Appeal No. UKEAT/0300/19/JOJ(V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 18 November 2020
Judgement handed down on
22 January 2021

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

CHIEF CONSTABLE OF MERSEYSIDE POLICE APPELLANT

MR S KNOX RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr D Tinkler (of Counsel) Instructed by Weightmans LLP 100 Old Hall Street Liverpool L3 9QJ
For the Respondent	Mr A Rozycki (of Counsel) Instructed by Minister Law Solicitors Kingsfisher House Peel Avenue Wakerfield WF2 7UA

SUMMARY

VICTMISATION

The Claimant in the Employment Tribunal, a police officer serving with the Respondent Force, made a number of subject access requests to the Respondent's Data Access Unit (DAU). One of these, made in 2017, (SAR1) was for all emails sent within the Force "with a connection to me" between 2002 and 2017. The Respondent was aware that he considered that he had been the victim of unlawful discrimination, and intended to (and did) bring Employment Tribunal claims.

SAR 1 was referred by the DAU to the Anti-Corruption Unit (ACU), which was the body which kept an archive of all emails sent within the Force. Following an initial response from the ACU to the DAU, the Claimant was informed that his request was too wide, and that he needed to identify the names of senders and recipients that he wanted searched. The DAU was told by the ACU that its software at the time did not enable an automated search to be conducted for any email mentioning the Claimant, regardless of who sent or received it. In January 2018 the Claimant was given access to the emails that had been provided to the DAU by the ACU in November 2017. The Tribunal accepted that, to comply with GDPR from May 2018, the ACU upgraded its software, which improved its automated email search capabilities. Thereafter, following further correspondence about his request, a further batch of emails was provided to the Claimant in October 2018.

The Tribunal, by a majority, found that the Claimant had been victimised, in three respects, by the conduct of the Data Access Manager, referred to as Mr D, in connection with SAR 1. The premise of all these findings was the majority's conclusion that the ACU in fact had the capability to find the further batch of emails provided in October 2018, when it first responded to SAR1 in November 2017; that the limitations of the ACU's software prior to the GDPR upgrade did not truly explain why that second batch of emails had not been disclosed with the first batch; and that Mr D knew this to be the case. This conclusion was relied upon by the

majority to support the conclusion that Mr D's impugned conduct was reasonably viewed by the Claimant as detrimental treatment; and that the burden shifted to the Respondent to show that such conduct was not because of the Claimant's protected acts; and that, as Mr D had not been called as a witness, the Respondent had not discharged that burden, so that findings of victimisation followed.

On the Respondent's appeal, it was held:

(1) The majority did not have a proper basis, on the evidence before the Tribunal, and facts found, to conclude that the explanation given, for why the ACU was not able to retrieve more emails than were produced, prior to the software upgrade, was not true. The majority rested their conclusion on their understanding of what the ACU existed to do, but the facts found about that, whether generally or in relation to the email archive, did not properly support such an inference. The majority were also wrong to draw an adverse inference from the failure of the Respondent to call a witness from the ACU (in addition to one from the DAU) when the pleaded victimisation claims did not identify that the conduct of the ACU in relation to SAR1 was specifically being criticised. The finding that the explanation given by the ACU was not true was therefore perverse. As it was conceded by the Claimant that the findings of detrimental treatment all rested on that finding (and the inference that Mr D knew that the ACU could have retrieved the October emails at the outset), those findings of detrimental treatment could not stand.

(2) In any event, the matters referred to by the majority as supporting a shifting of the burden of proof could not, separately or cumulatively, properly support the shifting of the burden. In addition, in considering whether the burden shifted in relation to Mr D's impugned conduct, the majority should have considered the picture painted by all of the Tribunal's relevant findings regarding his conduct, and his interactions with the Claimant, in relation to SAR1. Consideration of the whole picture reinforced the

conclusion that there was no proper basis for the majority's finding that the burden of proof shifted to the Respondent.

The appeal was accordingly allowed.

HIS HONOUR JUDGE AUERBACH

Introduction

1. I will refer to the parties as they were in the Employment Tribunal, as Claimant and Respondent. This is the Respondent's appeal.

2. The Claimant is a Constable serving in the Merseyside Constabulary. A number of claims by him, of victimisation, and of harassment, related in some cases to disability, in others to sex, were heard by the Employment Tribunal in March 2019. In its reserved decision sent to the parties in June 2019 the Tribunal, by a majority – Mr G Pennie and Mrs J C Fletcher, with Employment Judge Horne dissenting – made three findings of victimisation. One complaint of harassment related to disability was also upheld unanimously. The remaining complaints were dismissed, either on their merits, because they were out of time, or upon withdrawal.

3. This full appeal hearing was concerned solely with a challenge to the majority decision in respect of the successful victimisation complaints. The judgment provides, in that respect:

> **"The judgment of the tribunal is that:**
>
> **1. By a majority (the Employment Judge dissenting), the tribunal's judgment is that the respondent is liable for victimisation of the claimant by its employee (referred to in this judgment as "Mr D") subjecting the claimant to the following detriments:**
>
> **1.1. Delaying between 26 January 2018 and 25 May 2018 taking any action to search for e-mails that should have been provided as part of the response to the claimant's data subject access request ("SAR1") of 17 August 2017;**
>
> **1.2. Sending dismissive e-mails on 7 August and 30 August 2018; and**
>
> **1.3. Failing to escalate SAR1 to an appropriate person in a position of influence over the Anti-Corruption Unit."**

The Facts and the Tribunal's Decision

4. I can summarise the background and context fairly briefly, in order to set the scene.

5. The Tribunal made findings about various events occurring over a period from roughly September 2015 onwards, and regarding the background of the Claimant's family circumstances. In 2016 the Claimant was unsuccessful in an application to change his shift pattern. He complained of direct sex discrimination in that regard. He was then given a new posting as part of a reorganisation that was to be implemented in early 2017, and made a further application to change to a 9 – 5 shift pattern in that connection, which, this time, was successful. However, there was a claim that he was mocked by a colleague, in a manner amounting to harassment, in connection with his having secured a 9 – 5 shift pattern. After he took up his new role there were some issues between him and his new line manager.

6. In February 2017 the Claimant was notified of a change in shift patterns arising from an operation planned for the team of which he was now a part, on dates in early March. This led to him applying for a change in shifts, and then a change in duties. There were factual disputes about the detail of how events unfolded, which I do not need to document. On 22 February 2017 the Claimant began a period of sickness absence which was still ongoing at the time of the Employment Tribunal Hearing in March 2019. Events during the twelve months following the start of that absence gave rise to further complaints of harassment relating to disability (by reference to the Claimant's mental health), the details of which I need not set out. The Tribunal made detailed findings of fact about those events. In particular, the Claimant was initially on full pay, but this was due to fall to half pay in August 2017. He applied for discretion to be exercised to keep him on full pay from that point, but in August 2017 he was informed that this application had been unsuccessful. The Tribunal found that from this time onwards he pursued various requests for information with a view to bringing a claim in the Employment Tribunal.

7. In October 2017 the Claimant was issued with a return-to-work plan requiring him to return at the beginning of November. He was "considerably upset" by this and was signed off for a further period until 18 December 2017. He saw Occupational Health in November, who reported that he was too unwell to resume work. On various dates in the period from December 2017 to February 2018, the Claimant went through ACAS Early Conciliation, initiated multiple internal grievances, and presented his Employment Tribunal claim.

8. I now need to set out the relevant parts of the Tribunal's Reasons that are directly pertinent to this appeal. Because of the nature of the challenge, close consideration needs to be given to exactly what the Tribunal said in the key passages, and so I need to cite these fairly extensively.

