Neutral Citation Number: [2024] EAT 160

Case No: EA-2022-000975-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 August 2024

Before :

HIS HONOUR JUDGE BEARD

- -

Between:

ANDRAS SZUCS

Appellant

- and –

GREENSQUARE GROUP LTD

Respondent

- -
- -

MS G CORBY, Counsel (instructed via Advocate) for the **Appellant**
MR R FITZPATRICK, Counsel (instructed by Trowers & Hamlins LLP) for the **Respondent**

Hearing date: 15 August 2024

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JUDGMENT

SUMMARY

VICTIMISATION

The grounds of appeal were interconnected. The ET set out the correct test for causation when dealing with the law, but used the language of a different form of test when dealing with conclusions. This lack of clarity was combined with the ET setting out that an aspect of matters connected to protected acts was separable. This was in circumstances where the ET had implied but not set out, clearly, what the actual reason for the detriment (dismissal) was. In addition to this the ET had not set out why it had chosen evidence which supported a particular conclusion from the documents (which were the only evidence of the state of mind of the decision maker who chose to dismiss who did not give evidence) in preference to aspects of that evidence which pointed in the opposite direction. All of these matters, taken together, meant that the Judgment reasons were not Meek compliant. It was not possible from the reasons for the claimant to properly understand why he had lost.

HIS HONOUR JUDGE BEARD:

PRELIMINARIES

1. This is an appeal against the judgment of Employment Judge Livesey and members which was sent to the parties on 18 August 2022. I will refer to the parties as they were below as a claimant and respondent. The claimant is represented by Ms Corby acting pro bono under the aegis of advocate, and the respondent by Mr Fitzpatrick, both of counsel. The grounds of appeal are numbered but they are non-sequential, I am not going to refer to them by numbers but simply read them into the judgment.

GROUNDS OF APPEAL

2. It is contended that the tribunal erred because it gave no sufficient or clear explanation for their conclusions so as to enable the claimant to know why his claim was not upheld. In particular, in paragraph 8.4 the tribunal concluded that a reference to the claimant as a "complainer" was separable from the protected features of the complaints themselves. The tribunal then applied the approach in **Martin v Devonshires Solicitors** [2011] ICR 352. The error is said to be that the tribunal did so without explaining, in the absence of any evidence from Mr Lillis, how they had established his state of mind in making that reference. The respondent had admitted the complaints were protected acts. A further error is alleged on the basis that the conclusion that it was the manner of complaints rather than the complaints themselves that caused Mr Lillis to make this reference was unsupported by any evidence and therefore that the tribunal could not reasonably reach that conclusion. In terms of the decision that the reference was separable the claimant contended that the tribunal erred in concluding that it could do this when it, wrongly, attempted to divide the claimant's complaints into Equality Act and non-Equality Act complaints, because the respondent had admitted that all complaints were protected acts.

3. The next ground is that the tribunal failed to apply Section 136 of the Equality Act 2010 correctly when considering the appellant's complaint of victimisation. The tribunal did not consider either properly, or at all, whether the respondent had satisfied Section 136(3) of the Equality Act 2010. In the absence of evidence from Mr Lillis, explaining matters which had caused the tribunal to conclude that the burden of proof had shifted, the tribunal could not reasonably conclude that the respondent had satisfied the requirement to prove that there was no victimisation. Accordingly, the tribunal was required by Section 136(2) to find that the claimant had been victimised.

4. In paragraph 8.4 of the written reasons, the tribunal found that Mr Lillis's reference to the claimant as a complainer was properly to have been viewed as having been separable from the protected features of the complaints themselves as in Martin v Devonshires, and that it was the manner of the claimant's complaints which frustrated Mr Lillis when the tribunal heard no evidence from Mr Lillis and had no other evidence from him as to what he was referring to when so describing the claimant.

5. It is contended that the tribunal misapplied the principle in **Martin** in determining that Mr Lillis's reference to the claimant as a complainer was properly to have been viewed as being separable from the protected features of the complaints themselves. The tribunal wrongly sought to separate the complaints that had been made by the claimant into Equality Act and non-Equality Act claims when the complaints themselves in their entirety had been admitted by the respondent to be protected acts.

6. Under the heading of "Misdirection and/or misapplication of the test for causation", the tribunal failed to direct itself properly and/or misapplied Section 27 one of the Equality Act 2010 in considering whether the respondent had dismissed the claimant because he had done the protected acts in concluding in paragraph 8.5 of the written reasons that the protected acts had not been the effective or substantial cause of the claimant's dismissal. The tribunal failed to consider whether

notwithstanding this conclusion, the respondent also showed the fact that the claimant had done the protected acts was not a significant influence on the decision to dismiss.

