Neutral Citation Number: [2022] EAT 168

Case No: EA-2021-000569-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24 November 2022

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MR G KALU
PROFESSOR O OGUEH **Appellants**

- and –

UNIVERSITY HOSPITALS SUSSEX NHS FOUNDATION TRUST (FORMERLY BRIGHTON and SUSSEX UNIVERSITY HOSPITALS NHS TRUST) **Respondent**

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Ayoade Elesinnla (Direct Access) for the **Appellants**
Thomas Kibling (instructed by Cater Leydon Millard) for the **Respondent**

Hearing date: 18 October 2022

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE; RACE DISCRIMINATION

The claimants were employed by the respondent as consultant obstetricians and gynaecologists. They were both members of the BME network. A colleague, Ms Burns, brought a grievance against the chair of the BME network alleging that, at a network meeting, she had been treated in a homophobic manner. A number of other grievances pursued by the chair, Ms Burns, and others, followed. These included a collective grievance, to which both claimants were a party, about Ms Burns' grievance against the chair, the content of which they alleged was discriminatory towards them.

An external barrister was appointed to investigate all of the related grievances under the respondent's Dignity at Work policy. The claimants objected to the use of that policy, and to the particular appointment. They were instructed to co-operate with the investigation, but declined to do so.

The barrister's report concluded that there was a case to answer that the claimants had, by their part in the collective grievance, victimised Ms Burns contrary to the respondent's DAW policy. The claimants appealed, but objected to the procedure used, and indicated that they would not attend the appeal hearing. The respondent then treated the appeal as withdrawn. There was then an MHPS investigation. The respondent determined that the claimants were not entitled to be accompanied by a barrister at the investigation hearing. The claimants then declined to participate. The investigation report found sufficient evidence to support the allegations that the claimants had victimised Ms Burns, that there was no justifiable cause for their non-participation in the investigation process, and that they may have breached their implied obligations of trust and confidence. This led to disciplinary charges, which were upheld following a disciplinary hearing in which the claimants both ultimately decided not to participate. Both claimants were dismissed. Their internal appeals were unsuccessful.

The employment tribunal dismissed multiple complaints of direct race discrimination, victimisation

and detrimental treatment for having made protected disclosures. It also dismissed complaints of unfair dismissal for the reason or principal reason of having made protected disclosures and wrongful dismissal. It found that, because of a procedural failing, the claimants were unfairly dismissed, but reduced their compensation to zero applying *Polkey* and on account of contributory conduct.

In relation to the grounds of appeal that were before it the EAT concluded as follows:

(1) The tribunal had found that the claimants' participation in the collective grievance was not a protected act within the meaning of section 27 **Equality Act 2010** because the allegations made were untrue and made in bad faith. The claimants contended that this was an error, because the bad faith point had not been part of the respondent's pleaded case. But, having regard to the contents of the pleadings read as a whole, the tribunal had not so erred;

(2) It was, however, unfair for the tribunal to have made a finding that the claimants were in bad faith in relation to that grievance, within the meaning of section 27(3), as the judge had prevented the respondent's counsel from putting that specific point in cross-examination. There is not an absolute rule that an allegation which has not been put can never be considered, but bad faith in the context of section 27(3) connotes dishonesty, which is a serious matter;

(3) The tribunal did not err in rejecting complaints of victimisation relating to the external barrister's report, (which were considered on the assumption that the collective grievance was a protected act, alongside other protected acts found by the tribunal). The tribunal properly found that the impugned conduct on the part of the barrister was not because of the (actual or claimed) protected acts. Its conclusions were not non-*Meek*-compliant nor perverse. Nor were they vitiated by the fact that the tribunal referred to a legal authority that had not been flagged up at the hearing. The authority was not referred to for any distinct point of law that was not in play, but by way of a factual analogy or illustration.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. I will refer to the parties as they were in the employment tribunal, as claimants and respondent. The claimants were both employed by the respondent as consultant obstetricians and gynaecologists, respectively from 2002 and 2001, until they were both dismissed in 2017 for the given reason of conduct. They presented claims which came to a CVP hearing in 2020 at London South before EJ Khalil, Ms J Jerram and Mr P Adkins. The claimants were represented then by Mr Elesinnla, and the respondent by Mr Kibling, both of counsel. Both of them appeared again in the EAT.

