation did not know what the other was doing and had been disorganised, with poor communication skills; that it was inept management. I do not agree with the Claimant that the ET was prohibited from making such a finding, because this had not been pleaded by the Respondent. It was, however, required to apply section 136 and to ask itself whether, on the facts it had found, it *could* - but not necessarily *would* - determine that the Respondent had acted in breach of the **EqA**. There was no actual comparator, but it seems that no one else was in the same position as the Claimant and no one else had been dismissed contrary to the agreement with the trade unions. There was, thus, a breach of an agreement in circumstances where the Claimant was disabled and had taken significant time off due to his disability (and for other reasons), where he had raised complaints of (race and disability) discrimination, such as to give rise to a protective act and where there had apparently been some animus directed towards him relating to that. The ET was not bound to find that the reason for this treatment

was unlawful under section 13, section 15 or section 27 **EqA**, but I am unable to see that it asked itself whether the burden of proof had shifted or whether it could so conclude and, if so, whether the Respondent had provided cogent evidence as to why this had happened.

61. In my view, this was a question that particularly arose in relation to the section 15 claim. The Claimant was absent from work at the relevant time - this was the "*something*" arising from his disability - and the question arose as to whether this was the reason why the Respondent failed to retract the notice in time. Looking to see whether the ET engaged with that question, I am unable to see that it did. Indeed, under the heading, *"Relating to the Section 15 Claim,"* the ET simply reverts back to its earlier findings relating to the background context - the fact that there was a redundancy situation and the Claimant had declined earlier offers to relocate or accept a position at Waterloo Station. Even allowing that I should refer to the reasoning provided under the section 13 claim, that does not assist, because it does not consider whether the Respondent's ineptitude might have related to the Claimant's absence.

62. More generally, however, I am not satisfied that the ET properly engaged with the issue it had to determine under this head in relation to any of the Claimant's claims, in terms of the proper application of section 136 **EqA**. It seems to me that the ET wrong-footed itself by failing to properly consider what the actual detriment was. In taking that misstep, the ET failed to then ask itself whether the Claimant had established facts for the purposes of section 136(2) and, if so, whether an adequate explanation had been provided that was other than for one of the prohibited reasons relevant to these claims. That renders the ET decision on the question of the 2014 dismissal unsafe and I therefore allow the appeal in this regard.

(2) The failure to offer the Claimant a permanent position in 2015

63. I turn then to the second issue that is the subject of challenge before me: the ET's approach to the complaint that the Respondent failed to offer the Claimant permanent employment, specifically relating to the positions identified by Mr Lindsell. Again, I bear in mind the fact that the ET was dealing with a case that was put on a far broader basis than that which is now before me. More than that, however, that case was vague - a general assertion that did not identify particular positions and certainly not these particular positions. The Claimant has pointed out that he had not seen the Respondent's internal correspondence until late in the disclosure process, but it is apparent that he was aware of these positions in May 2015, and the record of his meeting with Ms Petitt, which was put before the ET, suggests that he did not consider them suitable. I am not making any finding of fact in this regard myself, but I do think it is fair for the Respondent to observe that, had the Claimant considered that he should have been offered these particular positions, he had sufficient information to provide particulars of that complaint. He did not do so. Even after the Claimant had seen the Respondent's internal documentation, he did not apply to formally amend to particularise his case to specifically complain about these positions. This does not mean that he was not entitled to point to these as examples of jobs that might have been offered to him as part of his general complaint in this respect, but it is relevant to my consideration as to how this matter was addressed by the ET.

64. I note, therefore, that the ET was faced with a general complaint about not being offered permanent positions; that it had found that this was certainly not true in respect of certain other roles; and that it had before it evidence that showed that the vacancies identified by Mr Lindsell were drawn to the Claimant's attention in May 2015, but he had not sought to apply for these roles and had not identified these in his ET claim or the further particulars provided by way of

his Scott Schedule. In the circumstances, I consider the ET was entitled to find that the Claimant's own failure to put himself forward for the roles that had, on the evidence, been allocated for him, meant that this complaint could not be made out. It was not bound to infer that Mr Panya's decision relating to the Claimant's skillset related to his absence from work, his disability or his protected act, because the Claimant himself - apparently viewing the jobs in question as matching his own role only "*on paper*" - chose not to put himself forward for these roles. In the circumstances, the ET reached a permissible conclusion and gave adequate explanation for that conclusion (bearing in mind the way in which the case was being put before it), and I do not allow the appeal on this ground.

(3) The failure to deal with the Claimant's concerns in April 2015

65. Finally, I turn to the question of the Respondent's response to the Claimant's April 2015 grievance. The detriment here related to the failure to address this as a grievance raising complaints of race and disability discrimination and victimisation. In dealing with the Claimant's complaint, Ms Jethwa focused on the specific issue about the application for the band four role, but failed to address the Claimant's grievances about potential discrimination or victimisation. The ET was satisfied, however, that this was not due to the Claimant's disability or because of his absence from work (something arising from his disability) or to any protected act, but was a simple error on Ms Jethwa's part.

