Neutral Citation Number: [2024] EAT 185

Case No: EA-2023-000138-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 November 2024

Before:

HIS HONOUR JUDGE JAMES TAYLER

- -

Between:

MR FRANK ALIYU

Appellant

- and –

TESCO STORES LIMITED

Respondent

- -
- -

The **Appellant** in person
Joel Wallace (instructed by Pinsent Masons LLP) for the **Respondent**

Hearing date: 20 November 2024

- -

JUDGMENT

SUMMARY

Victimisation, Harassment and Protected Disclosures

Despite some infelicities of expression, the Employment Tribunal did not err in law in its determination of complaints of victimisation, harassment and protected disclosure detriment and dismissal.

His Honour Judge James Tayler

Introduction

1. In this appeal the claimant challenges the approach adopted by the Employment Tribunal to claims of victimisation, harassment, protected disclosure detriment and dismissal. Amended grounds of appeal were drafted by Counsel who acted under the ELAAS scheme at a Rule 3(10) Hearing held on 7 February 2024. The claimant represented himself at the full appeal hearing.

2. The appeal is against the judgment of the Employment Tribunal, Employment Judge Abbott sitting with lay members. The hearing took place from 28 November to 2 December 2022. The judgment was sent to the parties on 16 January 2023.

The claimant's approach to the appeal

3. In his skeleton argument and oral submissions the claimant did not address the amended grounds of appeal to any significant extent but sought to re-argue the claim in the Employment Tribunal and to assert that the Employment Judge was biased against him. Despite being directed on a number of occasions to focus on the amended grounds of appeal the claimant did not do so. I appreciate the claimant's strength of feeling about his treatment, the consequences he feels it has had for his wellbeing and his conviction that his problems only arose after he made what he described as a "protective" report. He wishes to "clear his name". However, an appeal lies only on a point of law and the only matters that were properly before me were those set out in the amended grounds of appeal.

The outline facts

4. I take the key facts from the decision of the Employment Tribunal.

5. The claimant was employed by the respondent from 6 December 2019 as a delivery driver at the Charlton Bakery Hub.

6. On 5 October 2020, the claimant made a complaint through the respondent's "Protector Line" against a shift leader, Mr Howes and Mr Bargery, the Night Lead manager. The claimant made allegations of sexual harassment, favouritism, intimidation, and harassment of black and foreign

nationals.

7. The complaint was forwarded by email to Mr Popely, the People Partner responsible for the Charlton Bakery Hub.

8. The Claimant alleged that, at around 3.30am on 15 October 2020, Mr Bargery made a "heil Hitler" salute to him. Mr Bargery denied the allegation, and said he was simply waving to the Claimant to indicate that he should leave in his van. The Employment Tribunal rejected the claimant's assertion having considered the competing evidence. That finding is not subject of this appeal. The Employment Tribunal also rejected a contention that Mr Bargery had made such salutes previously.

9. Later on 15 October 2020, the claimant attended an informal meeting with Mr Popely to discuss his grievance. Mr Popely did not accept that what the claimant described was a "heil Hitler" salute but concluded that Mr Bargery made gesture waiving the claimant away. Mr Popely also suggested that the heil gesture was not inherently racist and that "Hitler copied it from someone else" and that it had subsequently been "used in the wrong way". Mr Popely is recorded as saying in the transcript of the meeting that the "shooing you away bit is definitely rude. 100% is rude and I support you with that, but that's not a racist gesture".

10. The Employment Tribunal held:

> 61. We find that what Mr Popely said in this regard was inappropriate and, to an objective observer, makes him come across as being an apologist for such actions. It is important to bear in mind that, at this point, there had been no investigation of whether or not Mr Bargery had made such a gesture. However, as ill-judged as his comments were, it is evident that Mr Popely understood what the Claimant was describing not to be a heil Hitler salute, and that was at the heart of what Mr Popely was commenting upon.

11. On 18 October 2020, there was an informal mediation meeting between the claimant and Mr Bargery, facilitated by Ms Sivasuthan, a Store Manager. It was not handled well and was unsuccessful.

12. On the night shift between 26-27 October 2020, it was alleged that the claimant made a comment about another colleague, Mr Sheikh along the lines of "turn off the lights so we can't see Shak". The Employment Tribunal accepted that the claimant had made some comment along these lines but did not make a finding that the comment was racist.