2. There were complaints of detrimental treatment relating to various aspects of the investigation and disciplinary processes that led to the dismissals, including the decision to dismiss and the subsequent internal appeal and related matters. Each matter complained about was said to amount to victimisation contrary to section 27 **Equality Act 2010**, detrimental treatment on the ground of having made protected disclosures contrary to section 47B **Employment Rights Act 1996** (or unfair dismissal for the reason or principal reason of having done so contrary section 103A), and/or direct discrimination because of race contrary to section 13 of the **1996 Act** (although, in relation to two particular matters, the complaints of direct race discrimination were withdrawn at the full merits hearing). There were also complaints of ordinary unfair dismissal and wrongful dismissal.

3. In a reserved decision the employment tribunal dismissed all of the complaints save for that of ordinary unfair dismissal. As to that, it found that the dismissals were procedurally unfair in one respect, but that there should be 100% *Polkey* reductions and/or that the basic and compensatory awards should be reduced to nil by virtue of sections 122(2) and 123(6) of the **1996 Act**.

The Facts

4. For the purposes of the issues raised by this appeal, a summary of the facts found by the employment tribunal, and its salient observations in the course of the fact-finding, is as follows.

5. The claimants are both black and were both members of the BME network. Erin Burns was employed by the respondent as a Change Consultant. In January 2014 she attended a BME network event chaired by Dr Lyfar-Cissé. Following this she raised a grievance, the gist of which was that Dr Lyfar-Cissé had outed her to the meeting as gay, in a manner that she believed was homophobic. In April 2014 Ms Burns raised a further grievance complaining that Dr Lyfar-Cissé had breached confidentiality by speaking publicly about her first grievance at a BME conference.

6. Colin Hann was appointed to investigate both grievances. Dr Lyfar-Cissé was accompanied at a meeting with him by the first claimant. At that meeting the first claimant told Mr Hann that if action was not taken against Ms Burns over remarks made in her grievance about BME network members, he would be forced to take action; and that Ms Burns' conduct could not go unpunished.

7. Mr Hann's report did not uphold Ms Burns' complaint, but was critical of Dr Lyfar-Cissé. Ms Burns appealed. She also lodged a further grievance about the contents of an email from Dr Lyfar-Cissé to some 600+ BME network members. The appeal was heard by Dominic Ford. Dr Lyfar-Cissé also appealed in respect of the Hann report, stating: "The Members will also be submitting their collective grievance against Ms Burns in due course." Dr Lyfar-Cissé also submitted a grievance about Ms Burns.

8. The tribunal continued, at [29]:

> **"On 12 January 2015, a collective grievance was raised against Ms Burns by 8 BME network members (pages 510). This included both claimants. The complaint, in summary, was about Ms Burns' comments (in her grievance against Dr Lyfar-Cissé) about the BME members being referred to as 'strangers' and being stereotypically assumed to be homophobic or to treat her in isolation as a result and about being subject to and under the control of Dr Lyfar-Cissé. This email was relied upon as a protected act and a protected disclosure. The Tribunal found the context of the grievance was not, reasonably, about race discrimination. There was no express allegation of race discrimination. The objection was to the BME members being stereotypically insinuated as being homophobic based on Ms Burns' view that her sexual orientation had been outed amongst a group of strangers. This was not, in the Tribunal's view, an opinion (of Ms Burns' grievance) that could reasonably be inferred. Her grievance had nothing to do with race on any reasonable interpretation."**

9. Ms Burns lodged a further grievance among other things complaining that the collective grievance amounted to an act of victimisation. In a response to Dr Lyfar-Cissé's appeal she stated that the collective grievance was an act of bullying, harassment and victimisation. Dr Lyfar-Cissé's appeal was heard in March, by William Stronach, as she had objected to Mr Ford. There were further grievances by Dr Lyfar-Cissé against Mr Ford, and by Ms Burns against a Helen Weatherill, in relation to an alleged direction to Mr Hann not to investigate Dr Lyfar-Cissé's circular email.

10. The outcomes of the appeals considered by Messrs Ford and Stronach were both to the effect that the Hann investigation had been inadequate and unreliable. Both recommended that all the linked grievances be considered together. At this point the respondent's chief executive, Matthew Kershaw, decided to instruct an external investigator, Henrietta Hill QC (as she then was) to investigate all the outstanding grievances. She had had no prior involvement nor any knowledge of any of the parties.

11. The respondent used the Dignity at Work (DAW) procedure for the Hill investigation, but the claimants considered that the grievance procedure should have been used. They also wanted a different investigator. However, the respondent proceeded with the DAW investigation under Ms Hill QC, and the claimants were instructed to meet with her. The tribunal said that there was nothing unreasonable, unfair or irregular about these decisions.