THE PERMISSION GIVEN

7. The claim was presented to the Employment tribunal on 5 August 2020. The tribunal's reasons for its judgment, dismissing the claimant's claims, were sent to the parties on 18 August 2022. This appeal was lodged on 27 September 2022. At that stage the appeal had a considerable number of additional grounds. However, HHJ Auerbach, who directed a full appeal hearing, dismissed many. HHJ Auerbach in allowing these matters to proceed to a full hearing said:

> *"there are elements of overlap and repetition amongst this group of paragraphs. Separately or together, it appears to me they raise the following distinct points of substance. The first is that the tribunal applied the wrong legal test in order to determine whether, in particular in relation to Mr Lillis, the decision to dismiss was because of the protected acts or at least one of them. The second is that it erred in reaching the conclusion or explaining how it had reached a conclusion about whether, even if it applied the correct legal test, Mr Lillis's conduct was because of the protected acts. In the absence of oral evidence from Mr Lillis himself, the third is that the tribunal erred in concluding that what influenced Mr Lillis was something separable from the substance of the protected acts applying Martin v Devonshires. The fourth, raised by the second part of paragraph 4, is that the tribunal wrongly sought to separate the complaints into Equality Act and non-Equality Act complaints and all the claimed protected acts were admitted to be such. In the light of the wording of paragraph 8.5, the first of these points is arguable. The others are closer to the margin of arguability. The tribunal did have some evidence to draw upon when considering what it could infer about Mr Lillis's thought process, including the notes he had made prior to speaking to*

> *the claimant, the transcript of what he said in the conversation itself, and the wider evidence and findings about the course of the claimant's employment. Whether the third is arguable as a distinct ground is debatable given the reason or reasons for dismissal were essentially a matter for the tribunal to find as a fact. The fourth, I think, misunderstands the tribunal's point which is that apart from the protected acts, there were a number of other complaints or issues raised by the claimant over the course of his employment. However, bearing in mind that all these points are in related territory, I thought it better to allow this group of sub-grounds to proceed to a full appeal hearing."*

8. The approach taken by both counsel, unsurprisingly, is to relate their arguments on appeal to Judge Auerbach's reasons. That was an entirely appropriate exercise on their part. I consider this appeal ought to be approached by considering the way in which these particular grounds of appeal interact with one another.

EMPLOYMENT TRIBUNAL FACTS

9. Amongst the facts found by the tribunal, it is important to note, was that the claimant had less than two years' service. The claimant was dismissed without any procedure being followed or any warning being given to him. The tribunal found that this dismissal followed what had been seen as a deterioration in the claimant's performance, and, to a lesser extent, his attendance. The tribunal also found that the claimant's managers approached their HR department for advice. That advice was given by Mr Lillis who was also the person who then dismissed the claimant.

10. The tribunal was considering a list of issues which set out the protected acts relied upon. By the time of the hearing these were agreed as being protected acts. The protected acts were the submission of a grievance on 26 November 2019; the submission of a further grievance on 16 December 2019; entering into ACAS early conciliation on 12 November 2019; entering again into

early conciliation on 23 February 2020; appealing the grievance outcome on 20 March 2020; and on 2 April 2020, the claimant informing the senior HR advisor that he intended to submit a further grievance. There are some particular aspects of the tribunal's judgment are particularly pertinent. At paragraph 6.1 of the reasons it is set out that the tribunal attempted to restrict its findings to matters which were relevant to a determination of the issues. This, it was said, was not easy in light of the fact that there was a great deal of extraneous material.

11. At paragraph 6.16 of the reasons, having noted that the claimant's complaints were that he had been given expenses to travel to Oxford at one stage but these expenses were then disallowed, the tribunal said this:

> "Whatever the rights and wrongs of the expenses situation, it was clear that it remained a significant bugbear for the claimant and he frequently raised it when other matters were being discussed."

The tribunal went on to say that in terms of evidence, it had been said by Ms Bielby, a manager of the claimant, that his attitude became negative. She had said it was a struggle from then on because it was very difficult to do anything without that issue being raised.

12. At paragraph 6.27, the reasons refer to cross-examination of the claimant:

> "Things deteriorated in the spring and summer of that year [that year being 2019] and in cross-examination, the claimant accepted that his performance did deteriorate after February 2019. In a one-to-one meeting which was held on 16 April, problems were clearly identified."

13. In dealing with the law, at paragraph 7.1 the tribunal said this:

> "As to the remaining live issue of detriment, the test of causation under Section 27 is similar to that under Section 13 in that it required us to consider whether the claimant had been victimised "because" he had done a protected act, but we were not to have applied the "but for" test **Greater Manchester Police v Bailey** [2017] EWCA Civ 425 The act had to have been an effective or a substantive cause of the detriment but it did

not have to be the principal cause. The most recent formulation of the test in **Warburton v The Chief Constable of Northamptonshire Police** [2022] EAT 42 stressed the need to focus upon the reason why Question and consider whether the protected act had been, at the very least, a significant influence of the detriment."

14. These are the conclusions reached by the tribunal. Beginning with paragraph 8.3:

"8.3 Although the respondent was not able to call Mr Lillis to explain his decision, Mrs Cranshaw gave good, compelling evidence about what was in her mind at the point of the appeal. The respondent drew on a number of points.