13. On 28 October 2020, the claimant telephoned Ms Sivasuthan and requested that Mr Popely be removed from his grievance process, given the apparent lack of any progress. On 28 October 2020, Mr White, a colleague who claimed to have witnessed the allegedly "racial" remark made by the claimant to Mr Sheikh reported it to Mr Bargery. Mr Bargery reported the allegation to Ms Etwareea, a People Partner, who was covering for Mr Popely. The Employment Tribunal held that Ms Etwareea advised Mr Bargery to suspend the claimant and that it would have been unusual for his to go against such advice. The Employment Tribunal held that, while aware that the claimant had an outstanding grievance, Ms Etwareea was unaware of its contents or that he had made a Protector Line complaint.

14. Later that day the claimant was suspended by Mr Munir, Shift Leader, and informed that he was being suspended for allegedly making a "racial comment".

15. There was a lengthy delay. It was not until December 2020 that Mr Somasundaram, a manager, was appointed to take forward the grievance and disciplinary investigation. The claimant refused to meet with Mr Somasundaram until he had been provided with notes of various meetings.

16. In late February 2021, Ms Ijaz, another manager, was appointed to take over the investigation of the grievance and of the alleged racial comment. The grievance was dealt with first. Ms Ijaz conducted an investigation which the Employment Tribunal considered was not "gold standard" because, for example, she did not interview Mr White, but the flaws did not undermine the process or render it flawed. Ms Ijaz produced her grievance outcome report on 16 March 2021 and met with the claimant to discuss it on 24 March 2021.The grievance was rejected.

17. The Employment Tribunal held that the claimant "reacted badly to this outcome" sending messages to Ms Ijaz including stating that "I pray GOD/ALLAH reward you accordingly now or in the future" and that she should be "cursed with the pain of 1000 widows".

18. The disciplinary complaint was extended to include the messages that the claimant had sent to Ms Ijaz. Another manager, Mr Somadas. was appointed to pursue the disciplinary investigation.

19. The claimant did not substantively participate in Mr Somadas' disciplinary investigation. Mr Somadas decided that the claimant should be referred for a disciplinary hearing. The Employment

Tribunal concluded that the decision was reasonable on the basis of the evidence. There was no credible evidence to suggest that Mr Bargery influenced the decision.

20. A disciplinary hearing was conducted by Mr Akram, another manager. The claimant refused to attend a meeting without a lawyer. Mr Akram conducted some investigations of his own. Mr Akram upheld complaints about the comments made by the claimant to Mr Sheikh and Ms Ijaz. The claimant was summarily dismissed with effect from 20 August 2021. The Employment Tribunal concluded that there was no credible evidence to suggest that Mr Bargery or others improperly influenced that decision.

21. The claimant appealed on 1 September 2020. The appeal was considered by Ms Whelan, an Area Manager. The claimant again refused to attend a meeting without a lawyer. Ms Whelan considered there were some errors in the disciplinary process and conducted further investigations herself to correct the errors. Ms Whelan upheld the decision to dismiss the claimant. The Employment Tribunal found that was "a reasonable conclusion available to her based on the evidence" and that Ms Whelan had not been improperly influenced by Mr Bargery or others.

The complaints

22. The claimant brought complaints of direct race discrimination, harassment, victimisation, protected disclosure detriment and unfair dismissal including automatic unfair dismissal for the reason, or principal reason, that the claimant had made protected disclosures and for unpaid holiday pay. The complaints relevant to this appeal are those related to victimisation, protected disclosures and harassment.

Core determination of the Employment Tribunal

23. So far as is relevant to this appeal the core conclusions were made in a section headed "Victimisation". The Employment Tribunal accepted that the claimant had done protected acts by alleging discrimination. The Employment Tribunal considered the asserted detrimental treatment, and also considered causation:

87. **Point (a)** is the alleged Heil Hitler salute. We have found on the facts that **there was no Hitler salute** made, and therefore this cannot be a detriment.

88. **Point (b)** is **Mr Popely's explanation of the origins of the Hitler salute**. We have found on the facts that **what Mr Popely said in this regard was inappropriate and, to an objective observer, makes him come across as being an apologist** for such actions. However, **to qualify as a detriment there must be shown some kind of a disadvantage**. We cannot see what disadvantage this comment can reasonably have caused the Claimant, and **the Claimant gave no evidence to suggest this particular comment can cause him emotional impact. It was immediately followed by a debate about the meaning of other terms.** In addition, **whilst it was done in a clumsy and inappropriate way**, we consider that **Mr Popely's intentions when making this comment were not malicious or because the Claimant had done a protected act**, but to seek to smooth over the differences between the Claimant and Mr Bargery in his role as a People Partner.