9. First, in the section identifying the complaints and the issues that it had to consider, the Tribunal said the following, in relation to victimisation:

> **"24. There was one complaint of victimisation. It had a single central theme, but there were many facets to it. It was common ground that the claimant had done a number of protected acts within the meaning of section 27 of EqA. The respondent accepted that these acts including the making of four requests for information. In the claim as formulated by the claimant, these requests were described as "freedom of information requests" to the "Data Protection Unit". In fact, the relevant department was the Data Access Unit, and the claimant's requests were at all times treated as data subject access requests ("SARs"). We were not shown the actual requests that the claimant made, but the respondent does not dispute the fact that the claimant indicated in those requests that he required the information in connection with an employment dispute. It is also common ground that the claimant did further protected acts in February 2018 by raising multiple grievances, expressly or impliedly alleging discrimination.**
>
> **25. The List of Issues handed to the tribunal on the second day of the hearing attempted to capture the victimisation issues in the following terms:**
>
> **"…Was the claimant subjected to detrimental treatment by the respondent failing to deal with his requests for information within the statutory time limits or within a reasonable period or at all?"**
>
> **26. During the evidence and submissions, it became clear that there was more dividing the parties than that simple question would suggest. First, it was clear that the claimant's case was that the respondent had victimised the claimant not just in delaying the provision of information, but also by providing information that was allegedly incomplete. Second, it was clear that there was a very real issue about whether anybody had acted with the prohibited motivation. In the language of section 27 of EqA, we had to decide whether any employee or officer of the respondent had subjected the claimant to the alleged detriment**

> ***because*** **the claimant had either done one or more of the protected acts or was believed to be going to do so.**
>
> **27. During the course of the hearing, there was a discussion about who, on the claimant's case, had acted with the prohibited motivation. Counsel for the claimant confirmed that it was not part of the claimant's case that Mrs Jaymes of the Data Access Unit (DAU) had been motivated in that way. No such allegation was put to any of the witnesses who gave evidence. Rather, it was the claimant's case that there had been "general collusion behind the scenes". The claimant was given the opportunity to apply to have witnesses recalled so it could be put to them that they had been a party to the general collusion. Having taken instructions, the claimant's counsel indicated that he would not be seeking to have any witnesses recalled for this purpose."**

10. In the course of giving its impressions of the various witnesses the Tribunal said this:

> **"33.9. In view of the fact that we have reached a majority decision in relation to the victimisation complaint, our impressions of Mrs Jaymes' evidence require a little unpicking. We all agreed that Mrs Jaymes spoke authoritatively on the processes that are required to be followed under the data protection legislation. We all accepted that she had given us an accurate account of the steps she personally had taken. It was our collective finding that Mrs Jaymes had spoken with a superintendent at the Anti-Corruption Unit (ACU), who had given her various explanations of what searches would be needed in order to retrieve the e-mails that the claimant was requesting. Where the tribunal disagreed was in our assessment of whether those explanations were credible and whether the lack of credibility was something that Mrs Jaymes must have realised. Our majority thought that the ACU must have been able to retrieve the information which the claimant sought, more easily than it was saying it could, and that that fact must have been obvious to Mrs Jaymes. The employment judge did not think that there was an adequate basis for such a finding. There was no evidence other than that of Mrs Jaymes about what the ACU existed to do, and how information held on its database could be retrieved.**
>
> **34. The respondent did not call any witness from the ACU. There was a difference of opinion between the members of the tribunal as to what we ought to make of this fact:**
>
> **34.1. It was the view of the majority that we could conclude from the failure to call such a witness that the ACU was actually capable of retrieving more information than they were letting on. The majority believed that it should have been clear to the respondent that they would need to justify the incomplete results of the SAR by reference to the detailed workings of the ACU. The key issue was that the claimant was not provided with, or was delayed in being provided with, access to information to which he was entitled and was, as he saw it, fundamental to his ability to make an effective claim to a tribunal.**
>
> **34.2. The Employment Judge disagreed. The claim was about the failure to respond to the claimant's statutory requests for information (which he had described as "freedom of information requests" but which in substance were SARs and were treated as such). It was alleged in the claim that all of these requests had been made to the "Data Protection Unit". The respondent would therefore have been forgiven for thinking that it was the Data Protection Unit who, being both named in the claim and being responsible for complying with SARs, was the body of people alleged to have acted with the prohibited motivation. They did not have to justify their actions or delays objectively. All they had to do was explain why they had acted as they did on the information that was provided to them. It would therefore make perfect sense for them to call a witness from the DAU to tell us what she had been told by other departments and the action that she had taken on receipt of that information. It would not have been necessary to call a witness from a different department to face questions on whether that information was factually correct or not."**

35. Later, in the course of the findings of fact, there is the following passage.

"115. We must rewind the clock to deal with the claimant's allegation of victimisation. The sole surviving complaint concerns the respondent's handling of the claimant's requests for information. Being the Head of a Public Authority, the respondent is subject to the requirements of the Freedom of Information Act 2000. We can see from printed material provided by the claimant that in recent years the respondent has dealt with literally hundreds of requests under that Act. The respondent is also a data controller. It holds vast amounts of personal data, much of it belonging to the thousands of police officers and civilians employed by the Force. Data subjects, including police officers, have a statutory right of access to their personal data which, until May 2018, was to be found in section 7 of the Data Protection Act 1998. Because of the volume and administrative demands of dealing with SARs, the respondent has its own Data Access Unit ("DAU") to whom witnesses often referred as the "Data Protection Unit". Within the DAU is a team of Data Analysts.

116. Between August 2017 and an unknown date in 2018, one of the Data Analysts was a man to whom we will refer as "Mr J". At all relevant times, his line manager was Mrs Vivien Jaymes, Disclosure Manager. In turn, Mrs Jaymes reported to the PNC and Data Access Manager. Certain of the actions of this manager are criticised by the majority of this tribunal. He was not called to give evidence and answer those criticisms. In the circumstances we thought it preferable to refer to him simply as "Mr D". None of these individuals had met or interacted with the claimant until he started making requests for information. There is no evidence that they had had any dealings with anyone who is alleged as part of this claim to have discriminated against the claimant.

117. The DAU has a policy of being "applicant-blind". This means that all SARs are given equal priority, regardless of the identity of the applicant or the purpose for which they require their personal data.

118. Also established within the respondent's organisation is the Anti-Corruption Unit ("ACU"). Beside what we could infer from the ACU's name, we had little evidence about what the ACU actually does. We were not told, for example, what role if any the ACU takes in the active investigation of uspected corruption. Nor were we told what access to police officers' personal data the ACU requires in order to carry out such investigations. We do not know whether it has the authority or the capability to undertake pro-active monitoring of police officers' emails, or whether it simply preserves e-mail evidence in tamper-proof form. The purpose of the server might, for example, be to check whether an e-mail subsequently produced by a police officer was genuine or not.

119. One of the ACU's functions is undoubtedly to store archived e-mail data. Emails sent within the Force are stored on the ACU's server and accessible for a period of 7 years. Police officers are free to delete e-mails from their own Force e-mail accounts, but, if they do, the ACU server copy of the e-mail will be left untouched. The ACU has a means of searching for and retrieving e-mails held on its server. The only evidence before us about how that system works comes from Mrs Jaymes, based on what the superintendent in charge of the ACU told her.

120. Prior to June 2018, Mrs Jaymes was told that there was no system for searching the server for e-mails by keyword. According to the ACU superintendent (as relayed to Mrs Jaymes) e-mail could only be retrieved automatically if the searcher was able to enter accurate data into all of the following fields:

120.1. The name of the sender;

120.2. The name of the recipient;

120.3. The time and date of the e-mail; and

120.4. The subject line.

121. If incomplete information was entered, the ACU would have to resort to a "manual" search. Despite its name, a manual search was done electronically, but it would involve the searcher examining e-mails, one after another, on the computer screen until he or she found an e-mail containing personal data. It was not entirely clear whether the searcher could make the manual search easier by filtering the mass of e-mails by reference to periods of time, or the sender's or recipient's identity. One thing that Mrs Jaymes clearly understood was that there was a particular problem in retrieving e-mails concerning the claimant where the claimant was neither the sender nor the recipient."

36. The Claimant made four Subject Access Requests (SARs), but the one to which this appeal relates was the first, referred to as SAR 1. The relevant factual findings are as follows:

> **"124. The claimant made a written request for information on 17 August 2017. It will be remembered that, at that time, the claimant had just been informed that his pay had been cut in half. His request was for "e-mail traffic within Merseyside Police with a connection to me, between 2002 and 2017. All information held with my name/number on it". Although the request itself was not available to us, the parties all agree that, within this request, the claimant indicated that he needed the information in connection with "an employment issue". Whatever the claimant thought was the appropriate label to attach to this request, it was rightly treated by the respondent as a SAR. (We refer to this request as "SAR1".) The statutory timescale for responding was 40 days, which would have expired on 26 September 2018.**
>
> **125. Mr J was the Data Analyst assigned to deal with the claimant's request. It is common ground that Mr J took little or no action within the 40-day time limit. On 28 September 2017, two days after the time limit expired, he made a request to the Human Resources Department for all the claimant's personal information. On the same date, he made a request with the ACU for all e-mail data to be supplied.**
>
> **126. We do not know exactly when or how ACU responded to Mr J following his initial referral, but on 30 October 2017, Mr J informed the claimant by e-mail that his request was too wide and would need the parameters shortening. In particular, Mr J asked the claimant to provide the names of the senders and recipients of the e-mails that he was seeking.**
>
> **127. On 3 November 2017, the claimant provided Mr J with a list of 12 names together with the dates over which he required an e-mail search. One of the officers named on the list was "Sergeant PF", a Police Federation representative.**
>
> **128. Early the following week, the claimant spoke to Mr J about the progress of his request. By this time, SAR1 had been escalated to Mrs Jaymes. Mr J told the claimant that Mrs Jaymes had made a suggestion as to how to make progress with the claimant's request for e-mails. Her idea was that, instead of relying on the ACU to retrieve e-mails from its database, the DAU could e-mail each officer on the claimant's list of names and ask them to search their own computers for the e-mails that the claimant was seeking. When Mr J told the claimant of this proposal, the claimant made his objection clear. Nevertheless, on 7 November 2017, Mr J sent an e-mail to 14 individual officers asking them to check their email accounts. The format of the e-mail was such that each officer named could see who all the other officers were. In a subsequent conversation with the claimant Mr J informed him that Mrs Jaymes had instructed him to send the email.**
>
> **… …**
>
> **130. The following day, 10 November 2017 he made the second of his four SARs ("SAR2"). His written request was for "HR data relating to historic shift data/changes etc". The claimant also e-mailed Mrs Jaymes that day to complain that she had gone against his express wishes in relation to SAR1 by instructing Mr J to approach individual officers for e-mails. His e-mail reiterated that his request concerned "an employment issue that may involve those individuals".**
>
> **131. On 15 November 2017, Mr J made a request by e-mail to the Work Schedule Unit for historic shift patterns and changes. The same day, the ACU e-mailed the DAU with the outcome of its e-mail searches pursuant to SAR1.**
>
> **132. On 8 December 2017, Mrs Jaymes e-mailed the claimant to explain that Mr J was on leave and that an update would be given when he returned to work three days later. The claimant asked for an update on 12 December 2017, causing Mrs Jaymes to ask Mr J to update the claimant urgently. The same day, Mr J e-mailed the claimant to indicate that the requested data would be sent once it had been redacted. The claimant sent numerous chasing e-mails during December 2017. Mrs Jaymes responded to his e-mails from time to**

time, apologising and providing information about how the claimant could make a further complaint. A batch of e-mails was provided to the claimant on 20 December 2017.

133. On 20 December 2017, the Work Scheduling Unit provided information about the claimant's shift patterns (SAR2) to the DAU. Unfortunately, Mr J then failed to forward that information onto the claimant. At some point (we do not know precisely when) the error was discovered by Mrs Jaymes. On 1 February 2018, the claimant was informed by e-mail that the shift data was available on the respondent's Egress computer system. He was given the information necessary to gain access to Egress.

134. On 25 January 2018 Mr D (the PNC and Data Access Manager) e-mailed the claimant to apologise for the delay in providing information to him under SAR1. He informed the claimant that Mr J's performance in processing the claimant's application would be addressed internally. Mr D's e-mail went on to assure the claimant that the ACU had "run a report" and that Mr D had instructed them to apply any necessary redactions to the newly discovered e-mails the same day. The SAR1 e-mails were placed on the Egress system the same day.

135. The next day, 26 January 2018, the claimant raised a formal grievance against the DAU. He complained about the delay in providing a response to his request for e-mails and that some of the e-mails that he had been requesting were still missing. He also raised a specific complaint about the way officers had been approached as a group to search their own e-mail accounts. His grievance indicated that, as a result of the delay, he was out of time to bring a claim to an employment tribunal. The claimant's grievance was passed to Mr D to investigate. Mr D found that the information in the report prepared by the ACU (which had ultimately been available to the claimant on 25 January 2018) had in fact been sent to the DAU by the ACU on 15 November 2017. He found that the delay until 25 January 2018 had been caused by Mr J's failure to act on the ACU's response. In a report dated 5 February 2018, Mr D outlined the failings that he had discovered and apologised to the claimant "for the lack of professionalism and totally unnecessary delays in providing you with this information which you believe may have implications for submission of a case under employment law".

136. The claimant replied to Mr D's grievance outcome report, reiterating that he needed the information for a "serious employment issue". Amongst the many points that the claimant made in his reply, the claimant informed Mr D that the information that had been on the Egress system had now "dropped off" and was no longer available to be inspected.

… …

141. The claimant appealed against the outcome of his grievance against the DAU. The appeal was considered by Mrs Susan McTaggart, Head of Criminal Justice Reform and Support. She provided her written outcome on 28 March 2018. Like Mr D, she acknowledged the failure to deal with SAR1 within the statutory deadline. Consistently with Mr D's approach, she stated that she had been reassured that the claimant had been sent all the e-mail information that had been retrieved. She noted that Mr D had not dealt with the third aspect of the claimant's grievance, namely his complaint about the 7 November 2017 group email. Mrs McTaggart accepted that the intention had been to speed up the claimant's request "due to the initial issues in retrieving the data going back so far". Nevertheless, in Mrs McTaggart's view, the e-mail was "not good practice". She recommended that the DAU be informed that "this procedure is not acceptable".

… …

143. At around this time, a decision was taken that Mr J should no longer work within the DAU. Investigation into the claimant's complaints had revealed him to have acted incompetently by failing to treat SARs with the required urgency. Mrs Jaymes' finding was that he had demonstrated a lack of competence in relation to SARs made by other data subjects and not just the claimant. Mr J remains employed by the respondent in some other capacity.

144. On 26 April 2018 the claimant sent an e-mail to Mr D. He made a further complaint about the delay and informing him that the information on the Egress system had been incomplete and had now expired. This affected his ability to gain access to the information that had been made available to him in response to SAR1 and SAR2. Mr D replied the same day. He pointed out that the information had been provided to him and that the reason why the claimant had lost access to Egress was that his login details had expired

before he had opened his secure e-mail. The claimant asked Mr D to provide the shift pattern information in hard copy form.

… …

147. On 21 May 2018 the claimant e-mailed Mr D to further his quest for the missing e-mails under SAR1. By the time of sending this e-mail the claimant had been informed by Sergeant PF that he had not consented to providing any emails from his own Outlook account in response to the request that Mr J had made in November 2017. The claimant pointed out this fact in his e-mail and highlighted that he still believed that the e-mail data provided was incomplete. He reiterated his request for hard copy shift patterns.

148. Taking stock at this point, it appears that Mr D did nothing to investigate the claimant's specific criticism about missing e-mails between 26 January 2018 and his e-mail of 25 May 2018. Until late March 2018, the matter was in the hands of Mrs McTaggart who was dealing with the grievance appeal. For his part, the claimant left SAR1 alone between the grievance appeal outcome in March 2018 and his e-mail of 26 April 2018.

149. On 25 May 2018, the General Data Protection Regulation (GDPR) came into force and was largely replicated in the Data Protection Act 2018. Amongst its many changes to the law, the statutory deadline for complying with SARs was reduced to 30 calendar days. It also altered the requirements for the storage and retrieval of personal data.

150. In order to comply with the new data protection regime, the ACU upgraded its software relating to the retrieval of e-mails from its database. The upgrade allowed for the possibility of e-mails to be found which could previously be retrieved. Rather than require the claimant to submit a fresh SAR, it was agreed within the DAU that it should ask the ACU to perform a further search for e-mails using the new software.

151. On 25 May 2018, Mr D e-mailed the claimant to ask him for further information about the specific e-mails that the claimant was seeking so as to enable a further search to be carried out. He also invited the claimant to attend Force Headquarters on 11 June 2018 to collect the hard copy shift patterns that he had requested. On 11 June 2018 claimant went to Force Headquarters to collect the papers. On his arrival, he was dismayed to be handed a copy of the personnel file which he already had, and no shift patterns. Whilst this experience was undoubtedly infuriating to the claimant, we are satisfied that it was the result of a genuine administrative error by a Data Analyst. Two days after the claimant complained, he was provided with the hard copy shift patterns.

152. The claimant complained to Mr D by e-mail later than day. Mr D immediately apologised. For a time thereafter, Mr D was absent from the department. In the meantime, the claimant sent numerous chasing e-mails. On 12 July 2018, Mr D apologised again.

… …

154. Mr D reminded the claimant of the request he had made on 25 May 2018 for further details of the e-mails that he was seeking. In response, the claimant emailed Mr D on 20 July 2018 with specific examples of e-mails which he would have expected the ACU searches to reveal. Mr D acknowledged the claimant's further details and then replied more substantively on 7 August 2018. Mr D informed the claimant of a further obstacle to obtaining the e-mails that he had been requesting. In his e-mail he explained that the system utilised by the ACU for retrieving e-mails prior to 2017 was "experiencing issues". His e-mail went on to explain that the ACU system was "an audit tool and not a relevant filing system and cannot be relied upon to retrieve all data against search parameters". For that reason, the ACU was not in a position to facilitate any further enquiries regarding the claimant's request.