8.31 First, there were the claimant's concerns over his expenses and the fact that once they had been reserved in a way which had not been to his liking, a marked impact that was noted upon his attitude and performance.

8.32 The significant performance - concerns had begun to become apparent from at least the spring of 2019 which Ms Bilby recognised ought to have been addressed sooner and were directly with him. A detailed exposition of that evidence on that issue was set out in the respondent's closing submissions, particularly between paragraphs 4 and 19.

8.33 The claimant's attendance was also an issue. The trigger under the respondent's sickness policy had been met ten days or more in six months. The claimant had seven weeks off in four months.

8.34 The claimant's character and personality had also made it difficult for him to have undertaken the role, it was said. According to his manager, he was someone who needed direction and structure whereas the role required initiative and imagination. His personality had also seemed to have caused him to become fixated over the expenses issue.

8.35 The respondent further asserted that it had treated the claimant's grievance seriously and properly. An external independent person had been engaged. There was a significant and detailed investigation and the complaints were partly upheld. It could not have been said that they had been ignored or brushed under the carpet."

8.4 There were two main points which the tribunal took from the respondent's case. First, while it was undoubtedly the case that the claimant had raised a number of complaints with his employer, only a small part of what he had complained about had been covered by the Equality Act. He had complained about expenses issues, immigration advice, failures to be promoted, residents who had harassed him, and many other things. We accepted the respondent's submissions on this point included that Mr Lillis's reference to him as a complainer was properly to have been viewed as being separable from the protected features of the complaints themselves. As in *Martin v Devonshires*, it was the manner of the claimant's complaints which had frustrated Mr Lillis and his inability to accept a decision and move on (regarding his expenses, for

example). It was a reflection of the manner in which he had approached issues at work, not the issues themselves. They were separate things.

8.5 But further and more significantly, it was clear to us that the claimant's performance had been consistently recorded as poor and deteriorating through 2019 and 2020. Even from the claimant's closing submissions, it was evident he was still unable to see the overwhelming evidence against him in that respect. We did not consider that the protected acts had been the effective or substantial cause of the claimant's dismissal. The overwhelming reason for his dismissal had been his performance but, linked to that, his attitude and, to a lesser extent, his attendance."

15. The Employment tribunal heard no evidence from Mr Lillis who was no longer employed by the respondent at the time of the hearing. However, in any event, what the tribunal did have were documents which could be described as direct contemporaneous evidence from Mr Lillis. The first document is a synopsis which, as I understand it, draws together the respondent's matters of concern, prepared by Mr Lillis, probably to provide advice to the managers in respect of HR issues. The synopsis contains elements which I have no doubt the tribunal relied upon in coming to its conclusion, both on the issue of the reason for dismissal and in respect of the separability issue. However, what is not mentioned by the tribunal are the following elements within the synopsis. There is a section in the synopsis headed "Status Q&A" and it includes these:

Question: "What does AS [that being the claimant] think of the investigation, outcome, and recommendations?"

Answer: "He has appealed with a 10-page appeal letter refuting the findings."

Question: "Can we do anything further to improve his performance, attendance, and attitude to GS [GS being the respondent]?"

Answer: "Not in the author's view. The extent of complaints, appeal, and performance and attendance issues are too ingrained to resolve so as to add value to the business and make AS a valued employee."

Later on in the document, having referred to the two-year deadline:

Question: "What is the relevance of this?"

Answer: "Less than two years' service means the employee cannot sue for unfair dismissal as they don't have the required service. This would come under the Employment Rights Act 1996. Any other form of litigation by an employee is difficult to prove, such as discrimination under the Equality Act 2010."

Question: "Why do you think he may sue for discrimination?"

Answer: "He may take the view we're seeking to terminate his employment because he has raised a grievance, thus discriminating against him. Of course, this is not the case."

Question: "What is the view on this employee from a HR perspective?"

Answer: "He does want to leave the business as he can't/won't do the job he's employed to do. The issue for GS is how do we lose him with the least risk as he won't."

Question: "Is he likely to sue whatever we do?"

Answer: "Yes, the issue will be which piece of employment legislation will he sue under. This will either be the Employment Rights Act 1996 for unfair dismissal, two years' service required to use this legislation or the Equality Act 2010 for discrimination. No length of service required to sue under this legislation. However, very difficult to prove. Of course, given enough service, he could resign and use both pieces of legislation to sue. GS does have control over this."

Mr Lillis then sets out a series of options. The first option was to manage the claimant through performance improvement plans and disciplinary procedures. The second option was to have a protected conversation and reach agreement. The third option, which was the recommendation that was finally given, was to:

> "Dismiss based on the under two-year rule, thus eliminating the risk of him suing for unfair dismissal under the ERA. However, he may still sue under the Employment Act 2010 for discrimination, albeit this is much harder to prove, costly for him, and time-consuming. Probably 12 months to come to ET. Our approach would be to discuss with ACAS and try and reach a settlement via a COT3 and if that fails, seek a pre-trial to get the claim rejected as it has no significant chance of success, and if that fails, take a view."

