Neutral Citation Number: [2022] EAT 42

Case No: EA-2020-000376-AT
EA-2020-001077-AT

EMPLOYMENT APPEAL TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 March 2022

Before :

THE HONOURABLE MR JUSTICE GRIFFITHS

- -

Between :

EA-2020-000376-AT

Mr D Warburton	**Appellant**
- and -	
The Chief Constable of Northamptonshire Police	**Respondent**

EA-2020-001077-AT

The Chief Constable of Northamptonshire Police	**Appellant**
- and -	
Mr D Warburton	**Respondent**

- -
- -

Mr S Keen (instructed by **Berry Smith LLP**) for the **Claimant**
Mr A Roberts (instructed by **East Midlands Police Legal Services**) for the **Respondent**

Hearing date: 24 February 2022

- -

Judgment

SUMMARY

Whistleblowing, Protected Disclosures & Victimisation

In the appellant's claim for victimisation, the ET had not asked itself the correct question when deciding that the claimant had suffered no detriment. The key test is: "Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 HL applied.

Detriment is to be interpreted widely in this context. It is not necessary to establish any physical or economic consequence. Although the test is framed by reference to a reasonable worker, it is not a wholly objective test. It is enough that a reasonable worker might take such a view. This means that the answer to the question cannot be found only in the view taken by the ET itself. The ET might be of one view, and be perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to his detriment, the test is satisfied. It should not, therefore, be particularly difficult to establish a detriment for these purposes.

The ET had also not applied the correct legal test to the causation or "reason why" question. The question was whether the protected act had a significant influence on the outcome. **Chief Constable of West Yorkshire v Khan** [2001] 1 WLR 1947 HL, **Nagarajan v London Regional Transport** [2000] 1 AC 502, **Chief Constable of Greater Manchester v Bailey** [2017] EWCA Civ 425 and **Page v Lord Chancellor** [2021] ICR 912 CA considered and applied.

The appeal was allowed and the victimisation claim was remitted for rehearing.

The respondent's separate appeal against an order for costs was also allowed. The ET had refused an order for costs under rule 76(1)(a) of the ET Rules. It had no jurisdiction to make

an order for the costs of an unsuccessful application for a stay under rule 76(1)(b) and its order under that rule was therefore set aside. Rule 76(1)(b) applies to "any claim or response" which had no reasonable prospect of success. An application for a stay is not a "claim or response" for these purposes. Definitions of "claim" and "complaint" in rule 1(1) considered.

The Honourable Mr Justice Griffiths:

1. This is the hearing of two appeals.

    i) The appellant (Mr Warburton) appeals from a liability decision of the Watford Employment Tribunal which decided that his claim of victimisation was not well-founded ("the Liability Appeal").

    ii) The respondent (the Chief Constable of Northamptonshire Police), as well as resisting that appeal, brings his own appeal against a costs award made against the respondent on a subsequent occasion ("the Costs Appeal").

Background facts

2. The following facts appear from the liability decision of the Employment Tribunal ("ET").

3. The appellant applied to be a police officer with the respondent on 3 November 2017. Within his application email, he referred to what is accepted in this case as being a protected act, namely, proceedings he was bringing in another employment tribunal against another police force (Hertfordshire Constabulary), alleging unlawful discrimination. He had made an application to join that force, which had resulted in an offer, which was subsequently withdrawn.

4. The respondent police force was responsible for the recruitment of its own staff and police officers. It left the administration of the application process to the Multi-Force Shared Service Resourcing Team ("the MFSS"), a body supporting a variety of police forces in this way. Nothing turns on that. Counsel has made it clear to me that the administrative functions of MFSS did not involve taking any decisions, the selection

process itself being firmly located in the respondent police force in conjunction with its own Human Resources department.

5. By email on 13 December 2017, the respondent asked why the appellant had not been given a start date with Hertfordshire Constabulary. He replied within the hour, saying that he had been given a start date of 23 July 2017, but that, shortly before this date, he was advised that his vetting had been revoked and he had been rejected as an applicant. He also said that he had brought an ET claim of discrimination on grounds of disability and that he had raised 24 complaints against staff and officers at Hertfordshire Constabulary.

6. On 27 December 2017, the appellant was told that his application form had been accepted.

7. On 9 January 2018 he completed various forms, including the respondent's Police Review Vetting Form. On this (in the section asking for "any other information that you feel may be relevant") he gave details of the Hertfordshire Constabulary Employment Tribunal proceedings. He also mentioned various other matters, such as an incident of inappropriate behaviour at a social event and an allegation of racial abuse of a colleague, which he said was untrue. In answer to specific questions about criminal offences, he disclosed road traffic offences between 1992 and 2004, and a charge of criminal damage in August 2008. He said that this prosecution had been wrongly brought due to his unlawful arrest and that it was withdrawn by the Crown Prosecution Service when it reached trial in the Magistrates Court.

8. On 10 January 2018 he was interviewed by or on behalf of the respondent and tested at a Police Assessment Centre.

9. On 26 January 2018, he was "given a conditional offer subject to the pre-employment checks being completed" (ET judgment para 27).

10. On 1 February 2018 he was informed by email "that his application had been unsuccessful due to his failing to meet the respondent's requirements in respect of vetting", and that he was not entitled to reasons (para 28).

11. The context of this rejection was that vetting was routinely carried out by the respondent's Force Vetting Unit (para 16) in accordance with an 80-page written policy which said:

> "3.1 Vetting is conducted in the Police Service to help identify assess and manage risk relating to areas including, but not limited to:
>
> national security;
>
> public safety;
>
> public confidence;
>
> protection of organisational assets;
>
> operational safety;
>
> leadership;
>
> corruption / coercion; and
>
> integrity.
>
> 3.2 Vetting clearances must be granted before an individual is appointed. This is because the vetting process can uncover information which shows that the individual is unsuitable to serve in the Police Service. To avoid undue delay in Police business, vetting clearances need to be processed in a timely manner. Conditional clearances may be granted to an individual based on any known risks pending full clearance being received."

12. Para 47 of the ET Judgment notes that para 7.19 of the APP vetting guide placed a clear obligation on the recruiting police force to ensure the integrity of an applicant who was

re-joining, or transferring, from another police force. Section 7.24 required a Professional Standards check to be carried out by the recruiting force with the relevant Professional Standards Department at the force where the applicant previously worked. The APP vetting Code of Practice said that the vetting decision must be made on a case by case basis.