155. On 10 August 2018, the claimant complained to the Information Commissioners Office (ICO). It appears that this complaint was a follow up from previous correspondence that the claimant and the ICO had had. The essence of the claimant's complaint was threefold. First, the delay; second, Mr J's e-mail to the individual officers; and third, the fact that the information so far provided was still incomplete. After having sought the respondent's version of events, the ICO wrote to the claimant on 16 August 2018 to indicate its provisional view about whether or not the respondent had complied with the Data Protection Act. The provisional view was that the respondent had not breached the Act in relation to the e-mail from Mr J to the individual officers, but it was

likely to have breached the statutory timescales for compliance with SAR1 and also unlikely to have complied with the requirement to provide the claimant with all his personal data, especially bearing in mind that it appeared that some as yet undisclosed data was now retrievable.

156. It is unclear what information the ICO had at the time of expressing this provisional view. In particular, we do not know whether the ICO had been informed about the ACU's search capabilities either prior to or after GDPR.

157. The claimant e-mailed Mr D once again on 26 August 2018. His e-mail went back over some of the history of SAR1 and the way it was dealt with in November and December 2017. It also pointed out that he had since provided further detail about the e-mails that he wanted and still no further e-mails had been provided. Like previous e-mails, this e-mail pointed out that he required the information for "an Employment Tribunal matter".

158. In reply, Mr D referred the claimant back to his e-mail of 7 August 2018. He reiterated the ACU's stance at that time and added, "This being the case, there is nothing further I can do to assist in this matter". His e-mail contained an unfortunate typographical error (the words "your arrest" appeared instead of "your request"), but we are satisfied that it was nothing more than a typing mistake.

159. Pausing here, we are all of the view that, by this time, Mr D was beginning to let his frustration show. There was actually something that the ACU could have done to take the claimant's request further forward. They could have tried to resolve the "issues" that were preventing retrieval of the pre 2017 e-mails. We do not know whether Mr D had any influence over that process, but he could have chosen to use a less abrupt tone in his own e-mails to the claimant.

160. The claimant was not prepared to take no for an answer. He asked Mr D to provide him with the contact details for the officer at the ACU who had been liaising with the DAU. Whether it was in response to this e-mail or some other stimulus, Mr D e-mailed the claimant on 12 September 2018 to inform him that he had spoken again with the ACU and had been informed that the software issues concerning the system used for retrieving e-mails had since been rectified. The ACU had agreed to run checks against the names that the claimant had provided on 20 July 2018. Mr D informed the claimant that once these results were received by the DAU and had been examined he would contact him to provide him with the results. His expectation was that this would happen in the following week.

161. On 20 September 2018 Mr D e-mailed the claimant to inform him that further material had been received from the ACU and was being examined by his staff. This information was subsequently provided to the claimant on 8 October 2018. The claimant complained to Mr D on 28 October 2018 that some information was still missing. In particular, the claimant still required "transactional e-mails provided between officers/departments containing my details". In other words, the claimant wanted disclosure of e-mails that were neither sent by him nor received by him but which contained information about him. Mr D replied the following day to say that the ACU had now run their checks through their database and if the information did not exist there then it could not be provided. The claimant continued to correspond with the ICO, who took the position that, in the light of the respondent's assurance that all relevant data had been provided, they would take no further action.

162. On 19 November 2018 the claimant e-mailed Mr D again itemising certain categories of e-mails which he still believed were missing. This appears to have been the last e-mail passing between the claimant and the DAU on this subject."

37. I note that there is an obvious typo in [124]. The relevant date at the end was 26 September 2017. Mr Tinkler submitted there was also a mistake in [150]. The second sentence was missing a "not" and was meant to read: "The upgrade allowed for the possibility of e-mails

to be found which could not previously be retrieved." Mr Rozycki acknowledged that this might be a mistake, and sensibly advanced submissions on the footing that it was. I have no doubt at all that it was a mistake, and have read this sentence as corrected by inserting the missing "not".

38. The victimisation complaint related to matters to do with all four SARs. After setting out why the complaint failed in relation to matters to do with SAR2, SAR3 and SAR4, the Tribunal set out its conclusions (those which were unanimous, and then those of the majority and the minority) in relation to victimisation in connection with SAR1, as follows.

> ***"SAR1 – unanimous conclusions***
>
> **225. There was no doubt that the claimant had been subjected to detriments in the respondent's handling of SAR1. In order to understand how the tribunal reached its overall conclusion, however, it is necessary to separate out what those detriments were.**
>
> **226. The tribunal universally found that the claimant had experienced the following detriments:**
>
> **226.1. The respondent failed to provide him with any e-mails within the statutory deadline of 40 days. Mr J was entitled under section 7(3) to ask the claimant to narrow his search parameters, but left it until after the deadline had already expired before he made that request.**
>
> **226.2. The claimant was subjected to a further detriment on 7 November 2017 by Mr J, on the instruction of Mrs Jaymes. In our view this detriment just about comes within the purview of the claim as formulated by the claimant. We accepted that Mrs Jaymes and Mr J acted with good intentions. Their approach to the individual officers was a supplement to their enquiries with the ACU, not a substitute for them. Had Mr J blind-copied the individual officers, or e-mailed them all separately, the claimant could have had no legitimate cause to complain. But by revealing to all the recipients of the email the identity of all the officers in the group, Mr J was alerting those officers to the scale of the claimant's request and enabling them to detect a common theme. The list of individuals suggested it had to do with how the claimant had been managed and foreshadowed the possibility of a grievance or even a tribunal claim. That might incline the officers to a defensive attitude when searching for e-mails and deciding which ones to provide to the DAU. It created the risk that some of the claimant's personal information might not be provided to him. Whilst we all accepted that Mrs Jaymes had been genuinely trying to circumvent the difficulty in recovering archived e-mails from the ACU, the claimant could reasonably have understood Mrs Jaymes' instruction as being detrimental to him.**
>
> **226.3. A further detriment occurred between November 2017 and 25 January 2018; the claimant had provided the more focused information asked of him, but he still had to wait an unacceptably long time before the information held by the ACU was provided.**
>
> **227. As will be seen, our majority found that there were further detriments in relation to SAR1, to which we will return.**
>
> **228. We have already recorded our finding that Mr J did not act with the prohibited motivation, either consciously or subconsciously, when dealing with SAR2. For the same reasons, we have reached the same unanimous view as regards SAR1. Just as with SAR2, it is not open to the claimant to impugn Mrs Jaymes' motivation in giving the instruction to send the 7 November 2017 e-mail. There is no evidence that Mr D was involved at all prior to 25 January 2018. With regard to the detriments that we unanimously found, our**

collective view was that the reason why the claimant was subjected to those detriments was not because he had done a protected act, or because he might have done so in the future. SAR1 – conclusions of the majority

229. Further detriment 1 - Our majority considered that the respondent did not stop subjecting the claimant to detriments on 25 January 2018. The majority view was that a further detriment occurred on 25 January 2018 in that the e-mails placed onto the Egress system that day were incomplete. As we now know, the ACU actually had in its archive a number of e-mails that were subsequently provided to the claimant in October 2018. In the majority's view, the ACU ought to have found the e-mails by 25 January 2018 and made them available to the claimant at that time. The majority accepted Mrs Jaymes' evidence that the ACU Superintendent explained to her that it was only the software change following GDPR that allowed the ACU to retrieve those e-mails at a later date. As we have already recorded, however, the majority also found the Superintendent's explanation (as reported by Mrs Jaymes) to be incapable of belief either by the tribunal or indeed by Mrs Jaymes herself. The majority found as a fact, based on their understanding of what the ACU exists to do, that the ACU was able to retrieve the October 2018 e-mails in January 2018 and that Mrs Jaymes must have realised that fact. The claimant could therefore reasonably understand himself to have been put to a disadvantage when he viewed the e-mails on Egress and found fewer e-mails than he had been expecting.

230. Further detriment 2 - Whilst Mr D's grievance outcome found that the claimant had been provided with his requested data on 25 January 2018, the claimant appealed and informed Mr D by e-mail on 26 April 2018 that he still required further e-mails to be provided to him. By not looking for further SAR1 e-mails until May 2018, Mr D subjected the claimant to a further detriment.

231. Further detriment 3 - From the outset of Mr D's involvement, our majority considered that Mr D should have escalated SAR1 to an officer capable of exerting influence over the ACU. He subjected the claimant to a further detriment by failing to do so.

232. Further detriment 4 - Our majority considered the compliance with SAR1 to have been incomplete by the time Mr D sent his e-mails on 7 August and 30 August 2018. Those e-mails, which were dismissive in their tone, were part of the respondent's handling of SAR1 and therefore fell to be taken into account as a further detriment.