16. The next document is an email dated 2 April 2020 containing the following sentence:

> "Following the concerns you have recently raised, Steve Lillis, HR business partner, has now taken up your case and would like to meet with you to discuss the concerns you have raised about the business and your future employment with GreenSquare."

The email required the claimant to attend a meeting on 6 April.

17. That meeting took place by telephone and was covertly recorded by the claimant. There is a transcript of that recording. As I understand it, the tribunal had both the recording and the transcript

before it at the hearing. The following comments, it seems to me, are important as said by Mr Lillis:

> "The company is concerned with regard to your current employment and how unhappy you are."

Later on:

> "The issue we have is that you are a very unhappy employee."

Later on again:

> "I'd like to understand, if I may, why you are such an unhappy employee and whether you're going to continue working for GreenSquare."

The answer from the claimant at that point was to ask what was meant by him continuing to work, to which the answer was:

> "The company is considering releasing you from your employment."

The claimant asked the question on what basis, and the answer was:

> "On the basis that your performance is poor, your attendance is poor, your attitude is poor, and the company doesn't see any real partnership between you and GreenSquare going forward."

The claimant's response to that was that he was under the impression that the meeting was about an informal discussion in respect of grievances that he was thinking of raising.

Later on, Mr Lillis says:

> "I read the investigatory report and investigatory outcome letter which you hadn't agreed with and you put in an appeal."

That is correct and the claimant agreed with that. So Mr Lillis went on to say:

> "So the issue is now, Andras, the is not who's right and who's wrong. The issue is one of why should this company keep you employed as a resource when you don't perform and all you do is complain?"

Later on in the conversation:

> "All right. We feel we've treated you fairly, or GreenSquare feels they've treated you fairly. GreenSquare feels they've listened to all of your concerns and GreenSquare believes that they've dressed all of your concerns. We now have an appeal situation and we now have a situation for a subject access request as well. Don't know what we've done to deserve that but there you are."

Later again:

> "Your employment contract with GreenSquare will come to an end forthwith. As from today, your employment will be terminated."

Then:

> "I will write to you formally and I will let you know the reason for termination. I will put the details in the dismissal letter but the bottom line is, Andras, that the company can no longer employ a person that has got poor performance, poor attendance, and poor attitude."

Later:

> "But quite frankly, all you've done is knock GreenSquare and say how poor GreenSquare is and might be for you. If that's the case, Andras, we'd rather you didn't work for GreenSquare.

With the question being asked by the claimant:

> "So what is your reason for terminating my employment again?"

The answer being:

> "Performance, attendance, and attitude."

Then a question from the claimant:

> "When you say my attitude, is that even, sort of, a legal term?"

Mr Lillis says this:

> "I told you the reason for termination. A letter will go out to you today or tomorrow. As from this time, 23 minutes past 3, you're terminated working for GreenSquare. Ensure that your equipment is all switched off... [et cetera]."

18. The final document before the tribunal was a letter of 14 April 2020 where the reason for termination is set out as follows:

> "Your poor performance, your poor attendance, and your poor attitude within your job function."

It is to be noted that the words "within your job function" are additional in the letter and not used in the conversation.

SUBMISSIONS

The Claimant

19. The claimant submitted that the key point to approach in this matter is the way in which the tribunal dealt with the issue of causation in respect of victimisation. However, the claimant also refers to the tribunal's approach to separability and the burden of proof as each being errors of law. The protected acts had been admitted. It was argued that the approach that the tribunal needed to take was whether the protected act had a significant influence in the decision to dismiss. I was referred to **Nagarajan v London Regional Transport** [1999] IRLR 572, which was, it is said, clarified in **Igen Limited v Wong** [2005] EWCA Civ 142; [2005] ICR 931; [2005] 3 All ER 812. Reference was also made to **Fecitt v NHS Manchester** [2011] ICR 476. I will return to these cases when I deal with the law.

20. The use of the words "significant influence" by the tribunal are to be found in paragraph 7.1. However, the claimant contended that the approach taken by the tribunal, particularly in its findings at paragraphs 8.4 and 8.5, was an indication that the tribunal did not actually apply that test, but some other test when they used the words "the effective or substantial cause" of the dismissal. The test to be applied when dealing with these matters is that something must be in no sense whatsoever discriminatory. The use of the words "more than a trivial influence" in **Fecitt** it was argued are fundamentally different from the words that were used by the tribunal in this case. At least that is the case when the tribunal makes its decision on the facts as opposed to its recitation of the law.