89. **Point (c)** relates to the Claimant's **suspension and the failure to give reasons**. We find both of these to **clearly qualify as detriments**. **The question is whether the reason for the detriments was the protected acts. We find they were not**. We have found that **Ms Etwareea was not aware of the protected acts and gave her advice independent of that knowledge. Mr Bargery acted on that advice, but it would have been unusual for him to do otherwise.** Whilst there were clearly flaws here, in particular in the failure of anyone to review the suspension or to give the Claimant details of the reasons earlier, **this was not as a consequence of the protected acts**.

90. **Point (d)** relates to the **alleged flaws in Ms Ijaz's investigation**. Whilst we have found that **the investigation was not 'gold standard'**, we have also found that the **flaws did not affect the outcome**. There was therefore **no disadvantage, and therefore no detriment**, here. Moreover, there is **no basis for a finding that the flaws happened because the Claimant had done a protected act**.

91. **Point (e)** relates to an alleged **false counter allegation made by Ms Ijaz**. We find that **the allegation made by Ms Ijaz was not false**, as is evidenced by the messages and email sent by the Claimant to Ms Ijaz, which can reasonably be seen as threatening and offensive. There is **clearly no detriment** to the Claimant here.

92.**Point (f)** concerns the **conclusion of the investigation that there was a disciplinary case to answer**. We have found that was a **reasonable conclusion open to Mr Somadas on the evidence** before him and he would have come to that conclusion **regardless of the protected acts**.

93. **Point (g)** relates to the **dismissal** and **the same applies** – we have found that **dismissal was a reasonable conclusion based on the evidence** before Mr Akram and, on appeal, Ms Whelan, and was **done irrespective of the protected acts**.

94. It therefore follows that none of the detriments have been proved, and the complaint of victimisation therefore fails. [emphasis added]

24. The core finding of the Employment Tribunal in respect of the harassment complaint was:

109. We can deal with this shortly, given that **the Claimant relies upon the same conduct as complained of under the victimisation and race discrimination complaints**. We have already explained why that conduct **did not amount to detriments**

> **nor to less favourable treatment because of the Claimant's race**. For the same reasons already given, **we conclude that none of the conduct complained of amounts to unwanted conduct related to the Claimant's race**. Strictly speaking, "related to a relevant protected characteristic" in section 26 EQA is broader than "because of a protected characteristic" in section 13 EQA but, on the facts here, this difference has no impact, nor does the lack of a necessity to consider comparators. Issue 9 does not arise. [emphasis added]

25. The Employment Tribunal dealt briefly with the complaint of protected disclosure detriment:

> 111. In respect of this complaint, the Claimant relies upon (i) the same complaints as were alleged to be protected acts in the victimisation complaint and (ii) the same detriments as in the victimisation complaint, save for his dismissal. **We have already found that none of the acts relied upon were detriments because of the protected acts for the purpose of the victimisation complaint, and the same therefore applies to this complaint**. [emphasis added]

26. In respect of the protected disclosure dismissal claim, the Employment Tribunal held:

> We have found as a fact that the actual reason for dismissal was the Claimant's misconduct. **That the Claimant had made a complaint about his manager and colleagues was not a reason (or principal reason) for the dismissal**. [emphasis added]

The appeal

27. The amended grounds raise the following challenges to the conclusions of the Employment Tribunal:

27.1. Ground A, Detriment:

27.1.1. failure to apply the relevant legal principles in considering whether the claimant was subject to detriment for the purposes of the victimisation and protected disclosure detriment complaints for points b (explanation of "salute"), d (flaws in Ms Ijaz's investigation), e (false counter allegation made by Ms Ijaz) and f (conclusion of the investigation).

27.1.2. insufficient reasoning in respect of points f (conclusion of the investigation) and g (dismissal).