233. The majority then considered Mr D's motivation for treating the claimant detrimentally in these four ways. In their view, there were facts from which they could conclude that the reason why Mr D acted as he did was because the claimant had done protected acts. These facts were:

233.1. Mr D undoubtedly knew from the claimant's grievance against the DAU that he wanted the missing e-mails in connection with a proposed claim.

233,2 Mr D must have been aware of Mr J's group e-mail of 7 November 2017 and the risk that individual officers might not provide the DAU with all the information the claimant was asking for. That procedure had been found by Mrs McTaggart to be "unacceptable" during the grievance appeal.

233.3. Mr D must have known that the ACU's explanation lacked credibility. The respondent had not called the ACU as a witness. His failure to call that person gave rise to a legitimate inference that the ACU could actually have retrieved the missing e-mails much earlier than they did and that their explanation would not stand up to scrutiny.

233.4. The tone of the e-mails of 7 August and 30 August 2018 was dismissive.

233.5. In general terms Mr D was, (in the majority's opinion) blocking the claimant batting him away, and trying to wear him down. 233.6. The DAU was criticised by the ICO.

233.7. (In the view of one of the lay members), the DAU unjustifiably hid behind its applicant-blind policy. It was not enough for the DAU to treat the claimant in the same way as they would treat other SAR applicants. Mr D knew that the claimant had a more pressing need for his personal information than other applicants would have for theirs. These circumstances cried out for extra effort. The DAU's failure to give the claimant

priority over other applicants was an indicator that they trying to obstruct not just his statutory SAR, but also his claim.

234. The burden of proof therefore shifted to the respondent to show that Mr D did not victimise the claimant. Mr D was not called as a witness. In those circumstances, our majority found that the respondent had not discharged the burden of proof. The victimisation complaint in relation to SAR1 therefore succeeded.

SAR1 – minority report

235. The employment judge disagreed with the views of the majority. The first area of disagreement was over whether the claimant had been subjected to the four further detriments that the majority had found. Dealing with each one:

235.1. Further detriment 1 - There was no evidential basis for finding that the ACU was able to retrieve the October 2018 e-mails by 25 January 2018. The only evidence about what the ACU could and could not find came from the ACU Superintendent's explanation, as relayed to us by Mrs Jaymes. The fact that the ACU were able to find further e-mails in October 2018 did not mean that the explanation was not credible. It was explained by the finding we unanimously made that the ACU had changed its software to comply with GDPR and that the change enabled searches to be made that had not been previously possible. The ICO's provisional view (that the claimant was provided with incomplete information) does not alter the analysis. We do not know what information the ICO had before it in order to make that provisional assessment. The claimant could not therefore reasonably have thought himself to have been put at a disadvantage by the extent of the information provided on 25 January 2018.

235.2. Further detriment 2 - In the judge's view, the impermissible finding in relation to Further detriment 1 also taints the finding of Further detriment 2. Unless the tribunal can permissibly find that the respondent had retrievable emails to disclose in January 2018, the claimant had no further section 7 rights under SAR1. In April and May 2018, the DAU were entitled to regard SAR1 as complete and all the claimant had was an unjustified sense of grievance. If that view is wrong, and the respondent was still under an obligation to provide further e-mails at that time, the claimant could just about reasonably understand Mr D to have subjected him to a detriment by waiting until May 2018 to initiate the procedure for making further searches. It must be borne in mind, however, that it would have been quite reasonable of Mr D to let the grievance appeal run its course (until late March 2018) and view the matter as closed once Mrs McTaggart had concluded that the claimant had been provided with all the requested information. He replied to the claimant's email of 26 April 2018, which was also about the loss of data from Egress. He did not specifically address the claimant's request for missing e-mails until 25 May 2018, but by that stage it was not easy to keep track of all the different requests that the claimant was making.

235.3. Further detriment 3 – The claimant could not have anything more than an unjustified sense of grievance in relation to Mr D failing to escalate SAR1 further. By the time SAR1 reached Mr D it had already been escalated twice. In any case, the matter was effectively escalated beyond Mr D when Mrs McTaggart heard the grievance appeal. She was satisfied, at that time, that there was no further SAR1 information to provide.

235.4. Further detriment 4 – In the employment judge's view, this only amounted to a detriment if the claimant could reasonably have viewed SAR1 as still outstanding in August 2018. For the reasons given in relation to Further detriment 1, this is not a finding that the tribunal can permissibly make.

236. The view of the employment judge was that, even if the claimant was subjected to these four further detriments, it was not because the claimant had done any protected acts. On the employment judge's understanding of the tribunal's findings, there were no facts from which this conclusion could be drawn. The starting point is that, in order to shift the burden to the respondent, there must be something more than the mere existence of a protected act and the finding of a detriment. Dealing with the facts identified by the majority:

236.1. Knowledge of the protected act, by itself, would not be a fact from which a tribunal could infer victimisation in this case.

236.2. The group e-mail of 7 November 2017 was sent on the instruction of Mrs Jaymes, who is not alleged to have acted with improper motivation. There is no evidential basis for any finding that Mr D knew about that instruction prior to the claimant's grievance on 26 January 2018. The fact that Mrs Jaymes' and Mr J's use of this procedure was later criticised by Mrs McTaggart cannot tell us anything about Mr D's motivation from 26 January 2018 onwards.

236.3. Paragraph 34 already sets out the tribunal's internal difference of opinion about whether it was appropriate to draw any adverse inferences from the lack of a witness from the ACU.

236.4. The tone of the e-mails of 7 August and 30 August 2018 expressed Mr D's frustration, which was understandable against the context of the claimant's large number of e-mails. Whilst it lends support to the view that, by this stage, Mr D was not inclined to help the claimant any further, it does not shed any light on Mr D's reason for being unwilling to help.

236.5. The finding of "batting away" is expressed in very general terms and, if it is open to the tribunal, must be capable of being reached by stepping back and looking at the whole picture of what Mr D did and did not do. When one does that, the majority's finding is not supportable. At times Mr D went out of his way to help the claimant. He investigated the claimant's grievance and apologised for Mr J's lack of action. He proactively responded to the change in the ACU's software by inviting the claimant to provide further information that would enable a new search to be carried out.

236.6. The ICO unsurprisingly indicated a likely breach in failure to comply timeously, but that says nothing about Mr D's motivation because the deadline had already long expired by the time Mr D became involved. The other provisional finding of breach was that not all the claimant's personal information had been provided. To the extent that this helps determine whether there was a breach or not (which depends on the information provided to ICO at that stage), it still does not help the tribunal understand Mr D's motivation for persisting with any such breach.

236.7. It cannot be right to say that the respondent victimised the claimant by treating him the same as they would have treated anyone else. Section 27 of EqA does not impose any duty on employers to afford preferential treatment for people who do protected acts. Having unanimously found that the DAU followed its "applicant-blind" policy in relation to the claimant, it is hard for us to conclude that the claimant's protected act motivated any of the DAU, let alone Mr D, to subject the claimant to the alleged detriments.

237. The employment judge's conclusion was that the burden of proof had not shifted to the respondent to disprove victimisation in respect of Mr D's involvement in SAR1. The victimisation complaint should therefore have failed."

39. There is an apparent anomaly in relation to the number of detriments found by the majority. At [229] to [232] they refer to four numbered detriments; and at [233] they consider Mr D's motivation for treating the Claimant detrimentally "in these four ways". However, the Judgment only found three unlawful detriments. Both counsel agreed before me that the solution is that there were, indeed, only three pieces of conduct found by the majority to amount to acts of victimisation, being the three identified in the Judgment. These corresponded, in the order in which they appear in the Judgment, to what were numbered, in the Reasons, as detriments 2, 4 and 3, found at paragraphs [230], [232] and [231]. As is clear from both [233]

and [234], and the Judgment, all of the found acts of victimisation were said to be on the part of Mr D. The subject matter of [229] is, in substance, not the conduct of Mr D, but that of the ACU, though the findings that it contains are said to have been an essential lynchpin of the conclusions in relation to Mr D.