21. The claimant engaged with the respondent's skeleton argument and the authorities relied upon when considering the importance of the words "significant influence". The two authorities at paragraph 14 of the respondent's skeleton argument were challenged. The first **O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor,** [1997] ICR 33 pre-dated **Nagarajan** and the case law that followed, the tests set out "effective and predominant cause" and "real and efficient cause" were not in keeping with more recent authority. The case before Eady P **Imperial College Healthcare NHS Trust v Matar** [2023] IRLR 264, referred to the various formulations of the test during the course of the judgment. However, Eady P then goes on to state the correct test and throughout the authorities the judicial gloss placed on the words "because of" were still "being in no sense whatsoever" connected to the protected act.

22. The claimant's position is that the tribunal applying the wrong test goes to the heart of the conclusions reached in paragraph 8.5. In the way it is expressed, it does not exclude the possibility of there being significant influence by the protected acts. Even the analysis of the word "attitude", which is used both in the judgment and in the documents before the tribunal is not adequate to dispel the issue of influence. Even when read benevolently the analysis is not good enough because this was a central decision for the Employment tribunal to make.

23. As to the application of **Martin v Devonshires**, I was referred to **Kong v Gulf International Bank (UK) Limited** [2022] EWCA Civ 941. The claimant argued that **Kong** requires that there needs to be an analysis requiring a tribunal firstly, to reach a conclusion as to what the reasons for the detriment are and then to decide if those reasons are separable from the protected acts. It is argued that this must be set out in a way that it can be clearly seen whether a reason for the detriment has nothing to do with the protected acts. In this case, the poor performance is completely unrelated to the protected acts, it should be clearly set out that this is a reason for the detriment, if that is the case. However, analysis of those elements that are connected to the

protected acts need also to be considered, unless they are excluded as a reason for the detriment. If a reason for the detriment connects in some way to the protected act the tribunal should explain the way in which that reason is separable from the protected act itself. So, for instance, if it is the manner in which a protected act is pursued which is said to be separable the tribunal should explain the aspects of the manner which would show that it was properly separable from the protected act itself.

24. The argument in respect of the burden of proof is that despite saying that the burden of proof applied, it is not analysed in the judgment. There is criticism of the claimant, it is said, at paragraph 8.6 that the claimant did not put to a witness that the decisions were because of the Equality Act protected complaints. The claimant argues that that was indicative of the Employment tribunal not keeping its mind properly on the burden of proof. That witness was not, it was argued, someone who had reacted to the protected acts and that witness was not the decision-maker. Therefore, it was not necessarily appropriate for the claimant to cross-examine on those matters.

25. The claimant argued that there was perversity in the conclusion reached by the tribunal because there was no real evidence to support the decision that the matters were separable. In particular, in light of some of the comments from the documents before the tribunal. The tribunal had simply not dealt with those matters in the decision. The ultimate submission was that this was not a decision that was open to the tribunal on the evidence before them. Therefore, it was perverse in the sense that they had reached the conclusion that no reasonable tribunal could reach.

26. However, using the same approach it was argued that the reasons were not **Meek** compliant. In terms, there is no explanation within the reasons why elements of the telephone conversation and the synopsis which supported a conclusion that the protected acts were part of the reason for the dismissal, why they were not, or, other than that, were separable from the protected acts in some way. The tribunal had said that the "overwhelming" reason for dismissal was the performance of

the claimant. However, the tribunal, in their use of overwhelming, does not go on to say, it is argued, that the protected acts have had no causal effects. That conclusion, however benevolently the reasons are read, is missing from the judgment.

The Respondent

27. The respondent began by arguing that the proper approach to an appeal must be considered relying on **DPP Law Limited v Greenberg** [2021] IRLR 1016. An appellate tribunal is not to focus on individual words, but to read the tribunal reasons in the round. The appellate tribunal should not be hypercritical of the way in which the tribunal phrases its decision. It is to be presumed, unless it can be shown clearly to the contrary, that the tribunal that correctly sets out the law, applies the law correctly. That is a reinforced position where, as here, it is a specialist tribunal. It is necessary on appeal for the to show the contrary.

28. The appropriate test and what it means is set out in paragraph 7.1 of the judgment. It is not enough that the definite article has been used in paragraph 8.5 to undermine that exposition of the law. It is the same test that is involved in discrimination and whistleblowing and there was no real disagreement as to what that test is. However, a fair and benevolent reading, of this judgment in the round, shows that the law had been applied properly to the facts. In particular that **Martin v Devonshires** was not mechanically applied by the tribunal. The tribunal considered the law and the protected acts and how those operated on the decision-maker's state of mind when it came to its conclusions.

29. The respondent's argument was that the shifting burden of proof is unnecessarily relied upon in some cases. The shift of burden is only required in those cases where a decision has to be made which relies on the tribunal being at a balanced point. In this case that was unnecessary

because the judgment showed that facts had been found showing "the reason why" a dismissal took place. This could be seen without the need to apply the burden of proof. Dealing with the argument in respect of the reasoning in **Kong**, it was submitted that there is no specific process involved in the approach to arriving at the reasons and separability, **Kong** merely offers guidance to the approach to be taken.