13. The respondent's witness Stephen Burke, Team Leader for the respondent's Vetting Department, gave evidence (which the ET accepted in para 34) that, although he wrote in his Daybook for 1 February "REJECT Damian Warburton", this only meant that he would be rejected "from the recruitment process for the current ongoing intake of Officers being recruited"; not that he would have his application completely rejected.

14. Mr Burke entered the following reasons for this decision into the computer system on 1 February:

> "Damian Warburton 14/05/1974 has applied for a role as a Police Officer. He has outstanding complaints with other Forces. He cannot be considered until these are resolved. He has been sent a letter explaining this. Once they are settled he is free to apply again."

15. At this point, on 1 February 2018, there was a change of approach from the respondent, which has caused the appellant in his appeal to focus more on the position at that date than on the position after it, although both the ET1 and the Notice of Appeal cover both periods. Counsel for the respondent, Mr Allan Roberts, who appeared at the liability hearing before the ET (which counsel for the appellant, Mr Spencer Keen, did not) indicated that emphasis on the position at 1 February 2018 as opposed to later was not a feature of the case presented to the ET, and it was not pleaded on that basis, which is why (he said) the ET does not analyse the case in that way in its decision. I think there

is force in the criticism that the appellant should not be allowed to run his case on appeal in a way that differs from the way he presented it before the ET.

16. The appellant immediately, on 1 February 2018, emailed back a response to the email at para 10 above, saying that he was entitled to reasons, "especially as I am suing Hertfordshire Constabulary in discrimination for having rejected me on vetting grounds". He said his solicitor would be in touch "regarding the victimisation that you have now committed".

17. The respondent, also on 1 February 2018, responded. The email was from Detective Sergeant Barsby, who figures prominently in the ET reasons, and for whom the ET had nothing but praise, having heard him as a witness. DS Barsby confirmed in his email that the respondent was responsible for vetting and suggested that the appellant's threat of litigation was premature. He confirmed that the respondent's new Vetting Policy allowed for a review to take place following a vetting decision.

18. On 14 February 2018, DS Barsby emailed the Appellant to say that the only information the respondent held was the Appellant's own vetting form, and an entry on the Police confidential vetting system, which he passed on to him, as follows:

> "On viewing the applicant's vetting form, it was noted that he has several ongoing cases with Herts Police and Avon and Somerset Police. He is also taking Herts to the Employment Tribunal. It was decided that we would not start his vetting until the outcome of these cases are known. A letter was sent to him saying he is welcome to apply once they were concluded. A service request which was sent to him saying he is welcome to apply once they were concluded."

19. DS concluded his email with the following further explanation of what was happening to the appellant's application:

> "In these particular cases (Officers that have previously served with other Police Forces) I can confirm that it is usual practice in Northants Police not to continue with the vetting application where there are ongoing proceedings between an applicant and a previous Police Force. This is to protect the organisation from any potential risk that could arise as a result of these proceedings.
>
> The reason we do not hold any other information is due to your vetting not being commenced as stated above. I can also confirm that we have not communicated with any other Police Forces with regards to this matter. Therefore, to clarify, your vetting hasn't been rejected, it simply wasn't commenced.
>
> However, as a sign of good faith and in the interest of openness and transparency, I can offer you the opportunity to ask for Police vetting to commence, if you feel that the process adopted above is not proportionate in the circumstances."

20. DS Barsby personally supervised the appellant's vetting from about this point. As part of the process, enquiries were sent to two other police forces mentioned by the appellant, namely West Midlands Police and Avon and Somerset Police. On 21 March 2018, West Midlands Police provided details of two allegations against the claimant from 1998, but stated that he had left that particular police force before any investigation had been concluded. DS Barsby appeared to take a relaxed view of this.

21. Avon and Somerset Police never provided information. They were reluctant to do so because the appellant had complained previously about them sharing his information. Direct approaches to them from DS Barsby were not successful. The appellant told him that he had been told that Avon and Somerset "had taken a policy decision not to respond because of an ongoing public complaint and litigation that the Claimant had in progress with them" (para 42 of the ET Judgment).

22. DS Barsby told the appellant that he could not proceed with his vetting until he had received the necessary information from Avon and Somerset Police. He added:

> "…you haven't failed vetting with Northants. I just cannot proceed without all the information."

23. DS Barsby did not accept a suggestion from the appellant that the respondent might exercise discretion when another police force had refused to respond to requests for information. However, he said that he would not close the appellant's file but would leave it open in the hope that he could resolve the matter with Avon and Somerset Police in the near future. But he did not hear from them and, on about 2 May 2018, "the vetting process with the Respondent was put on hold" (para 45).

24. Absent from this narrative so far is any reference to the respondent making an enquiry to Hertfordshire Police. This is striking because there is no doubt, both from the ET1 and from the Liability decision of the ET appealed from, that the only protected act relied on in support of the Appellant's claim was "bringing and continuing proceedings against Hertfordshire Constabulary under the **Equality Act 2010**" (para 12 of the Particulars of Claim attached to the ET1).

25. It seems that DS Barsby was not interested in hearing from Hertfordshire Police. Another of the respondent's vetting officers, Jo Bowden, emailed Hertfordshire Police sometime later, on 2 August 2018, "seeking any information of the vetting levels held and any relevant information and files that they held for the purposes of vetting" (para 46). However, DS Barsby's evidence (which was accepted) was that she had done this in error and without his consent (para 46 of the ET Judgment).

THE LIABILITY APPEAL

The issues on the liability appeal

26. The Notice of Appeal advances five grounds of appeal as follows:

    i) "The Tribunal erred in law by misstating the test for victimisation". (Notice of Appeal Ground 1).

ii) "The Tribunal erred in failing to find that the Claimant suffered detriment by having his application rejected." (Notice of Appeal Ground 2.1).

iii) "The Tribunal erred in failing to find that the Claimant's protected act caused the victimisation." (Notice of Appeal Ground 2.2).

iv) "The Tribunal erred by taking into account an irrelevant factor". (Notice of Appeal Ground 2.3).

v) The Tribunal failed to provide any or any sufficient reasons for its findings in respect of detriment and/or causation including, in particular, its failure to explain on what basis it was concluding that the Respondent had discharged the burden of proof". (Notice of Appeal Ground 2.4).