27.1.3. perverse finding that points b (explanation of "salute"), d (flaws in Ms Ijaz's investigation), e (false counter allegation made by Ms Ijaz), f (conclusion of the investigation) and g (dismissal) did not amount to detrimental treatment

27.2. Ground B, Causation:

27.2.1. no consideration of whether point e (false counter allegation made by Ms Ijaz) was done because the claimant had done a protected act

27.2.2. but for causation was applied to point f (conclusion of the investigation)

27.3. Ground C, Harassment

27.3.1. failure to apply the correct test in considering whether the conduct in point b (explanation of "salute") was related to race

27.4. Ground D, Public Interest Disclosure – failure to make a finding on whether the claimant made any protected disclosures

27.5. Ground E, Failure to take into account relevant factors – failing to take account of two relevant factors

Relevant law and the extent to which the correct principles were considered

Victimisation

28. So far as relevant to the appeal, section 27 **Equality Act 2010** ("**EQA**") 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 …

29. The Employment Tribunal directed itself as to the meaning of the term detriment:

> 15. In order for a disadvantage to qualify as a "detriment", the Tribunal must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that they had thereby been disadvantaged in the circumstances in which they had thereafter to work. The test must be applied by considering the issue from the point of view of the victim. If the victim's opinion that the treatment was to their detriment is a reasonable one to hold, that ought to suffice. While an unjustified sense of grievance about an allegedly discriminatory act cannot constitute detriment, a justified and reasonable sense of grievance may well do so (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11).

30. This self-direction fits with the helpful analysis provided by Griffiths J in **Warburton v Chief Constable of Northamptonshire Police** [2022] EAT 42, [2022] ICR 925:

> 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, and particularly in the opinion of Lord Hope of Craighead at paras 33—35.
>
> 49 Detriment is a word to be interpreted "widely" in this context: *Chief Constable of the West Yorkshire Police v Khan* [2001] ICR 1065, per Lord Mackay of Clashfern at para 37(cited in *Shamoon* at para 33).
>
> 50 The key test for present purposes is for the employment tribunal 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 opinion 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 employment tribunal itself. The tribunal 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.

31. The causation test for victimisation is whether the treatment was "because" of the protected act. Although the Employment Tribunal did not consider the causation required to establish that treatment is "because" of a protected act, it did consider the meaning of the word "because" when considering the complaints of direct race discrimination. The Employment Tribunal stated at paragraph 21:

> It is well established law that a respondent's motive is irrelevant and, indeed, the possibility of unconscious discrimination is recognised (see e.g. **Nagarajan v London Regional Transport** [1999] IRLR 572, HL). Moreover, the protected characteristic need not be the sole or even principal reason for the treatment as long as it is **a significant influence or an effective cause** of the treatment.

32. Thus, the Employment Tribunal did identify the correct test of whether the protected characteristic has a significant influence on or is an effective cause of detrimental treatment. There is no reason to believe that the Employment Tribunal did not give the word "because" the same meaning when considering victimisation.

33. Where an Employment Tribunal properly directs itself as to the law, the EAT should be slow to assume that the direction has not been applied when deciding the case: **DPP Law Ltd v Greenberg**

[2021] IRLR 1016.

Public interest detriment

34. Section 47B **Employment Rights Act 1996** ("**ERA**") provides:

> 47B Protected disclosures.
>
> (1) A worker has the right not to be subjected to any **detriment** by any act, or any deliberate failure to act, by his employer done **on the ground** that the worker has made a protected disclosure.

35. The meaning of detriment is the same as for victimisation.

36. The causation test is that the detriment is done "on the ground" that the claimant made the protected disclosure. The Employment Tribunal correctly directed itself:

> 31."On the ground that" means that the protected disclosure must materially influence the employer's treatment of the worker, in the sense of being more than a trivial influence (*Fecitt v NHS Manchester* [2012] ICR 372, CA).

37. The causation tests for victimisation and protected disclosure detriment are essentially the same.

The approach adopted to causation by the Employment Tribunal

38. When referring to causation the Employment Tribunal mainly used the word "because", although it also used the terms "a consequence of" and referred to treatment that was done "regardless of the protected acts" and acts "done irrespective of the protected acts". However, in light of the Employment Tribunal's direction as to the law, and reading the judgment as a whole, I consider that the Employment Tribunal applied a causation test of whether a protected act or protected disclosure had a significant influence on or was an effective cause of detrimental treatment.

Protected disclosure dismissal

39. The Employment Tribunal correctly directed itself that it must consider whether the reason, or principal reason, for dismissal was that the claimant had made a protected disclosure.