The Law

40. The Tribunal directed itself in relation to the law concerning victimisation as follows:

> **"173. Section 27(1) EqA defines victimisation. Relevantly the definition reads:**
>
> **'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.'**
>
> **174. Subjecting a person to a detriment means putting them under a disadvantage: Ministry of Defence v. Jeremiah [1980 ICR 13, CA, per Brandon LJ. A person is subjected to a detriment if she could reasonably understand that that she has been detrimentally treated. A detriment can occur even if it has no physical or economic consequence. An unjustified sense of grievance, however, is not a detriment: Shamoon v. Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11.**
>
> **175. As in direct discrimination cases, tribunals hearing victimisation complaints are encouraged to adopt the "reason why" test (Chief Constable of West Yorkshire Police v. Khan [2001] ICR 1065. Victimisation may occur subconsciously as well as consciously.**
>
> **176. The need to identify the correct person's motivation is equally important in victimisation cases as in those of direct discrimination.**

41. In relation to the burden of proof it cited the relevant parts of Section 136 **EqA** and from pertinent authorities, including **Igen v Wong** [2005] ICR 931, **Hewage v Grampian Health Board** [2012] ICR 1054 and **Greater Manchester Police v Bailey** [2017] EWCA Civ 425. No issue was taken before me as to the correctness of these self-directions, as such.

42. I also drew both counsel's attention to the principles governing the drawing of adverse inferences from a failure of a party to call a witness, as captured in **Wisniewski v Central Manchester Health Authority** [1998] EWCA Civ 596. In summary, there must be some evidence adduced to support a prima facie case to answer on the issue in question, there must be a reason to suppose that the absent witness would have had relevant evidence to give on the

issue, and there must be no good or credible reason why the witness in question was not called. If all of these apply, then an appropriate inference *may* be drawn, as to the nature of the evidence that the witness would or would not have been able to give, had they been called.

The Grounds of Appeal and the Arguments

43. I can summarise the essential elements of the Grounds of Appeal, and the principal arguments in relation to them, in this way.

44. Grounds 1, 2 and 3 challenge the findings, in respect of each of the matters referred to in [1.1], [1.2] and [1.3] of the Judgment, that Mr D had subjected the Claimant to a detriment. In each case this conclusion was said to be predicated on the majority's finding that the ACU was in fact, in January 2018[1], able to retrieve those emails which were not in fact sent to the Claimant until October 2018. (I will refer to those emails, hereafter, as the October emails.) But, it is said, that finding was not properly reached, as there was no evidence to support it, or it was otherwise perverse. That was because the Tribunal had unanimously accepted the Respondent's explanation, that the ACU was not able to retrieve more emails until after it changed its software to comply with GDPR; and/or there was, in any event, no proper evidential basis on which the majority could reject the explanation given for why the October emails had not been retrieved sooner, being the limitations of the ACU's search capabilities prior to the upgrade, as not credible.

45. In relation to [1.1] it is contended that it then followed that the Claimant could not have reasonably considered himself disadvantaged by the failure to search for more emails between

[1] As reflected in the Tribunal's findings of fact, January 2018 was when the DAU made the first batch of emails available to the Claimant. They had in fact been provided by the ACU to the DAU in November 2018. But January 2018 is clearly being used as a reference date regarding the ACU's disputed capabilities at the time of its first response, prior to the GDPR upgrade in May 2018, as opposed to following the upgrade.

January and May 2018. In relation to [1.2] it is contended that it followed that the Claimant could not reasonably have considered the emails of 7 and 30 August 2018 from Mr D, explaining the factual position correctly, as detrimental. In relation to [1.3] it is contended that it followed that it could not reasonably be viewed by the Claimant, as detrimental, not to escalate matters to someone with influence over the ACU. In all three cases the only proper conclusion was that there was, in **Shamoon v Chief Constable of the RUC** [2003] ICR 337 terms, no more than an unjustified sense of grievance.

46. Ground 4 contends that, even if the majority properly found that there *were* one or more detriments, they erred in concluding that there were facts that shifted the burden of proof to the Respondent, to show, in each case, that the reason(s) for the treatment did not include the protected acts. This was because the seven matters relied upon by the majority at [233] could not properly be found to support a shifting of the burden. Alternatively, that conclusion was not properly reached, because the majority failed to take into account, as they should have, the significance of *other* relevant findings that had been made, about supportive and proactive steps that Mr D had taken in relation to SAR1. Mr Tinkler, however, accepted that, if the majority properly found that the burden *had* shifted, then, as the Tribunal had not heard evidence from Mr D himself, the majority were entitled to go on to find that it had not been discharged.

47. On behalf of the Claimant, Mr Rozycki said he agreed that the majority's rejection of the Respondent's explanation for why the October emails were not provided to the Claimant in the January 2018 batch, and their conclusion that those emails could in fact have been provided then, formed an essential element of all three findings of detriment. So, he agreed that, if that conclusion could not stand, then Grounds 1, 2 and 3 must all succeed. But, he said, that conclusion was one that the majority *were* fully entitled to reach. It was not enough that the

Judge came to a different view, even if he properly did so. That would not show that there was no evidence to support the majority's conclusion, or that it was perverse. There was no basis so to conclude, and the EAT could not interfere with the majority's findings. On the question of the high threshold for intervention in a finding or evaluation of fact, he referred to well-known authorities including **Piggott Bros & Co Ltd v Jackson** [1991] IRLR 309, **Stewart v Cleveland Guest (Engineering) Limited** [1996] ICR 535 and **Yeboah v Crofton** [2002] IRLR 635.

48. In relation to Ground 4, Mr Rozycki contended that the majority were properly entitled to take the view that the features they referred to at [233], in combination, provided the "something more" (in the sense expounded in **Madarassy v Nomura International plc** [2007] ICR 867) sufficient to cause the burden of proof to shift to the Respondent, even though, he accepted, some of these features might not have properly been viewed as sufficient alone to do so.

49. As I have noted, both counsel agreed that Grounds 1, 2 and 3 turned upon whether the majority permissibly reached the conclusion that they rejected the given explanation for the non-disclosure of the October emails in January. I need to set out the arguments about that in a little more detail, as set out in the skeletons, and developed in the oral argument, of both counsel. The rival contentions before me turned, in part, on an analysis of different passages from the Reasons, what they meant, and how they did or did not fit together.

50. Mr Tinkler suggested that an issue arose as to what the majority meant when they said, at [229], that they found the ACU Superintendent's "explanation" (as reported in evidence by Mrs Jaymes), to be "incapable" of belief. He submitted that the correct reading was that they

were not purporting to reject the factual proposition that the ACU's search capabilities *did*, prior to the upgrade, suffer from the limitations described to, and in turn by, Mrs Jaymes, as set out at [120] – [121]. But they were rejecting as incapable of belief the proposition that those limitations truly explained why the October emails had not been supplied in January.

51. Mr Tinkler argued that the Tribunal had, at [150], unanimously found as fact, that, as described in the account given by Mrs Jaymes, the GDPR upgrade *had* enhanced the email search capability. The Judge had, at [235.1], correctly observed that this was what the Tribunal as a whole had found. Further, the Tribunal had also, as the Judge recorded there, unanimously accepted that this fact *explained* why the Respondent had been unable to retrieve the October emails when it first responded to SAR1. It was, accordingly, not then open to the majority to make a finding which contradicted those earlier unanimous findings of fact.

52. But in any event, said Mr Tinkler, leaving aside whether their purported findings contradicted those of the whole Tribunal, it was not open to the majority, on the evidence that was presented, to conclude (if this was what they meant) that it was not credible that the limitations on the search capabilities of the ACU prior to the upgrade were indeed as described by Mrs Jaymes; nor was it open to them to conclude that it was not credible that this explained why the October emails were not provided in January. The majority stated at [229] that they "found as a fact based on their understanding of what the ACU exists to do, that it was able to retrieve" the October emails in January. But there was no other *evidence* to contradict the evidence given by Mrs Jaymes, that the limitations on the ACU's search capability prior to the upgrade *were* as she described, *and* that those limitations *were* the explanation for why those emails could not be retrieved sooner. Neither the majority's "understanding of what the ACU

exists to do", nor the mere fact that the October emails were indeed successfully retrieved in October, provided any proper basis to reject that evidence as incredible.

53. Nor, said Mr Tinkler, was it properly open to the majority to draw the inference that they did (at [34.1]), or *any* adverse inference, from the failure of the Respondent to call a witness from the ACU. On this point he essentially adopted the Judge's reasoning, as set out at [34.2].

54. Mr Rozycki submitted, first, that the findings of the majority were *not* at odds with the Tribunal's unanimous findings elsewhere in the Reasons. In particular, as the findings at [33] and [119] to [121] made clear, the Tribunal did accept as fact that Mrs Jaymes had spoken with a Superintendent at the ACU, and, as fact, her account of what that Superintendent had told her. But it had *not* made any finding of fact that what the Superintendent had told her, about the systems, and the limitations on search capabilities (prior to the upgrade), was true; nor had it made a finding that, even if true, such limitations in fact provided the true explanation for why more emails had not originally been provided by the ACU to Mrs Jaymes' team.