The submissions on the liability appeal

Ground 1 - The Tribunal erred in law by misstating the test for victimisation

27. The Appellant based this Ground on paras 49-51 of the ET's Judgment which state the ET's understanding of the applicable law in the following terms:

> "**Legal Issues**
>
> Victimisation
>
> 49. Section 27 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (race or sex in this case), A treats B less favourably than A treats or would treat others.
>
> *Causation*
>
> 50. If the act is not inherently discriminatory, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator acted as he did. Although his motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was his reason?
>
> *Comparators*
>
> 51. For the purposes of direct discrimination, Section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the Complainant and the comparator must be either the same

> or not materially different. Comparison may be made with a hypothetical individual."

28. The appellant points out that, while the first sentence of para 49 correctly identifies the relevant section of the **Act** (section 27 of the **Equality Act 2010**), the rest of para 49 does not summarise that section at all but, instead, sets out the test for direct race or sex discrimination. That was (it is common ground) a mistake because this was not a claim of direct discrimination, and it was not a claim based on race or sex. It was a victimisation claim.

29. The appellant also argues that the law of "causation" in victimisation cases set out in para 50 is wrong, referring particularly to the first phrase of para 50 ("If the act is not inherently discriminatory…") which had no application to this case, it not being a case of direct discrimination but of victimisation.

30. The appellant further argues that para 51 was, similarly, out of place in this case, because victimisation claims under section 27 do not require a comparator at all.

31. The respondent accepts that the ET was wrong in all these respects. He argues, however, that these were inadvertent errors that do not vitiate the substance of the judgment. The respondent argues that the ET applied the correct test for victimisation in the substance of its decision, and relies particularly on paras 1, 2, 6, 12 and 54-57 in that respect.

32. In para 1 the ET said "…the Respondent did not victimise the Claimant because of his protected act of bringing and continuing proceedings against Hertfordshire Constabulary". The respondent points out that this applied the correct "because of" test, and did not introduce any inappropriate direct discrimination language, including the language of comparators. In para 2 of the Reasons the ET correctly identified the claimant's case as being that the respondent "chose not to progress the vetting process

and did not appoint him as a Police Officer because he presented an Employment Tribunal claim against the Hertfordshire Police". Likewise (the respondent argues), the ET had the issues correctly when summarising the respondent's case in para 6: "…the respondent denies "(a) that the Claimant has made a protected act; (b) that the Respondent victimised the Claimant; and, (c) that the Claimant was subjected to detrimental treatment contrary to section 27 of the Equality Act 2010."

33. In paras 54-57 (the respondent argues) the ET correctly divided its analysis into "Protected Act" (the heading to para 54), "Detriment" (the heading to paras 55-56) and "Reason" (the heading to para 57 of the ET Judgment).

i) In para 54 it found in the appellant's favour that his ET claim against Hertfordshire Police was a protected act under section 27 of the **Equality Act 2010**.

ii) In para 55 it found that "The Respondent did not progress the Claimant's vetting process because of the ongoing Employment Tribunal proceedings with Hertfordshire Police, but more importantly because of the failure of Avon and Somerset Police to provide the information which had been requested on numerous occasions and which they appeared to have refused to disclose. The decision to place vetting on hold was consistent with the Respondent's vetting processes and a reasonable step to take taking into account the obligations provided with regards to vetting by the APP vetting guide and Code of Practice."

Although the appellant relies heavily on the first phrase in this paragraph ("The Respondent did not progress the Claimant's vetting process because of the ongoing Employment Tribunal proceedings…"), the respondent to the appeal says that the operative part of that sentence is the next one which shows that the

answer to the "reason why" question is "more importantly because of the failure of Avon and Somerset Police to provide the information", which is unconnected with the protected act claim against Hertfordshire Constabulary. The respondent also argues that the decision to place vetting on hold is shown by the rest of para 55 both to be because of policy (and not because of the ET claim) and to be reasonable (so as not to pass the *Shamoon* test of detriment which I will be discussing below, namely, "Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?").

iii) In para 56, the ET (quoting it) "…did shift the burden of proof given that there was a prima facie case established by the Claimant that he had suffered a detriment." This was because of the use of the word "rejection" in Mr Burke's Daybook and the comment of "RV failure". However, the ET went on, later in para 56, to decide that Mr Burke's evidence was correct and "this was a matter where the Claimant had not been permanently rejected". When DS Barsby then became involved, "he worked tirelessly", and "The reason why this matter stalled is due to the failure of Avon and Somerset Police". The "reason why" question is (the respondent argues) therefore answered not with the protected act claim against Hertfordshire Constabulary but for an unrelated reason, namely the "failure of Avon and Somerset Police".

iv) Finally, in para 57 of the ET Judgment, under the heading "Reason", the ET said that even if (contrary to its finding), the appellant had been able to establish a detriment:

> "…the Tribunal is not satisfied that the reason for this detriment is because the Claimant had made a protected disclosure. It is true that the Claimant had presented an Employment Tribunal claim against Hertfordshire Police. However, the detriment which the Claimant has identified was not caused by the proceedings which he brought against Hertfordshire Police, but due to the absence of the information being provided by Hertfordshire Police and Avon and Somerset Constabulary not providing the necessary information."

The respondent argues, again, that this applies the correct test.

Ground 2 - The Tribunal erred in failing to find that the Claimant suffered detriment by having his application rejected

34. In support of this Ground, the appellant argues that the ET has confused issues of liability with issues of quantum by looking at what difference the Respondent's approach made rather than what the reason for it was.

35. The appellant also argues that the ET failed to set out or apply the **Shamoon** test of what constitutes a detriment, or any legal test of detriment. The appellant argues that the ET ought to have found that, before DS Barsby got involved in February 2018, the appellant was facing a refusal to engage in the vetting process at all, and the ET was wrong not to identify this as a detriment. The appellant also argues that, even after DS Barsby got involved, his claim was unsuccessful (in that his job offer was never made unconditional) and the vetting process was excessively strict in getting stuck on the lack of information from other forces.

36. The respondent argues that, taken as a whole, the ET Judgment found that the claimant had not been unsuccessful but only had his application placed on hold and that his case failed both on whether there had been a detriment and on whether, if there had, the reason why was his claim against Hertfordshire Constabulary. The respondent argues

that these are unimpeachable findings of fact which it was open to the ET to make. The respondent objects to a case being run on appeal that the appellant being unsuccessful in obtaining selection in the *current* recruitment round constituted a detriment, when that was not how the case was pleaded or argued before the ET.

Ground 3 – The Tribunal erred in failing to find that the Claimant's protected act caused the victimisation

37. The appellant argues (but the respondent denies) that there was uncontested evidence that the decision not to appoint the claimant, either at all or in the current recruitment exercise, was taken, at least in material part, because of his discrimination claim against Hertfordshire Constabulary. Particular emphasis was placed on the contemporaneous record quoted in para 18 above. The appellant argues that a finding that the detriment had been "because of" his protected act was inevitable and that the ET could only have failed to make it because it applied the wrong test of causation or by reaching a conclusion not open to a reasonable ET properly directing itself on the law.