Harassment

40. Section 26 **EQA** provides:

> 26 Harassment
>
> (1) A person (A) harasses another (B) if—
>
> (a) A engages in **unwanted conduct related to a relevant protected characteristic**, and
>
> (b) the conduct has the **purpose** or **effect** of—
>
> (i) **violating** B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (4) In deciding **whether conduct has the *effect*** referred to in subsection (1)(b), **each of the following must be taken into account**—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.

41. The term "related to" is wider than "because". In **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and another** [2020] IRLR 495 HHJ Auerbach stated:

> as the passages in *Nailard* that we have cited make clear, the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.
>
> Nevertheless, there must be still, **in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question**, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, **the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic**, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be. [emphasis added]

42. If the purpose of A is to violate dignity etc., harassment is established without more. If A did

not so intend, but the conduct has that "effect" it is necessary then to take account of each of "the perception of B", "the other circumstances of the case" and "whether it is reasonable for the conduct to have that effect" for the purposes of section 26(4) **EQA**.

The overlapping grounds of appeal

43. A number of the grounds overlap. I will consider the grounds of appeal by reference to each of the alleged unlawful acts raised in the grounds of appeal.

Point b (explanation of "salute")

44. The finding of the Employment Tribunal in respect of the detriment claim was:

> 88. **Point (b)** is **Mr Popely's explanation of the origins of the Hitler salute**. We have found on the facts that **what Mr Popely said in this regard was inappropriate and, to an objective observer, makes him come across as being an apologist** for such actions. However, **to qualify as a detriment there must be shown some kind of a disadvantage**. We cannot see what disadvantage this comment can reasonably have caused the Claimant, and **the Claimant gave no evidence to suggest this particular comment can cause him emotional impact. It was immediately followed by a debate about the meaning of other terms.** In addition, **whilst it was done in a clumsy and inappropriate way**, we consider that **Mr Popely's intentions when making this comment were not malicious or because the Claimant had done a protected act**, but to seek to smooth over the differences between the Claimant and Mr Bargery in his role as a People Partner. [emphasis added]

45. When considering harassment the Employment Tribunal held:

> 109. We can deal with this shortly, given that **the Claimant relies upon the same conduct as complained of under the victimisation and race discrimination complaints**. We have already explained why that conduct **did not amount to detriments nor to less favourable treatment because of the Claimant's race**. For the same reasons already given, **we conclude that none of the conduct complained of amounts to unwanted conduct related to the Claimant's race**. Strictly speaking, "related to a relevant protected characteristic" in section 26 EQA is broader than "because of a protected characteristic" in section 13 EQA but, on the facts here, this difference has no impact, nor does the lack of a necessity to consider comparators. Issue 9 does not arise. [emphasis added]

46. This reasoning is challenged under Ground A, detriment, and Ground C, harassment.

47. Because this point is not challenged under Ground B, causation, there is no basis upon which the finding that the treatment was not because the claimant had done a protected act or on the ground that he had made a protected disclosure could be set aside. The same complaints raised by the claimant against his colleagues were relied on as being protected acts and disclosures. While I can see some

force in the challenge to the detriment issue, the point is moot.

48. I consider there is force in the challenge to the approach of the Employment Tribunal to the question of whether the treatment was related to race in paragraph 109. The Employment Tribunal did not sufficiently explain why in the circumstances of this case "related to" was considered to add nothing to the "because of" test for the claim of direct race discrimination. However, paragraph 109 has to be read with paragraph 88. I consider that on a fair reading of the judgment the Employment Tribunal concluded that Mr Popely did not have the purpose of violating the claimant's dignity etc. and did not have that effect by expressing his understanding of the origin of the salute because it had "no emotional impact" on the claimant. Even though his explanation was found to be "inappropriate" and to make Mr Popely "come across as being an apologist" that does not constitute harassment if the conduct did not have the purpose or effect of violating dignity etc. While that factual conclusion may be surprising it does not pass the high threshold of being perverse.

Point d (flaws in Ms Ijaz's investigation)

49. The Employment Tribunal held:

> 90. **Point (d)** relates to the **alleged flaws in Ms Ijaz's investigation**. Whilst we have found that **the investigation was not 'gold standard'**, we have also found that the **flaws did not affect the outcome**. There was therefore **no disadvantage, and therefore no detriment**, here. Moreover, there is **no basis for a finding that the flaws happened because the Claimant had done a protected act**. [emphasis added]

50. This reasoning is challenged under Ground A, detriment. I can see force in the argument that this appears to suggest that there was a requirement for some concrete consequence on the outcome of the investigation whereas a justified sense of grievance is sufficient to establish detriment. However, there is no challenge to the causation conclusion and so no proper basis to overturn the overall finding in respect of Point d.