55. Further, having regard to the Tribunal's findings as to what the ACU did, which were themselves properly based on the evidence of Mrs Jaymes, the majority properly drew the inference that the ACU must have had a greater capability to retrieve the emails sought, when it first responded to SAR1, than the Superintendent had cared to admit to her. The majority had also properly drawn an adverse inference from the failure to call any witness from the ACU to give evidence. There was a case for the Respondent to answer as to the true reason why the October emails were not disclosed sooner. The Respondent knew that the ACU was the unit within the force which kept the email archive, to which the DAU had had to turn, in order to

respond to SAR1; and a witness from the ACU would obviously have been in a position to address its handling of that. There was no obvious reason why such a witness could not have been called.

Discussion and Conclusions

56. I consider first the challenge, which, as I have explained, underpins Grounds 1, 2 and 3, to the majority's conclusion, at [229] that "the Superintendent's explanation" was "incapable of belief", and their findings of fact, in that paragraph "that the ACU was able to retrieve the October 2018 emails in January 2018 and that Mrs Jaymes must have realised that fact."

57. The whole Tribunal found, at [126], that the Claimant was told by Mr J in October 2017 that his original request was too wide, and that he needed to provide names of senders and recipients that he wanted searching. The whole Tribunal also found, at [150], that, in order to comply with GDPR, the ACU upgraded its software relating to the retrieval of emails, and that this created the possibility of emails being retrieved which could not previously be retrieved, which prompted the SAR to ask the ACU to perform a further search using the new software. The whole Tribunal also made a finding, at [120] – [121], about what the Superintendent had told Mrs Jaymes; and the majority confirmed, at [229], that they accepted that account, as such. They then referred to the Superintendent having explained to her "that it was only the software change following GDPR that allowed the ACU to retrieve those emails at a later date" before observing that they, however, "also" found the Superintendent's explanation to be incapable of belief.

58. Against that background, the natural reading of [229] as a whole is that, whilst the majority accepted (as the whole Tribunal had found) that there *had* been a software upgrade to

comply with GDPR, which *had* improved the capacity of the ACU to retrieve emails, they considered that *nevertheless*, as at November 2017, the October emails could have been found by the ACU. The majority do not say, at [229], whether they doubted the accuracy of the more detailed explanation given to Mrs Jaymes, as described by her at [120] and [121], of the system's search capabilities prior to upgrade. But at [33] their view is recorded that "the ACU must have been able to retrieve the information which the Claimant sought more easily than it was saying it could"; and, at [34], that it was "actually capable of retrieving more information that it was letting on." That suggests that they thought that the detailed account given to Mrs Jaymes was, *one way or another*, an inaccurate or misleading account of the ACU's capabilities at that time.

59. Reading these passages overall, it seems to me that the majority took that view, not because there was any other direct or specific evidence to contradict the accuracy of that account, as such, but because they simply formed the view that, notwithstanding that the software capabilities *were* more limited in November 2017, than they became after the upgrade, the nature of the ACU's work meant that it could be inferred that, *one way or another*, it *must* have possessed the ability, in November 2017, to retrieve the October emails.

60. I turn, then to the question of whether these were conclusions that the majority were properly entitled to reach.

61. I consider first Mr Tinkler's submission, that the majority's purported conclusions were impermissible, because they contradicted other unanimous findings by the Tribunal. As to that, it would not have been open to the majority to take issue with the general proposition, which had been accepted as fact by the whole Tribunal, that "the ACU had changed its software to

comply with GDPR and the change enabled searches to be made that had not been previously possible". But that unanimous finding would not entirely preclude the majority from questioning the veracity of the more detailed account of the original capabilities, given by the Superintendent to Mrs Jaymes, nor from coming to the view that, *one way or another*, it was not true that, on account of its more limited search capabilities prior to the change, the ACU had been unable to find more emails than it did, in its original response to SAR1.

62. Mr Tinkler submitted that, in any event, it was not properly open to the majority to reject the explanation described in evidence by Mrs Jaymes as factually incorrect, because there was no other evidence to contradict it. As to that, it does not *necessarily* always follow that, if the evidence of a witness is not directly contradicted by that of another witness (or a document), it *must* be accepted as fact. In a given case issues may still arise as to its reliability or credibility. The Employment Tribunal is not bound by any formal rules of evidence; but where, as here, the evidence being given is hearsay, that *may* give rise to issues as to its reliability or accuracy. In some cases the credibility of the witness who gives the evidence may also properly be doubted, for example, if they give contradictory or evasive responses to questions. In others, the witness' account may be so intrinsically highly improbable that it is regarded as literally incredible.

63. In this case, however, it was not suggested that Mrs Jaymes' account of *what she had been told* was in any way unreliable or inaccurate, nor that her evidence in this regard lacked credibility. Rather, the whole Tribunal accepted that that account was, as such, true. Further, the majority did not rely on the fact that the account itself was hearsay. Although they said that the ACU's explanation was incapable of belief by Mrs Jaymes [229], and that Mr D must have

known that it lacked credibility [233.3], their position was that it was inherently not credible, not because of any such issues, but simply in light of "what the ACU exists to do".

64. Did the majority have a proper basis for drawing that inference in that way? The whole Tribunal recorded, at [118], that it had "little evidence about what the ACU actually does" beyond what might be inferred from its name. Specifically, it was not told what access the ACU required to officers' data to carry out its functions, nor whether it did anything more than simply preserving emails in tamper-proof form, so that if an issue about the authenticity of a particular email subsequently arose, that could be checked. The Tribunal found, at [119], that it was part of the ACU's functions to store all emails sent within the force for 7 years; but it had no evidence about its search capabilities beyond what the Superintendent had told Mrs Jaymes, and what Mr J conveyed to the Claimant after first hearing back from the ACU (see [126]), which was entirely consistent with that.

65. The majority do not explain how their understanding of "what the ACU exists to do" led them to the conclusion that the explanation given by the Superintendent was "not credible." I am bound to say that I do not see how, based on these very limited findings, they can properly have reached it. There was, for example, no finding about the nature of the ACU's own tasks and responsibilities, which might naturally point to the conclusion that it could not have properly carried these out, *unless* it had the capability to conduct an automated search for any reference to an individual, even in emails they had neither sent nor received. Nor was there any finding about *how* the ACU went about its own work, whether generally or in some other instance, which might be said to demonstrate that it *did*, in fact, have the capability to conduct an automated search of that sort, or otherwise beyond the capabilities described to Mrs Jaymes. Nor was there any finding about the ACU's wider functions, other than that they included to

"store archived email data". I do not see how that can be said to have carried any implication, for example, that it needed to maintain that archive in a form that would facilitate such an automated search. Given also that this was an archive of emails for the entire Force going back seven years, I cannot see on what other basis it can have been properly inferred that the ACU must have had the capability to find every email within the scope of SAR1 by carrying out a manual search.

66. For completeness, I note that it was not suggested by the majority that it was *inherently* implausible that the ACU's software, as software, had the limitations, in terms of its automated search capabilities, described in the account given to Mrs Jaymes, and conveyed by her to the Tribunal; and in any event I cannot see any basis on which it could have so concluded. There was, for example, no more specific evidence about which software brand or system it was, independent evidence about the capabilities of that particular system, or anything of that sort.

67. Was it open to the majority to draw adverse inferences from the failure of the Respondent to call a witness from the ACU, that the ACU were "actually capable of retrieving more emails than they were letting on" [34.1], and that they could have retrieved the October emails in January 2018, and that their explanation would not stand up to scrutiny [233.3]? Mr Rozycki submitted that the majority properly took the view that "it should have been clear to the respondent that they would need to justify the incomplete results of the SAR by reference to the detailed workings of the ACU". The **Wizniewski** guidance was satisfied; and the inference was properly drawn.

68. When considering this aspect in particular, it is important, I think, to trace how the way in which the victimisation claims were put, evolved. Prior to the Hearing before the Tribunal,

revised particulars of claim (POC) had been served. These included (at [8(ii)]) a generic complaint of victimisation, in respect of all four SARs, that "the Respondent subjected the Claimant to detrimental treatment by failing to deal with his requests for information with the statutory time limits, or within a reasonable period, or at all". This paragraph of the POC cross-referred to [32], where details of the four SARs were given, and [33], which again repeated the generalised nature of the detrimental treatment complained of in relation to all four requests.