Ground 4 – The Tribunal erred by taking into account an irrelevant factor

38. The appellant focusses on para 55 of the ET Judgment which said that "The decision to place vetting on hold was consistent with the Respondent's vetting processes and a reasonable step to take taking into account the obligations provided with regards to vetting by the APP vetting guide and Code of Practice." The appellant argues that, since "unreasonableness" is not a requirement of section 27 of the **Equality Act 2010** governing victimisation claims, the ET here took into account an irrelevant factor.

39. The respondent argues that the reasonableness of its decisions supported the ET finding that the appellant had suffered no detriment (because no reasonable worker would or

might take the view that in all the circumstances it was to his detriment) and was not, therefore, irrelevant.

Ground 5 – The Tribunal failed to provide any or any sufficient reasons for its findings in respect of detriment and/or causation including, in particular, its failure to explain on what basis it was concluding that the Respondent had discharged the burden of proof

40. The appellant repeats his earlier criticisms of the ET's statements of the law, and lack of statements of the law. He also relies on Rule 62 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**:

> "62.—(1) The Tribunal shall give reasons for its decision on any disputed issue, whether substantive or procedural…
>
> …
>
> (5) In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues…."

41. The Appellant relies on **Greenwood v NRF Retail Ltd** [2011] ICR 896 although he accepts (as was said by Judge Hand QC in that case at para 56) that: "a judgment will not be erroneous in law simply because the structure of the rule is not visible on the surface of the decision so long as its constituent parts can be unearthed from the material beneath". It is necessary only that the judgment can demonstrate "substantial compliance". The respondent emphasised well-known dicta to the effect that Rule 62 and its predecessors are not to be a "straitjacket". Per Buxton LJ in **Balfour Beatty Power Networks Ltd v Wilcox** [2007] IRLR 63 at para 25:

> "…the rule is surely intended to be a guide and not a straitjacket. Provided it can be reasonably spelled out from the determination of the employment tribunal that what rule 30(6) requires has been provided by that tribunal, then no error of law will have been committed."

Discussion and decision on the Liability Appeal

42. It seems to me that the ET decision on liability can most conveniently and clearly be analysed by looking separately at its decision on (i) what if any detriment had been suffered and (ii) the reason for any such detriment.

(i) The decision on detriment

43. The ET decided "that the Claimant did not suffer the detriments which he identified as his issues in these proceedings" (ET Judgment para 57). If they were correct about that, the issue about the reason why he suffered any such detriment did not arise (although the ET went on to consider it, and decided that issue against him too).

44. There is no gainsaying the ET's failure to set out the correct law on section 27 victimisation. Although para 49 began by referring to section 27, what followed in that paragraph bore no relation to section 27 at all, and stated, instead, the test for direct discrimination, which was not the cause of action relied upon by the appellant.

45. At no point in its decision did the ET set out para 27 or correctly paraphrase it. The respondent's argument is that a correct understanding is to be inferred from the ET decision as a whole.

46. Section 27 of the **Equality Act 2010** provides:

> "**27 Victimisation**
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act."

47. In this case, there was no dispute that the A had performed a "protected act" within the meaning of the **Act**. This was identified in para 13 of the Particulars of Claim attached to the ET1 as "bringing and continuing proceedings against Hertfordshire Constabulary under the **Equality Act 2010**".

48. Detriment is not defined in the **Act** (although section 212(1) excludes it from claims which might otherwise be characterised as harassment, a refinement which has no relevance to the facts of the present appeal). However, there was agreement before me that the applicable law is in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 HL, and particularly in the judgment of Lord Hope at paras 33-35.

49. Detriment is a word to be interpreted "widely" in this context: **Chief Constable of West Yorkshire v Khan** [2001] 1 WLR 1947 per Lord Mackay at para 37 (cited in **Shamoon** at para 33).

50. The key test for present purposes is for the ET to ask itself: "Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?". It is not necessary to establish any physical or economic consequence for this question to be answered in the affirmative. The requirement that this hypothetical worker is a reasonable person means, of course, that an *unjustified* sense of grievance would not pass this test. All of this is established by the judgment of Lord Hope (and other cases which he cites) in **Shamoon** at para 35.

51. Although the test is framed by reference to "a reasonable worker", it is not a wholly objective test. It is enough that such a worker would *or might* take such a view. This is an important distinction because it means that the answer to the question cannot be found only in the view taken by the ET itself. The ET might be of one view, and be

perfectly reasonable in that view, but if *a* reasonable worker (although not all reasonable workers) *might* take the view that, in all the circumstances, it was to his detriment, the test is satisfied. It should not, therefore, be particularly difficult to establish a detriment for these purposes.

52. However, the absence of this definition from the ET judgment makes it at least uncertain that the ET applied the correct test.

53. In the section of the judgment entitled "Discussion and Analysis" (paras 54-57) there are sub-headings "Protected Act" (para 54), "Detriment" (paras 55-56) and "Reason" (para 57). However, the "Detriment" section starts with a causation point (which one would have expected to find in the "Reason" section):

> "The Respondent did not progress the Claimant's vetting process because of the ongoing Employment Tribunal proceedings with Hertfordshire police but more importantly because of the failure of Avon and Somerset Police to provide the information which had been requested on numerous occasions and which they appeared to have refused to disclose."

Thus, reassurance is so far lacking.

54. What follows does refer to the decision to place the A's vetting on hold being "consistent with the espondent's vetting processes and a reasonable step", before saying "The involvement of DS Barsby could not be considered a detriment". However, this passage does not in itself demonstrate that the correct approach to whether the conduct complained of constituted a detriment was being taken. The reasonableness of DS Barsby's actions might be relevant to the reaction of the reasonable person, but it is not quite the same as determining whether the treatment of the appellant by the respondent was of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment.

55. The remainder of para 55 deals simultaneously, and without analytical separation, with questions of reasonableness on the part of the respondent and with what decision was actually made. It said "The Claimant was not appointed to the Respondent but when he commenced proceedings it was not the case that he had been told that his application process had come to an end. The application had simply been put on hold."