Point e (false counter allegation made by Ms Ijaz)

51. The Employment Tribunal held:

> 91. **Point (e)** relates to an alleged **false counter allegation made by Ms Ijaz**. We find that **the allegation made by Ms Ijaz was not false**, as is evidenced by the messages and email sent by the Claimant to Ms Ijaz, which can reasonably be seen as threatening and offensive. There is **clearly no detriment** to the Claimant here. [emphasis added]

52. This reasoning is challenged by Ground A, detriment and Ground B, causation.

53. It is important to note that the specific detriment asserted by the claimant was that Ms Ijaz made a **false** allegation. The Employment Tribunal correctly held that the allegation was not false. Accordingly, the pleaded detriment was not established on the facts. The making of a true allegation could be such that a reasonable worker would or might take the view that in all the circumstances it was to his detriment, particularly if such a true allegation was made for an ulterior motive. But that was not the assertion in this case. The Employment Tribunal did not go on to consider causation, but it was not required to do so because detriment was not established.

Point f (conclusion of the investigation)

54. The Employment Tribunal stated:

> 92.**Point (f)** concerns the **conclusion of the investigation that there was a disciplinary case to answer**. We have found that was a **reasonable conclusion open to Mr Somadas on the evidence** before him and he would have come to that conclusion **regardless of the protected acts**. [emphasis added]

55. This reasoning is challenged by Ground A, detriment, and Ground B, causation.

56. The fact that the decision that there was a disciplinary case to answer was reasonable does not necessarily mean that it was not detrimental. It is not clear whether the Employment Tribunal held there was no detriment. However, the claim also failed on causation. Although, perhaps infelicitous, I consider on reading the judgment as a whole the term "regardless of the protected acts" meant that they had no material influence on the decision to refer the claimant for a disciplinary hearing. There is no error of law in that determination.

Point g (dismissal)

57. The Employment Tribunal held:

> 93. **Point (g)** relates to the **dismissal** and **the same applies** – we have found that **dismissal was a reasonable conclusion based on the evidence** before Mr Akram and, on appeal, Ms Whelan, and was **done irrespective of the protected acts**. [emphasis added]

58. This is challenged under Ground A detriment. Correctly analysed it is a complaint of dismissal within section 29(4)(c) **EQA** rather than of detriment. The Employment Tribunal found that the

claimant was dismissed because of his conduct alone. I consider that the term "irrespective" was used to mean that the protected act was not a material factor in the decision to dismiss. The complaint failed on causation grounds that have not been challenged so there is no basis for overturning that conclusion.

Ground D, Public Interest Disclosure

59. The Employment Tribunal did not determine whether the claimant made protected disclosures. However, the disclosures relied on were those that were said to be protected acts for the purposes of the victimisation complaint. Accordingly, the protected disclosure detriment claims failed for the same reasons as the victimisation complaints. The Employment Tribunal specifically held that the reason, or principal reason, for dismissal was not the making of any disclosure. This ground does not affect the correctness of the determination of the Employment Tribunal.

Ground E

60. The claimant asserts:

> 13. The Tribunal failed to take into account the following relevant factors in reaching its decision:
>
> a. when the claimant made a complaint on 5 and 15 October 2020 about racist comments and sexual harassment no action was taken whereas when a complaint was made against him on 28 October 2020 he was suspended and then the complaint was a part of the reason for his dismissal;
>
> b. the claimant was suspended only 3.5 hours after he asked for Jamie Popely to be removed as the investigator into his complaint, which was evidence of a culture of retaliatory action by the respondent that supported the alleged victimisation and/or protected disclosure detriment and dismissal claims.

61. I accept the respondent's contention that this was not the basis upon which the claim was put forward by the claimant at the hearing before the Employment Tribunal. In particular the claimant did not assert a "culture of retaliatory action by the respondent". Further, the Employment Tribunal was not required to refer to every matter it considered. The claimant's allegations against colleagues were not established whereas the complaints against him were found to have been made out. The different circumstances were set out in the findings of fact of the Employment Tribunal. The Employment Tribunal concluded that the claimant's complaints against others were not a reason, in

the sense of being a material factor, in his treatment.

Outcome

62. The appeal is dismissed.