66. The Claimant has pointed out that Ms Jethwa could hardly be portrayed as an inexperienced HR professional. The ET was, however, cognisant of that fact; it expressly found that it should have been clear to her, as a Senior HR Business Partner, that this should have been treated as a grievance. That said, having had the benefit of hearing Ms Jethwa giving evidence, the ET concluded that she would have failed to spot this fact in relation to any email

of this nature; there was no less-favourable treatment because of disability or any protected act and no unfavourable treatment due to the Claimant's absence. Although the ET was thus focusing on this specific act, or this specific treatment, there was, of course, nothing to link Ms Jethwa to any particular animus towards the Claimant. The ET was, rather, entitled to see this act or treatment in context, which included Ms Jethwa's apparent focus on the Claimant's complaint about his non-selection for the band four position.

67. In making these findings, I do not consider the ET lost sight of the burden of proof. It was, however, satisfied that there was an explanation for Ms Jethwa's behaviour other than the Claimant's protected characteristic, protected act or the something arising from his disability. The Respondent might itself have failed to identify that as a failure on Ms Jethwa's part but, having found that her response was inadequate, the ET was entitled to ask itself why that had been so. Finding that her response would have been the same absent the relevant matters on which the Claimant relied, the ET was entitled to find that the treatment in question was in no sense because of the prohibited matters. I am satisfied that for me to seek to go behind that finding would be to impose my own assessment of the evidence presented to me on the appeal, without the benefit of hearing from the witness in question. That would be an improper step at this stage and I find that the appeal has not been made out on this ground.

Disposal

68. Having given my Judgment on the appeal, I permitted the parties to address me further on the question of disposal.

69. For the Respondent, it is submitted that the appeal has only been upheld on a very limited basis and I can be satisfied that the error identified cannot be material: the Claimant

suffered no pecuniary loss; as a matter of law, he was not dismissed and he had previously declined alternative roles. In the circumstances, I can be satisfied that I can uphold the ET's overall decision and/or reach my own conclusion that the error is not fatal to the decision reached (see the guidance provided by the Court of Appeal in **Jafri v Lincoln College** [2014] ICR 920).

70. I disagree. The result of my Judgment is that I have found that the ET erred in its approach to the Claimant's complaint of detriment in respect of his dismissal on 24 September 2014. That act of detriment gives rise to an issue - albeit no doubt limited - for the ET to determine. Correctly applying the burden of proof, the ET will need to consider whether the reason for the failure to retract the notice of dismissal (or offer to do so) was by reason of the Claimant's disability, or something arising from that disability, or because of his protected act. If the ET concludes that liability should be determined in the Claimant's favour (albeit there may also be issues as to whether or not the claim was brought in time and whether it would be just and equitable to extend time), although the Claimant may have suffered no pecuniary loss, the ET would then need to consider whether the Claimant suffered any injury to feelings. These are all matters for the ET to determine. There is no one answer, nor can I be satisfied that the error in question is immaterial to the overall conclusion reached by the ET.

71. In the alternative, the Respondent says that I should make use of the **Burns/Barke** procedure (see **Burns v Royal Mail Group plc** [2004] IRLR 425 and **Barke v SEETEC Business Technology Centre Ltd** [2005] IRLR 633), and allow the ET the opportunity to make good its reasoning on the one point in issue or, in the further alternative, that I should remit this matter to the same ET as it would be proportionate to do so. For the Claimant it is said that this matter needs to be remitted, but he seeks to argue that that should be to a different

ET. The Claimant submits that, after the time that has passed, it cannot be assumed that this ET would have any particular recall of the case, and there was a real risk that justice would not be seen to be done should I remit it to the same ET, which has already formed a view on this issue.

72. I do not consider that a **Burns/Barke** reference is appropriate once I have allowed an appeal after a Full Hearing; that would seem to simply allow an ET to have a second bite at the cherry, to make good its reasoning, which has been found to be deficient. On the other hand, I do agree with the Respondent that the appropriate course at this stage is to remit this matter to the same ET, so far as that it remains practicable. In reaching this view, I have had regard to the guidance laid down in **Sinclair Roche and Temperley and Others v Heard and Another** [2004] IRLR 763, and to the various factors listed there. It is plainly proportionate to remit this matter to the same ET, which has spent time making extensive findings of fact, most of which have not been disturbed. There is, moreover, no question as to the ET's professionalism and no suggestion that it is in any way biased; I have no reason to doubt that the ET would do anything other than come to this matter afresh, having regard to the notes it made previously, and properly applying section 136 **EqA** to the act of detriment on the specific complaint relating to the dismissal of the Claimant on 24 September 2014.

73. I, therefore, direct that this matter be remitted to the same ET for reconsideration of that particular point. If that is not practicable, the assignment of this matter to a different ET will be a matter for the Regional Employment Judge.