56. In para 56, the ET began "In considering this decision, the Tribunal did shift the burden of proof given that there was a prima facie case established by the Claimant he had suffered a detriment." It is not clear to me whether "this decision" is the decision to place the appellant's application on hold discussed in the previous paragraph or the Tribunal's own decision in the section concluded by this paragraph on the issue (stated in the sub-heading) of "Detriment". Perhaps it does not make much difference. But it is notable that at this point they do find a prima facie case of detriment, notwithstanding the previous case about reasonableness. The reference to shifting burden connects with the earlier section of the judgment entitled "The Burden of Proof in Discrimination Cases" (paras 52-53) referring to section 136 of the **Equality Act 2010** and **Igen Ltd v Wong** [2005] IRLR 258.

57. It is clear from the first sentence of para 57 ("While the Tribunal is of the view that the Claimant did not suffer the detriments which he identified as his issues in these proceedings") that the ET is, in the remainder of para 56 which immediately precedes that sentence, stating reasons for finding that the appellant was not subjected to a detriment notwithstanding its prima facie conclusion in the first sentence of para 56 that he was.

58. The reasoning of this section, however, again seems to move between the question of what happened (the identification of the alleged detriment), the question of whether it

was reasonable from the respondent's point of view (while not asking or answering the **Shamoon** question about whether a reasonable worker would or might take the view that in all the circumstances it was to his detriment) and the question of causation ("The reason why this matter stalled is due to the failure of Avon and Somerset Police"). The analysis is, consequently, difficult to follow for the purposes of making sure that, notwithstanding the judgment's failure to set out the correct legal test of what constitutes a section 27 detriment, it was properly applying that test.

59. I have therefore come to the conclusion that the ET finding that there was no detriment cannot stand. It is reached on the basis of a misstatement of the applicable law, and the reasoning is not sufficiently clear for the ET conclusions to be grafted onto and justified by reference to the correct law. Nor do I think it appropriate to substitute my own decision on this point. I have stated the law, but it is not my function to find the facts.

60. Hence, the ET's finding against the appellant on the question of detriment cannot be determinative of this appeal, and I must go on to consider the submissions on causation.

(ii) The decision on causation

61. I have used the word "causation" as shorthand, and it was used in that way in the Notice of Appeal and during the hearing. However, the authorities, both on the terminology of sections 1 and 27 of the **Equality Act 2010** ("because of"), and on their predecessors ("by reason that" in, for example, section 2(1) of the **Race Relations Act 1976**, and "on grounds of" race or sex in section 1 of that **Act** and in the **Sex Discrimination Act 1975**, defining direct discrimination), suggest that this term is to be "deprecated" (per Underhill J in **Amnesty International v Ahmed** [2009] IRLR 884 at para 22). Other terms, which trip less easily off a lawyer's tongue, capture the exercise better.

62. Per Lord Nicholls in **Chief Constable of West Yorkshire v Khan** [2001] 1 WLR 1947 HL at para 29:

> "Contrary to views sometimes stated, the third ingredient ("by reason that") does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach. For the reasons I sought to explain in *Nagarajan v London Regional Transport* [2000] 1 AC 502, 510-512, a causation exercise of this type is not required either by section 1(1)(a) or section 2. The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test."

63. In **Nagarajan v London Regional Transport** [2000] 1 AC 502 HL, Lord Nicholls said, at 512H to 513B:

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

64. The "but for" test is clearly not applicable, setting the bar too low. But the "operative" or "effective" cause sets it too high if it leads to the error of looking only for the main or principal cause. Lord Nicholls' formulation - whether the protected characteristic or protected act "had a significant influence on the outcome" - is the correct test. And "the reason why" is to be preferred to "causation".

65. All these strands are tied together in a leading case on the current law of direct discrimination and victimisation (in section 13(1) and section 27 of the **Equality Act 2010**), **Chief Constable of Greater Manchester v Bailey** [2017] EWCA Civ 425. Per Underhill LJ at para 12:

> "Both sections use the term "because"/"because of". This replaces the terminology of the predecessor legislation, which referred to the "grounds" or "reason" for the act complained of. It is well-established that there is no change in the meaning, and it remains common to refer to the underlying issue as the "reason why" issue. In a case of the present kind establishing the reason why the act complained of was done requires an examination of what Lord Nicholls in his seminal speech in *Nagarajan v London Regional Transport* [2000] 1 AC 501, referred to as "the mental processes" of the putative discriminator (see at p. 511 A-B). Other authorities use the term "motivation" (while cautioning that this is not necessarily the same as "motive"). It is also well-established that an act will be done "because of" a protected characteristic, or "because" the claimant has done a protected act, as long as that had a significant influence on the outcome: see, again, Nagarajan, at p. 513B."

66. A number of cases illustrate different outcomes on various facts, depending on whether the bringing of proceedings (a protected act) was or was not "the reason why". Sometimes the proceedings are "the reason why", and sometimes they are not. It is not a case of one size fits all. The distinctions may be quite fine. The cases are fact-specific.

67. In **Aziz v Trinity Street Taxis Ltd** [1989] 1 QB 463, a taxicab proprietor brought proceedings for race discrimination against Trinity Street Taxis, an association to promote the well-being of Coventry taxi operators, of which he was a member. In the course of the proceedings, Trinity Street Taxis discovered that he had been making secret recordings of conversations with other members, because he used them in support of his claim in the proceedings. He lost the case and he was expelled. On his subsequent claim of victimisation, the Court of Appeal upheld the dismissal of the claim. The

proceedings had, of course, been a protected act. But, per Slade, Neill and Mann LJJ at 483H – 484B, the expulsion was:

> "…because its members, or the majority of them, considered that the making of the secret recordings had been an underhand action and a breach of trust. On the findings of fact of the industrial tribunal, it seems clear that TST's decision would have been the same, even though the complainant's purpose in making the recording had had nothing to do with the race relations legislation…. he cannot show that the fact that the relevant protected act was done by the complainant under or by reference to the race relations legislation in any way influenced the alleged discriminator in the treatment of the complainant."

68. In **Chief Constable of West Yorkshire v Khan** [2001] 1 WLR 1947 HL, Sergeant Khan brought tribunal proceedings against his Chief Constable (of West Yorkshire) alleging race discrimination, which was a protected act. While the proceedings were continuing, he applied for a job with another force. The Chief Constable of West Yorkshire refused to provide him (or, rather, his prospective new employer) with a reference. The following explanation was provided to the requesting police force:

> "Sergeant Khan has an outstanding industrial tribunal application against the chief constable for failing to support his application for promotion. In the light of that, the chief constable is unable to comment any further for fear of prejudicing his own case before the tribunal."