69. As the Tribunal found, the DAU had responsibility for dealing with all requests concerning personal data, in whatever form the data requested might be held. It had a team of Data Analysts, a Disclosure Manager (Mrs Jaymes) and a Data Access Manager (Mr D). It had the responsibility of responding to all such requests in a proper and timely fashion. It was, accordingly, the unit to which all four of the Claimant's requests were submitted. The claims related to four requests, in respect of all of which the gist of the complaint was the same. Only one of these was for emails, and therefore necessitated the DAU liaising with the ACU. The others concerned shift pattern records, pocket notebooks and a tablet known as a Pronto device. It appears to me that there was therefore nothing in the way the claims were pleaded to alert the Respondent to the fact that peculiar issues were being raised, or might be raised, regarding what the ACU had done or not done in relation to SAR1, as opposed to what the DAU had done or not done, generally in relation to all four SARs, in terms of how and when it responded. Although, in the course of argument, Mr Rozycki told me, on instructions, that the role of both the ACU and Mr D were mentioned in the run up to the trial, that did not find its way into the pleaded case.

70. This is reflected in the discussion at [24] to [27] of the Tribunal's Reasons. The list of issues given to the Tribunal on the second Hearing day related to all the requests, and simply

asserted that the detriment was failing to deal with them within the statutory time limits, a reasonable period, or at all. As [27] records, as to individuals, this was supplemented during the course of the Hearing, in so far as the Claimant disavowed any complaint being directed at Mrs Jaymes, did not seek to recall any other witness, and, at the hearing, asserted "general collusion behind the scenes." Mr Tinkler (who also appeared for the Respondent before the Tribunal) acknowledged in the course of oral submissions that the role of the ACU did get raised during the course of the Hearing; but I agree with him that this alone could not support an inference being drawn from the failure to call an ACU witness in addition to Mrs Jaymes.

71. Given all the foregoing context, and how the pleaded case was put, I do not think it could properly have been concluded that the Respondent was on notice, prior to the start of the Hearing, or even at the start of it, that particular allegations were being directed at how the ACU handled (or failed to handle) SAR 1 after it was first referred to it by the DAU, or that there would be a significant issue about what the majority called "the detailed workings" of the ACU, which only a witness from the ACU, as opposed to the DAU, would be in a position properly to address. I conclude that there was no proper basis for the majority to have drawn any kind of adverse inference from the failure of the Respondent to call a witness from the ACU.

72. For all these reasons I conclude that the majority did not have any proper or sufficient basis to support their conclusion that the ACU did have the capability to find the October emails in January, whether in the evidence, the unanimous findings of fact about what the ACU existed to do, by drawing an adverse inference from the Respondent's failure to call a witness from the ACU, or on any other basis. This conclusion was, therefore, perverse, and it cannot stand.

73. As I have described, Mr Rozycki accepted the Respondent's case that, if so, then Grounds 1, 2 and 3 must all succeed. Specifically, he accepted that, if those conclusions fell away, then the Tribunal's three findings of detrimental treatment by Mr D acting as stated in [1.1], [1.2] and [1.3] of the Judgment must also fall. Without a sound finding of detrimental treatment, the overall conclusion that the Claimant had been victimised in these three respects therefore cannot stand.

74. That is sufficient, therefore, to point to the conclusion that the appeal against all three findings of victimisation must be allowed. But, as it was fully argued before me, for good order, and because, if it is meritorious, it would also, by itself, point to the conclusion that the appeal against all three findings of victimisation must be allowed, I will turn to consider Ground 4.

75. The issue raised by this Ground is whether the majority could properly regard the seven matters referred to at [233] as, separately or cumulatively, having shifted the burden of proof; and/or, whether, in finding that the burden had shifted, the majority wrongly failed to take into account other relevant findings of the whole Tribunal.

76. I will first consider each of the matters listed in the sub-paragraphs of [233] in turn. Knowledge, on the part of Mr D, of the Claimant's protected acts was plainly a *necessary* condition of a claim that he had victimised the Claimant because of those acts; but, as Mr Rozycki fairly accepted, it could not be regarded as alone *sufficient* to shift the burden of proof. The group email of 7 November 2017 was sent by Mr J on the instruction of Mrs Jaymes. The Judge observed that there was no direct evidence that Mr D knew about it; but [135] suggests

that it formed a strand of the grievance, and Mr Tinkler fairly accepted that it could fairly be concluded that Mr D knew of it. However, I agree with Mr Tinkler that neither Mr D's knowledge of that email, nor the fact that Mrs McTaggart later criticised this procedure as "unacceptable" could be said to support any adverse inference about *Mr D's motivation* for the conduct complained of.

77. For reasons I have explained, there was no proper basis to draw an adverse inference from the failure by the Respondent to call someone from the ACU as a witness. As to the tone of the August emails, I was shown copies of the full text of both, and their substance is fairly captured at [154] and [158]. Mr Rozycki accepted that they were not, on their face, overtly dismissive, as opposed to simply explaining the factual position, as Mr D was saying he understood it. Mr Rozycki accepted that the significance attached by the majority to them, was informed by the majority's conclusion that Mr D must in fact have realised that the ACU had not been candid about their search capabilities, so that he was, in these emails, knowingly stonewalling the Claimant. However, in my judgment, for the reasons I have explained, the majority view that the ACU had the capability to retrieve the October emails in January was not properly reached; hence it could not properly have concluded that Mr D must have known this when he wrote those emails.

78. The majority view that Mr D was "blocking" the Claimant, "batting him away" and "trying to wear him down", does not refer to any additional factual feature of the case, or factual finding, but simply reflects the majority's evaluation of other facts. Again, the sense is that the majority considered that Mr D knew all along that there must be more emails out there, which had been deliberately withheld by ACU; and that he was, because of the protected acts,

stonewalling the Claimant's attempts to get hold of them. Again, I do not think there was a proper basis in the evidence for such a conclusion.

79. As for the ICO, having regard to the very limited findings by the Tribunal about its provisional findings, the lack of any detail as to its reasons for those findings, and particularly what the Tribunal says at [156], I do not see how the majority could properly have relied upon this aspect as a material additional factual feature supporting a shifting of the burden. Finally, as Mr Rozycki fairly acknowledged in oral argument, what is set out at [233.7] is stated, in terms, to be the view of one only of the two lay members. It therefore did not form part of the reasoning of the majority, and cannot be relied upon in support of its view.

80. Pausing there, and standing back, it therefore seems to me that the matters referred to in [233] were *not* sufficient, whether separately or cumulatively, to support the conclusion that the burden passed to the Respondent to show that Mr D did not victimise the Claimant.

81. Even if I am wrong about that, and some or all of the matters referred to in [233] could have *potentially* supported a shifting of the burden in relation to Mr D, I also agree with Mr Tinkler, that the majority erred by failing to have regard to other findings relevant to any consideration of the conduct of Mr D with respect to SAR1. These included: that neither Mr D nor anyone in the DAU had met or interacted with the Claimant previously; that there was no evidence that they had had any prior dealings with anyone alleged to have discriminated against the Claimant; that it was Mr J who first dealt with, and was slow to process, SAR1 (both after it was initially received, and after the ACU responded in November 2017); that when Mr D became involved, he apologised to the Claimant and told him that Mr J's failings would be addressed (and Mr J was later moved out of the DAU); that Mr D responded to the Claimant's

26 January 2018 grievance on 5 February, acknowledging that there had been failings and apologising again; that, while his further appeal was being considered by Mrs McTaggart, and thereafter, the Claimant did not pursue the matter with Mr D until his email of 26 April, to which Mr D replied the same day; and that, following the GDPR upgrade, Mr D emailed the Claimant seeking further information so that a further search could be carried out, and later reminded him of that request.

82. Looking at the picture of *all* of the Tribunal's relevant findings about Mr D's involvement and conduct, leaving out of account only the question of the explanation for the particular conduct of his, said to amount to a detriment, as the Tribunal should have done, reinforces the conclusion that there was no proper basis for the majority to find that the burden had shifted to the Respondent to explain Mr D's conduct, in respect of the matters that the majority ultimately found amounted to detrimental treatment by Mr D because of the Claimant's protected acts.

83. For all of these reasons, in my judgment the majority were wrong to conclude that the burden of proof passed to the Respondent to show that such conduct was not, in any sense, because of the Claimant's protected acts; and hence wrong to conclude that, because Mr D was not called as a witness to explain his conduct, the victimisation complaint in relation to SAR1 succeeded. I therefore conclude that, in addition to Grounds 1, 2 and 3, Ground 4 also succeeds.

Outcome

84. For all the foregoing reasons, this appeal is allowed, and the majority Decision that the Respondent victimised the Claimant as set out in paragraph 1 of the Judgment is quashed. As I

have found that this conclusion could not have been properly reached on the evidence before the Tribunal, and that, in light of its overall findings of fact, only one outcome is possible, I will therefore substitute a Judgment to the effect that all the claims of victimisation are dismissed.