12. In June 2015 the claimants and other signatories to the January collective grievance lodged a further grievance to the effect that (because of the choice of procedure being used) they were being denied a grievance hearing, and complaining of institutional racism. On 2 July the GMB union lodged a similar grievance on behalf of the same group. The tribunal described the GMB grievance as ill-informed and unreasonable, and found that it was sent solely to halt the Ms Hill QC grievance process. The GMB sent a further email on 27 July, which the tribunal found was in many respects inaccurate.

13. The claimants did not participate in the Hill investigation despite many requests and instructions to do so. The tribunal described Ms Hill QC's report as substantial, and observed, at

[52]: **"Crucially, it found that the claimants' collective grievance of 12 January 2015 was an act of victimisation against Ms Burns. This finding was reached after much reflection. This was obvious from the report."** I interpose that, as the tribunal later more precisely and accurately stated, Mr Hill QC concluded that there was a case to answer in that regard.

14. The tribunal noted that the Hill report had been considered in previous litigation brought by Dr Lyfar-Cissé, in which Ms Hill QC had been a respondent, and in which her report had been held not to be directly discriminatory or to amount to an act of victimisation. In addition, in the course of the present tribunal claims a deposit had been ordered in respect of the complaints relating to the report, which had been unsuccessfully appealed. The tribunal continued as follows.

> **"(55) The Tribunal did not consider issue estoppel, in so far as it was alleged by the respondent, applied – the parties in these proceedings were not the same. However, the previous judicial findings were not irrelevant – they were highly relevant. The Tribunal read Ms Hill QC's report. The Tribunal found that the finding of victimisation was properly open to Ms Hill QC. It was unambiguously the case that she had reached that finding with care and after consideration of all the material before her. The previous judicial findings and conclusions about the report were reasonable and the non-discrimination findings sound. Notwithstanding the foregoing, in relation to the victimisation claim in these proceedings, the Tribunal reached its own findings in relation to the collective grievance of 12 January 2015. These findings, unanimously, were as follows:**
>
> > **• The Collective grievance was lodged in close proximity to the grievance and appeals of Dr Lyfar-Cisse on 22 and 23 December 2014 respectively.**
> >
> > **• The decision or likelihood of raising a collective grievance was known to Dr Lyfar-Cissé when she submitted her grievance and appeal. This was made explicit.**
> >
> > **• Dr Kalu had been the accompanying companion for Dr Lyfar-Cissé when she was interviewed by Mr Hann on 29 July 2014. He had also been scheduled to accompany Dr Lyfar-Cissé previously.**
> >
> > **• At the meeting of 29 July 2014, Mr Kalu had expressed in non-neutral terms that if Ms Burns was not punished, he would take the matter further. This was, on the Tribunal's view, much closer to a threat than a reservation of position.**
> >
> > **• The Tribunal had regard to the grievance of Ms Burns (4 February 2014) and as found above, saw no reasonable basis for the consequential interpretation of it by the claimants. The complaint of Ms Burns was against Dr Lyfar-Cissé making her sexual orientation known in a public form and also in the context of previous alleged comments about gay marriage; that was it. That she went on to make claims about her alleged control over the network added nothing to suggest it could reasonably be interpreted as stereotypical and/or racially targeting the BME network or its members.**

> **• The Tribunal had regard to the finding by Employment Judge Webster that the claimant's assertion they had no knowledge of Dr Lyfar-Cissé's claim to be not plausible.**
>
> **(56) The Tribunal found the collective grievance to be retaliatory, heavy handed and an exaggeration and which had been deliberately mis-categorised as having a racial premise when in fact it was supportive of Dr Lyfar-Cissé against a person who had dared to challenge her. The grievance included the remark "Ms Burns should not get away with insulting us simply so that she can lend credibility to the hopelessly flawed allegation of bullying that she has levelled against Dr Lyfar-Cissé". It was in the Tribunal's unanimous view a thought through plan."**

15. The claimants and their colleagues who had submitted the collective grievance appealed against the Hill-report outcome. The respondent's then chairman, Julian Lee, was appointed to hear the appeal. The claimants again disputed the use of the DAW procedure, and the chairman's authority, and asserted that his appointment was an act of victimisation. They said that they would not attend the appeal hearing. In light of that the respondent treated the appeal as abandoned.

16. The respondent then commenced an MHPS investigation in respect of the claimants. The allegations were of misconduct by victimising Ms Burns, and by refusing to take part in the earlier investigation. The latter was said also to raise an issue of breakdown of trust and confidence. Marco Maccario was appointed as the case investigator. The claimants asked to be accompanied to a meeting with him by Mr Elesinnla. The respondent declined. The claimants raised a grievance about that, which was rejected, as was an internal appeal on the point. The tribunal considered the respondent's interpretation of the procedure on this point to be reasonable, as Mr Elesinnla had been the claimants' lawyer first (having been instructed by them in previous tribunal litigation) and friend second.