69. Sergeant Khan's claim of victimisation was upheld by the tribunal, and appeals by the Chief Constable to the Employment Appeal Tribunal and to the Court of Appeal were dismissed. But the House of Lords allowed an appeal and set aside the tribunal decision. Per Lord Nicholls at para 31: "An employer who conducts himself in this way is not doing so because of the fact that the complainant has brought discrimination proceedings, he is doing so because, currently and temporarily, he needs to take steps to preserve his position in the outstanding proceedings". That is a little different from the situation in the present case, in which the proceedings which are said to have held

up the Appellant's vetting and, therefore, appointment, were not against his prospective employer but another force entirely (see also per Lord Hoffmann at para 59). It seems also to be relevant that, when **Aziz** was decided, a claim of victimisation required a comparator (see the reasoning of Lord Mackay at para 45), although the Court of Appeal in **Chief Constable of Greater Manchester v Bailey** [2017] EWCA Civ 425 queries (at para 49) how much difference that is likely to make in an ordinary case.

70. In **Martin v Devonshires Solicitors [**2011] ICR 352 EAT, a legal secretary was dismissed after, but (as the ET found) not because of, grievances she had brought against the firm for discrimination or victimisation. In upholding the decision of the ET to dismiss her claims of victimisation, Underhill J (President of the EAT) said, at paras 22-23, that dismissal "in response to the doing of a protected act" will not necessarily be "because of" the protected act, where the employer "can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable." The reason for the appellant's dismissal was "a combination of inter-related features - the falseness of the allegations, the fact that the claimant was unable to accept that they were false, the fact that both those features were the result of mental illness and the risk of further disruptive and unmanageable conduct as a result of that illness". Therefore, "the reason asserted and found constitutes a series of features and/or consequences of the complaint which were properly and genuinely separable from the making of the complaint itself". Underhill J did, however, warn against over-reliance on such an analysis, recognising that "it is capable of abuse" (para 22).

71. In **Woodhouse v West North West Homes Leeds Ltd** [2013] IRLR 773, Judge Hand QC allowed an appeal against an ET decision which had found "genuinely separable

features" in accordance with this analysis. The claimant had brought multiple internal grievances against his employer (ten, in total) and, although the first two "had some substance", the rest were "empty allegations without any proper evidential basis or grounds" (para 35). Eventually, he was dismissed. The reason for the dismissal was explained in a letter as follows (para 46):-

> "That you have lost all trust and confidence in WNWHLL and that that has been the position for some considerable time... It is clear from both your own statements and occupational health advice that your view of the organisation would only change if your allegations for discriminatory conduct are accepted and that WNWHLL operates, in your words, a discrimination-free environment. WNWHLL considers that it does offer a discrimination-free environment. Your numerous allegations of discrimination have been taken seriously, but were ultimately not upheld following thorough investigations. I note that on occasion some of the panels have found that particular actions were not satisfactory, but that did not amount to discrimination. I do not believe that there can be a sustainable working relationship going forward."

72. The ET rejected his complaint of victimisation. The EAT held that the ET was wrong to apply **Martin v Devonshires** to the facts of the case. They allowed Mr Woodhouse's appeal and substituted (as "the only proper conclusion") a finding of victimisation (para 107).

73. In doing so, the EAT in **Woodhouse** questioned how often the reasoning in **Martin v Devonshires** should be applied, saying (at para 102):

> "It seems to us the process of measuring cases against such a yardstick is a dangerous one. One person's conviction that they have been discriminated against is very likely to generate the polar opposite, i.e. that the complainant is irrational, in the person or organisation complained about. Experience of this type of litigation teaches that grievances multiply and so the fact that here are a series of them is not unusual. It is a slippery slope towards neutering the concept of victimisation if the irrationality and multiplicity of grievances can lead, as a matter of routine, to the case being placed outside the scope of section 27 of the EA."

74. However, since that decision, the reasoning of **Martin v Devonshires** has been carefully re-examined and confidently affirmed by the Court of Appeal in **Page v Lord Chancellor** [2021] ICR 912 at paras 56-57. Underhill LJ (with whom Peter Jackson and Simler LJJ agreed) said (at para 57):

> "…employment tribunals can be trusted to recognise the circumstances in which the distinction there described can be properly applied, and I do not believe that it is useful to apply a requirement that those circumstances be exceptional: I note that Lewis J made the same point in *Panayiotou v Kernaghan* [2014] IRLR 500 (see para 54 of his judgment)."

75. In the case before me, the section of the ET judgment setting out the "Legal Issues" (paras 49-53) addresses the sub-heading "Causation" in para 50, which I have quoted in para 27 above. However, it starts incorrectly, by saying that the ribunal must look for the operative or effective clause "If the act is not inherently discriminatory", which is an echo of its mistake in para 49 and further mistake in para 51, apparently regarding victimisation as identical to direct discrimination, including the requirement of a comparator. Para 50 is therefore only correct if it is read without the first seven words, which are certainly wrong in this context.

76. As with detriment, the ET's failure to state the law correctly, or entirely correctly, when directing itself on the law of causation (the reason why) undermines its subsequent conclusions of fact. This is particularly so given the precise nature of the causation or "reason why" question, although in para 50 itself, the ET is definitely stating a test of "operative or effective" cause and recognising the distinction between motive and "what consciously or unconsciously was his reason". In the next paragraph of its Judgment (para 51) the ET goes on to refer to an entirely inapplicable concept of comparators.

77. The findings of fact are also somewhat mixed. It is confusing that the first finding relevant to causation is under the heading "Detriment", when para 55 of the ET Judgment begins:

> "The Respondent did not progress the Claimant's vetting process because of the ongoing Employment Tribunal proceedings with Hertfordshire Police, but more importantly because of the failure of Avon and Somerset Police to provide the information which had been requested on numerous occasions and which they appeared to have refused to disclose."

This sentence is ambiguous, as well as being out of place. Does it mean that the Avon and Somerset Police were the "more important" reason why but "the ongoing Employment Tribunal proceedings with Hertfordshire Police" nevertheless "had a significant influence on the outcome"? If so, the test in **Nagarajan** and **Bailey** is satisfied. Or does it mean that the proceedings against Hertfordshire Constabulary had no, or no significant, influence at all? The difference is crucial.

78. The statement that "The reason why this matter stalled is due to the failure of Avon and Somerset Police" in para 56 of the ET Judgment is in the section dealing with detriment, not causation, according to the sub-headings and it is part of a discussion about whether DS Barsby was in any way to blame.