30. It is important to recognise, Mr Fitzpatrick said, that there was evidence before the tribunal which was actually probably more powerful than evidence coming from a witness. That is on the basis that it was contemporaneous and actual evidence of what was said on an occasion. On that basis, the claimant's argument that there was no evidence is difficult to sustain.

31. The respondent then argued that the use of the word "attitude" in paragraph 8.4 clearly shows that it was related to the claimant's work. That is because of the evidence that is set out prior to that in paragraph 8.3. In those circumstances it was difficult to see how the tribunal could have approached that question as to what attitude meant differently than it did.

32. The respondent referred to **Greenberg** again, making the point that a failure to mention an aspect of evidence does not indicate that a tribunal has ignored that evidence. I was taken by Mr Fitzpatrick to paragraph 6.1 where the tribunal made the point that it was not dealing with extraneous evidence. The tribunal heard the evidence, weighed it up, and that was enough for the process which this tribunal was involved in to come to its conclusions.

THE LAW

33. Dealing with the law, Section 27 of the Equality Act 2010 provides:

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or..."

Therein there are matters setting out what is a protected act but they are not of any significance to this hearing.

34. Section 136 of the Equality Act 2010 provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision..."

35. I have had to deal obviously with the question of causation which has been raised in this case and causation involves me, in the first instance, dealing with **Nagarajan v London Regional Transport**, where Lord Nicholls said at page 67:

> "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..."

36. In **Fecitt v NHS Manchester**, in the Court of Appeal, Elias LJ considered, (that being a protected disclosure claim) that whistleblowing and discrimination law were closely linked. The question was whether the protected act was a material influence in the sense of being more than a trivial influence as to why the employer treated an employee in a particular way. Reference is made to other phrases which had been used, for instance, by Underhill LJ in **Page v The Lord Chancellor & Anor** [2021] EWCA Civ 254 at [30]:

> "The doing of the protected act does not have to be the sole or even the principal cause: it is enough if it was a significant part of the respondent's reason for doing the act complained of."

37. There is reference to mixed motives in **Owen & Briggs v James** [1982] IRLR 502 which indicates that where a tribunal finds mixed motives, some lawful, some unlawful, it is desirable for that to be clearly set out which of the unlawful elements was causative or not causative .

38. The respondent referred to **O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School & Anor** [1977] ICR 33, in which Mummery J (as he then was), asks what is the "effective and predominant" or "real and efficient" cause of the act complained of. In **Imperial College Healthcare NHS Trust & Anor v Matar** [2023] IRLR 264 at [60] Eady P uses similar phrases which the respondent argues makes them relevant. It seems to me clear also that she goes on to say and used the phrase which has come to be, it seems to me, more prominent "in no sense whatsoever".

39. It is useful to start with the source, the clear spring water of the statute; that simply uses the phrase "because of". Thus the legislation whilst it requires the protected act to be a reason why the detriment occurs it does not need to be the only reason why the detriment occurs. It has been defined as having a significant influence, or an effective influence, more accurately it is an operative reason why a detriment occurs and the phrase which has been used in a number of cases that of "material influence".

40. There is reference, in **Fecitt** to something having a trivial influence as to why a decision was made or an employee was treated to their detriment. It seems to me that the phrase was used in that case as a cipher for not being a material or operative part of the decision. It would be an extremely difficult exercise to define what was an operative or material influence on a decision, but which was yet only minor or trivial. I ask rhetorically, where would the line be drawn? Such a test would lack the precision necessarily implied by the statute. It must be an element which has no influence, is not material or operative on the reason why a decision was made or an employee was treated to their detriment. If that were not the case, the phrase "in no way whatsoever" would have no real

force. That phrase is one that tends to sum up all other phrases that have been used in the case law. "In no way whatsoever" implies that the protected act is a material influence or an operative part of the reason why a decision is made.

41. The question of separability is dealt with in **Martin v Devonshires**. That is case where, it must be remembered in very specific and difficult circumstances, it was found that an employee who was suffering from a paranoid illness, who was making complaints that had no foundation whatsoever and was dismissed for making those complaints, that it was a separable feature of the complaint. However, that that was said to be an entirely exceptional type of case. The tribunal in its judgment cited **Woodhouse v West North West Homes Leeds Ltd** UKEAT/0007/12/SM in which the EAT counselled against using **Martin v Devonshires** as a template. In particular, the tribunal lifted this phrase:

> "To be cautious regarding features such as multiplicity of grievances and obsessive overreaction by an employee as exceptional."

42. It seems to me also the case of **Kong** is of some importance. At [57], Simler LJ indicates that:

> "...the 'separability principle' is not a rule of law or a basis for deeming an employer's reason to be anything other than the facts disclose it to be. It is simply a label that identifies what may in a particular case be a necessary step in the process of determining what as a matter of fact was the real reason for impugned treatment. Once the reasons for particular treatment have been identified by the fact-finding tribunal, it must evaluate whether the reasons so identified are separate from the protected disclosure, or whether they are so closely connected with it that a distinction cannot fairly and sensibly be drawn..."