79. When the ET Judgment reaches its sub-heading "Reason", the matter is dealt with in just a few lines in para 57:

> "…the Tribunal is not satisfied that the reason for this detriment is because the Claimant had made a protected disclosure. It is true that the Claimant had presented an Employment Tribunal claim against Hertfordshire Police. However, the detriment which the Claimant has identified was not caused by the proceedings which he brought against Hertfordshire Police, but due to the absence of the information being provided by Hertfordshire Police and Avon and Somerset Constabulary not providing the necessary information."

80. Given the amount of work that was left to do to explain the ET's reasoning and demonstrate that it was correct, I have concluded that this section is not sufficient to show that the ET was both applying the correct law and reaching a decision in the respondent's favour with reasoning which was visible and sustainable. The reference to detriment being caused by "the absence of the information being provided by Hertfordshire Police" is also troubling. It is hard to reconcile with the ET's findings of fact that no information was sought from Hertfordshire Constabulary at all until a relatively late stage, and, at that stage, DS Barsby was not interested in information from Hertfordshire and gave evidence that his colleague was mistaken in even asking for it (see para 25 above).

81. The ET Judgment both on whether the Appellant was subjected to a detriment and on the reason why he was (if he was) is based on misstatements of the law and is not sufficiently supported by clear and correct reasoning on either issue. It therefore cannot stand.

82. I am not in a position to substitute my own finding of fact on the reason why. It is quite possible that the same outcome may be reached in this case on a correct application of the law. But, as with detriment, the ET Judgment leaves too many gaps for me to fill.

83. The question then arises whether I should remit the matter to the same or to a different ET. I have in mind the principles discussed in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 at para 46. It is now over 2 years since the hearing on 5-8 January 2020. There will have to be a re-hearing, at which the ET has well in mind while hearing the case the correct legal tests to be applied and, consequently, the questions to be answered by reference to the evidence being heard. The original ET consisted of an Employment Judge and two members. There may be difficulties in reconvening the

original ET and, even if this is possible, listing is likely to be less flexible and therefore less rapid if that is the aim. I will therefore remit the case for rehearing by a different ET.

THE COSTS APPEAL

84. The respondent's appeal on costs arises from a different decision in this case. The claimant had applied for costs at a preliminary hearing, and that application was decided on written submissions. The decision was as follows:

> "1. the claimant's application for a costs order arising from the respondent's application for a stay which was heard by Employment Judge Brown on 29 November 2019 is successful as it had no reasonable prospects of success in accordance with Rule 76(1)(b). This means that a cost order is made against the respondent who shall pay the claimant the sum of £1,590.98;
>
> 2. the respondent's other two applications which were heard by Employment Judge Brown on 29 November 2019 relating to an amendment and a deposit order were reasonably made and are not subject to the cost order.
>
> 3. the claimant's application for 3 costs order in accordance with Rule 76(1)(a) is unsuccessful and is dismissed; and,
>
> 4. the claimant's application for a wasted costs order in accordance with Rule 80 is unsuccessful and is dismissed."

85. The respondent (who is the appellant against this costs order) has been given permission to appeal on a single ground, namely, that the ET erred in awarding costs under Rule 76(1)(b) of the **ET Rules**. It argues that, having concluded that no costs should be awarded under Rule 76(1)(a), there was no jurisdiction for the ET to award costs under Rule 76(1)(b) in respect of an application for a stay.

86. Rule 76(1) provides, so far as material, as follows:

> "76.—(1) A Tribunal may make a costs order…, and shall consider whether to do so, where it considers that—

> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b) any claim or response had no reasonable prospect of success;…"

87. In this case, the ET concluded that no order should be made under (a), but it did make an order under (b).

88. The respondent's application at the preliminary hearing had been (i) for permission to amend its ET3 response, which was granted; (ii) for a stay of proceedings, on various grounds, which was refused and (iii) for a deposit order in respect of the victimisation claim, which was also refused. The order for costs was granted only in relation to issue (ii), the application for a stay. The amount awarded was assessed on the basis of one third of the costs claimed, accordingly.

89. In deciding the application for costs, the ET recognised that an award of costs is not routine (ET Costs Judgment para 30). It expressly found that the respondent's application for a stay "was not made unreasonably" (para 35), which was the basis for its refusal to award costs under (a). It also noted that there was no evidence of "any separate unreasonable or negligent act or omission on the part of the respondent's representative" (para 41).

90. The ET was very clear that it was awarding costs only under Rule 76(1)(b). It was finding, therefore, that the respondent's application for a stay "had no reasonable prospects of success". Dismissing an award under Rule 76(1)(a), the ET rejected the submission that the respondent had acted unreasonably in applying for a stay. The EJ concluded (at para 35 of the ET Costs Judgment):

> "…while I accept that this part of the application was not made unreasonably (Rule 76(1)(a)), it was one which had no reasonable prospects of success in accordance with Rule 76(1)(b)."

91. The issue on the appeal is very simple. It is whether Rule 76(1)(b) applies to an application for a stay. The Appellant (resisting the costs appeal) argues that the words "claim" or "response" in Rule 76(1)(b) should be interpreted to include an interim or procedural application, such as an application for a stay. The respondent (bringing the costs appeal) argues that the power under Rule 76(1)(b) does not apply to the conduct of proceedings (including applications made within them) but only applies to the claim or response itself. Therefore, the costs order was made without jurisdiction and should be set aside.

92. In **Opalkova v Acquire Care Ltd** EA-2020-345-RN (1 September 2021), HHJ Tayler allowed an appeal against the ET's refusal to make a preparation time order under Rule 76(1)(b) (which covers "a costs order or a preparation time order"). The claimant had brought six claims in her ET1, three of which succeeded. She claimed that the defence in the ET3 to the three of her claims that succeeded had no reasonable prospect of success and that a preparation time order should be made accordingly. The EAT accepted a submission that, for the purposes of Rule 76(1)(b), each of the three claims and defences was a "claim" or "response" respectively, and that the ET had been wrong to reason that, since the respondent succeeded in defending three of the six complaints brought by the claimant, its response as a whole could not be said to have no reasonable prospect of success for the purpose of Rule 76(1)(b). Per HHJ Tayler at paras 13-17:-

> 13. In order to analyse Rule 76 in a little more detail it is necessary to consider what is meant in subsection (b) by the terms "claim" and "response" and the time at which it is to be assessed whether the claim or response "had" no reasonable prospect of success.

> 14. Rule 1 of the ET Rules defines claim and complaint as follows:
>
> > ""claim" means any proceedings before an Employment Tribunal making a complaint; …
> >
> > "complaint" means anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal;…"
>
> 15. Because a "claim" is defined as being proceedings before the employment tribunal making a complaint, it might be thought that the word "claim" refers to the proceedings commenced by the service of the claim form, so that each claim form includes only one claim. However, because a complaint means anything referred to in an enactment conferring jurisdiction on the employment tribunal as a claim, complaint, reference, application or appeal, I consider that the better interpretation is that each separate statutory cause of action is a complaint. Thus, a claim form may include a number of claims.
>
> 16. I consider that in this case the proper analysis is that the claimant brought 6 claims in her claim form…."

This does not really help the appellant to resist the costs appeal, because HHJ Tayler was there dealing with what were undoubtedly ET1 claims and ET3 responses, rather than procedural applications.

93. In **Queensgate Investments LLP v Millet** [2021] ICR 863, the claimant brought unfair dismissal proceedings and, in those proceedings, claimed interim relief under section 128 of the **Employment Rights Act 1996**. HHJ Tayler decided that the application for interim relief under section 128 was a "complaint" within the meaning of Rule 1(1) of the ET Rules. At paras 28-29, he explained his reasoning as follows:

> "28. Mr Jones also contends that the other words in the definition of a "complaint" in rule 1(1) ET Rules 2013 "are all used in Employment legislation as the means of commencing proceedings". He notes that the term "application" is used in some enactments such as sections 120(2) and (3) of the Equality Act 2010 (EQA 2010) to refer to the bringing of a "primary claim". While I accept that the word "application" in the definition of "complaint" in Rule 1(1) ET Rules 2013 is not apt

> to cover applications in the course of case management; such as applications for further information, disclosure or the like, I consider that an application for interim relief is a substantive application, rather than a mere application in the course of case management. It is an application that, if granted, results in an order for continuation of the claimant's contract of employment, with the consequence of a continued entitlement to payment to trial, that will not be undone if the claim of unfair dismissal is unsuccessful.
>
> 29. The next question is whether it is referred to as such in a provision that "confers jurisdiction on the Tribunal". I consider that section 129 ERA 1996 does confer jurisdiction on the Employment Tribunal to award interim relief."

An application for a stay is more in the nature of "applications in the course of case management", than "a substantive application", following the analysis of HHJ Tayler.

94. The appellant (resisting the costs appeal) relies heavily on the definition of "claim" in Rule 1(1) of the **ET Rules** (there is no definition of "response", but the two may be seen as sides of the same coin). Since that definition uses the word "complaint", he relies, also, on the definition of "complaint":-

> ""claim" means any proceedings before an Employment Tribunal making a complaint;
>
> …
>
> "complaint" means anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal;"

95. Reading Rule 76(1) as a whole (which I have set out at para 86 above), the words "claim" and "response" seem to me to convey in context more the sense of an originating application than a step taken in the course of the proceedings. In this, Rule 76(1)(b) contrasts with Rule 76(1)(a), with its more flexible and inclusive reference to "either the bringing of the proceedings (in part) or the way that the proceedings (or part) have been conducted". The jurisdiction under (a) focuses on conduct, whereas (b) focuses on the underlying merits. It makes sense that (a) should apply to applications

and any conduct or action during the proceedings, while (b), which refers to the underlying merits, does not.

96. This analysis is supported by the definition of "claim" in Rule 1(1): "any proceedings before an Employment Tribunal making a complaint". That is narrower than "any proceedings before an Employment Tribunal".

97. The subsequent definition of "complaint" does not and cannot equate to "making a complaint" with "any proceedings before an Employment Tribunal". If it did, the extra words would be rendered entirely pointless, which is contrary to primary canons of construction.

98. The definition of "complaint" covers "anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal". The words I have underlined are important. They are, indeed, essential to the definition. There was no doubt that the interim relief application in **Queensgate** was made pursuant to a statutory jurisdiction to confer substantive relief (from which irrecoverable payments of wages or salary would follow) under section 129 of the **Employment Rights Act**. It is hard to see how an application for a stay of proceedings could be said to be a "claim", "making a complaint", or to be "referred to" in an enactment which confers jurisdiction on the tribunal. It seems to me to be of an entirely different character.

99. After research, neither party to the appeal could find any example of the costs of an application for stay of proceedings, or other procedural application, being awarded under Rule 76(1)(b), as opposed to (a). The existence of (a) makes the additional jurisdiction under (b) unnecessary when a party has acted vexatiously, abusively,

disruptively or otherwise unreasonably, and the appellant's application under (a) was expressly rejected by the ET.

100. The appellant's reliance on the definition of "complaint" in Rule 1(1) is at one remove from the wording of "claim or response" in Rule 76(1)(b), which does not include the word "complaint". It passes through the definition of "claim" and then to the definition of "complaint" on the basis that "complaint" is a word used in the definition of "claim". But, upon reaching the definition of "complaint" by this route, he still has to identify "anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal" in a way that includes the respondent's application for a stay. It did not seem to me that the appellant's counsel was able to do so.

101. Unlike the interim relief application considered in **Queensgate**, which was definitely made under section 129 of the **Employment Rights Act 1996**, the respondent's application for a stay asked for the exercise of the ET's ordinary case management powers, and did not invoke a specific statutory jurisdiction. In my judgment, something more is required to meet the test of an "enactment which confers jurisdiction on the Tribunal" than, for example, section 7(3) of the **Employment Tribunals Act 1996** (power to make procedural rules by regulation), para 29 of the **ET Rules** (power to make case management orders), or paras 30 and 30A of the **ET Rules** (procedure in relation to applications for case management orders including postponements). Nor am I persuaded by the appellant's submission that it is enough for these purposes to refer to the application of the Overriding Objective by Rule 2.

102. The appellant argued, in the alternative, that the appeal is academic because the fact that the application for a stay had no reasonable prospect of success (as the ET found

in its costs decision) meant that the respondent necessarily acted unreasonably in bringing it, so that an order would be made under Rule 76(1)(a). This does not follow. If it did, Rule 76(1)(b) would be unnecessary in every case. There must be and is a difference between the test applied in the two limbs of (a) and (b). Indeed, the ET expressly rejected the claim under Rule 76(1)(a) in this case, and there is no permission to appeal that part of its decision.

103. For these reasons, I am satisfied that the ET had no jurisdiction to award costs in this case under Rule 76(1)(b). The respondent's appeal therefore succeeds, and the award of costs is set aside.