43. In this case the tribunal decided that the burden of proof had shifted to the respondent. The question is really one of whether it gave an answer as to how the respondent had met sub-section (2) of Section 136.

44. I do not think I need to recite the guidance in the **Greenberg** case in any detail. I have already, to some extent, outlined it with the points that were made by the respondent in their

argument. **DPP Law Limited v Greenberg** draws together all of the decisions that were made as to how to approach dealing with an Employment Tribunal judgment, it indicates that the appellate tribunal ought to assume, in the tribunal's favour, that it has approached matters as it should and that all relevant evidence and factors were in the tribunal's collective mind when reaching their decision.

45. It is worth mentioning the case of **Oxford Saïd Business School & Anor v Heslop** [2021] N11WLUK 179(?) at [48], where Griffiths J said:

> "Any decision could usually have been expressed or structured differently, and perhaps a different court might have preferred a different structure or form of expression if it had had the task of writing the decision in the first place. It is, equally, always easy to say that an extra word or sentence would have improved a decision's resilience against an ex post facto attack following detailed scrutiny of it in preparation for an appeal. But that does not in itself mean that the original decision is wrong. The question is not whether the decision is ideal, or even excellent, but only whether it is good enough, with reasoning which is sufficient, and free of demonstrable error..."

DISCUSSION

46. These grounds of appeal were allowed to proceed to a full hearing by HHJ Auerbach who, as I have said, saw them as interconnected. There was some discussion before me about the ambit of the grounds but it appears to me upon reading them and reading the grounds themselves that I need to approach them with all of that interconnection in mind.

47. It seems to me clear that the tribunal set out the correct test in its description of the law. It was less careful the wording when the tribunal was applying the law to the facts in paragraph 8.5. It referred to the effective and substantial cause. That infelicity of expression is not sufficient to undermine the exposition of the law according to **Greenberg** unless there are other indications that the tribunal applied the wrong law. Ms Corby contends that these other indications are apparent because the tribunal did not say that the protected acts had no causal impact whatsoever, simply that there were other reasons.

48. The first of the grounds questions whether there is truly a separable element from the protected acts themselves. The tribunal approached matters by recognising that the complaints included aspects which were Equality Act based and aspects which were not. It seems to me that it is entitled to do that in terms of approaching the facts. What was in the grievance must be part of the way in which that grievance is to be considered by a tribunal.

49. In addition to that, as Mr Fitzpatrick argued, there were clearly matters in addition with which the respondent was concerned, those of performance, attendance, et cetera. However, what was in contention here was the dismissal. This, in my judgment, required the Employment tribunal to find clearly, as a fact, the reason or reasons for the dismissal. It is only by doing so that the Employment tribunal would be in a position to know whether the protected acts were (a) causal or (b) separable.

50. In paragraph 8.3 of the judgment the tribunal held that those were the appeal officer's considerations. In paragraph 8.4, it goes on to state that it considers two main points using the word "complainer". Clearly, there was material in the written documents, even in the absence of Mr Lillis, that the Employment tribunal could use to reach conclusions about the reason why the dismissal occurred. Although the word "complainer" was not used in those documents, that is clearly the label the tribunal attached to the approach taken by Mr Lillis to making the decision to dismiss.

51. However, the tribunal goes on in paragraph 8.5 to add other elements as to their reasons. It appears to me that what the tribunal does not do is take the **Kong** step of clearly identifying the reason or reasons. Certainly nothing points those reasons out clearly as being the reason for the decision to dismiss. I have to approach that with the **Greenberg** guidance in mind; I could not say that the Employment tribunal did not have the evidence to come to its conclusions. However, what seems to me is absent is a clear exposition that the protected acts had no material or operative

effect. It is clear that the performance and attendance complaints played a part and on the Employment tribunal's findings, the overwhelming part in the decision to dismiss. However, these are not are not separable in the **Martin** sense but simply separate in the **Kong** sense.

52. If the tribunal had set out that those were solely the reasons for dismissal, it would mean that the protected acts had played no part and that would be the end of the appeal. However, what is of concern, even taking the infelicities of language into account, is that there is no clear indication that the protected acts played no part. This particularly, as the tribunal found there was the "complainer" element in the decision; that is connected to the protected acts. The tribunal drew the conclusion that it was separable. How being a "complainer" could properly be separable from the complaint is something, in my judgment, that needs to be clearly explained. Whilst I accept that the non-Equality Act parts of the complaint could have led to this conclusion, it is not clear from the judgment that it did.

53. The separability question also leads to consideration of the causation point. Without that clear separation of reasons why something happened, it is not possible for a reader to understand what the tribunal considered had caused the decision. Having not explicitly said that the protected acts played no part in the reason why the claimant was dismissed, I find that the tribunal has fallen into error. It appears to me that the reasons are not **Meek** compliant. First of all, the explanations for the conclusion that Mr Lillis's reasons were not because of the protected act need to be clear. The evidence came solely from the documents. Those documents include features such as those references to the complaints made and the claimant being unhappy. Those are features which could support a conclusion that the dismissal was because of the protected acts. An explanation for why they did not is unclear or missing from the judgment. In my judgment, the tribunal would be expected to explain its finding as to the reason in the decision-maker's mind by showing why they had rejected those elements which supported the claimant's case. Without that, the claimant could not properly understand why he had lost. This is because that reason, as Ms Corby said at the outset

of her submission, is the key. It appears to me it was not sufficient to point the appeal officer's reasons as an analogue of Mr Lillis's reasons.

54. I add to that unclear conclusions, as I have found them to be, as to whether the protected acts in no way whatsoever played a part in the decision to dismiss. In particular, as to the approach to analysing the **Martin** separability issue the tribunal could almost be said to be creating a circular reasoning. In other words, the tribunal does not set out what the reason for dismissal is with clarity. Because of that, it cannot be understood whether the protected act was not the reason and the tribunal do not say that it was not the reason in any specific way.

55. That, in my judgment, is the basis upon which I should say that this appeal should be allowed. I have not approached the grounds as separate grounds but considered the position overall with those grounds in mind. Having approached the matter in that way, I should make this clear, I do not consider I am able to say that any aspect of this decision is perverse. There was clearly evidence upon which the tribunal could reach the conclusions that it did. Further, the Employment tribunal sets out the law correctly and I would not be able to say that because of an infelicitous phrase, it had made an error of law in that respect. My finding, overall, is that it is not possible, even with a benevolent reading of the judgment, to reach a clear understanding of why the protected acts played no part in the reason to dismiss which must be the basis of the finding if the tribunal is to reject the claim. As such, these reasons are not **Meek** compliant. I uphold the grounds of appeal but based on the reasoning and the approach I have outlined.

56. Now we can deal with the question of what happens next. It will be clear that I do not consider that I am in any position to make a decision in the claimant's favour in respect of any of the findings.

L A T E R

57. Both parties indicate that this matter needs to be remitted to the tribunal for further decision-making. That is obviously correct in light of my decision.

58. What is argued by the claimant, applying the approach of **Sinclair Roche & Temperley** is that a new tribunal ought to be dealing with the matter. Approaching the question of proportionality, the claimant argued that a self-contained hearing is unlikely to last the three days that it once did because the protected acts were no longer an issue. The significant passage of time since the decision was made and the impact on the claimant is something to be taken account of in that it would be much better to start afresh. It was not argued that the tribunal was biased or impartial but there was a real risk that there would be closed minds. Giving the tribunal a second bite of the cherry is not what is recommended. The EAT needs confidence that they would look at those matters fully if they were given guidance. There is a real risk, it was said, of the tribunal not applying its mind to matters afresh.

59. The final argument that the claimant would have difficulty, as a litigant in person, in the course of the hearing. The claimant contends he has a disability, he is high functioning on the autistic spectrum. (I note that the claimant uses the diagnosis Asperger's, I realise that that is not universally accepted as a description of the condition any longer because of the way in which Dr Asperger dealt with patients). It is argued that there would be a real difficulty for him, along with depression and anxiety, in appearing in front of the same tribunal.

60. Mr Fitzpatrick for the respondent argued that it ought to be remitted to the same tribunal. This is a small but central part of the case; the findings of fact have not been impugned. Issues such as the reversal of the burden of proof and findings in respect of that which would cause difficulties for any new tribunal. Being bound by those findings of fact in dealing with the case, if nothing else, would cause some discomfort.

61. In terms of proportionality, it was argued there is no sense for a fresh Employment tribunal to deal with this. The findings of fact are there. The relevant evidence is the documents and as far as the claimant's argument that it would take less time, it was pointed out that the case took three days in any event.

62. There is nothing, argues Mr Fitzpatrick, to show that this tribunal has a closed mind. Nothing at all to suggest it would act inappropriately and that can be seen by the way it was critical of the respondent as part of the judgment. In fact, it was critical of the respondent in respect of the burden of proof and the manner in which the claimant was dismissed.

63. In respect of the impact of disability, it is contented that there is no medical evidence before me. That the respondent is not in a position to comment reasonably in the absence of having such material and therefore that the respondent cannot comment reasonably whether what the claimant says is correct. I am in no position, it is argued, to say that he is correct because I do not have that evidence.

64. In my judgment, applying the question of proportionality that is required under **Sinclair Roche & Temperley**, I have come to the conclusion that it is more proportionate that this case is remitted to the same tribunal. They are acquainted with all the facts. They will only need to deal with those matters that are subject of this judgment. There is nothing to point to the tribunal being anything other than professional in their approach to this case. I accept the respondent's argument in respect of the impact of disability. I am simply not in a position to say there would be an impact. I do not have the expertise and a mere assertion is not enough for me to say that the disability would prevent this claimant pursuing a proper claim before the same tribunal. It is on that basis, in my judgment, this should be remitted to the same tribunal for consideration.