17. Mr Maccario reported that there may be sufficient evidence to support all the charges that he had investigated. That led to the claimants being informed of formal disciplinary charges on the same three points and invited to attend a disciplinary hearing before Dr George Findlay. They challenged his impartiality, but after investigating the allegation, the respondent declined to remove him.

18. The disciplinary hearing took place on 20 September 2017. The second claimant did not

attend. The first claimant attended at the start and applied for a postponement in relation to the accompaniment issue, pending resolution of a county court claim in that respect. That was refused. Dr Findlay sought to persuade him to remain and participate in the hearing, but he did not. The hearing therefore proceeded in the absence of both claimants.

19. As to Dr Findlay's decision, the tribunal found as follows, at [99].

> **"The charges against the claimants were upheld. The minutes of the disciplinary hearing were not challenged/disputed (and could not realistically have been disputed in the claimants' absence) and were found to be an accurate and fair summary (pages 931-943). Dr Findlay's reasons were set out in his witness statement paragraphs 56 to 73. He found the claimants were guilty of victimisation in bad faith and repeatedly refusing to comply with reasonable instructions to cooperate in the investigation, both of which he considered to be gross misconduct individually or cumulatively. The seniority of the claimants was cited in particular in Dr Findlay's decision making process. Separately, he concluded the refusal to engage in the investigation process was a breach of their duty of trust and confidence which had caused a complete breakdown in the employment relationship as a result. The sanction of dismissal was considered appropriate by Dr Findlay. He explained he had regard to expectations of senior clinicians that they must lead by example (paragraph 64) and he further concluded there was no good or justifiable reason for their behaviour regarding the investigation which he considered to be deliberate and calculated. He formed a view that the claimants felt they were 'beyond management' if they personally considered an action to be inappropriate (paragraph 74). He considered this unsustainable."**

20. The claimants appealed. The panel was chaired by the respondent's then chair, Michael Viggers. The day before the hearing the claimants sent him an email making a number of allegations, including accusing him of being a racist and questioning his intellectual capacity. The tribunal described the email as inflammatory, offensively explicit and unjustified. The claimants were warned that the appeal panel would proceed in their absence, which it did. The appeal was unsuccessful.

The Employment Tribunal's Conclusions

21. After a self-direction as to the law, the employment tribunal worked through its conclusions on the complaints and the issues, by reference to the list of issues appended to its decision. The following conclusions are relevant to this appeal. The tribunal first considered whether the collective grievance of 12 January 2015 was a protected disclosure and/or a protected act. It said:

> **"(149) The Tribunal concluded, having regard to its findings above, that the**

> **collective grievance raised on 12 January 2015 was not a protected disclosure. The Tribunal concluded that the claimants did not, subjectively, hold a reasonable belief that the disclosure tended to show that Ms Burns' grievance was a discriminatory/stereotypical assumption that BME Network members were homophobic and would, as a result, isolate her. The Tribunal recognised that a disclosure does not need to be in good faith and can have more than one purpose. However, the Tribunal concluded that the purpose of the grievance was, exclusively, to victimise against Ms Burns which was an unlawful purpose. Alternatively, the Tribunal concluded the claimants did not have a reasonable belief, objectively, that they were making a disclosure of information which tended to show that Ms Burns' grievance of 5 February 2014 was a discriminatory/stereotypical assumption that BME Network members were homophobic and would, as a result, isolate her. On no reasonable reading of Ms Burns' grievance was it a discriminatory remark or a stereotypical assumption about the claimants, the collective grievance signatories or the BME network, whether in relation to alleged homophobia, or, being subject to or under the control of Dr Lyfar-Cissé. The latter was a remark about the leadership /influence and could not be interpreted on any reasonable reading, even allowing for flexibility and latitude, in the way interpreted by the claimants. In addition, the Tribunal concluded for the above reasons, that the claimants did not subjectively believe that the disclosure was in the public interest. There was no genuine subjective belief because the grievance was raised solely to victimise/discriminate against Ms Burns. Alternatively, the disclosure was not, objectively in the public interest. Having regard to the four factor guidance in *Chesterton* the Tribunal concluded that the numbers in the group whose interests the disclosure served was, in reality, the claimants and the collective grievance signatories only and not the wider or entire BME network. The wider BME network members could but did not sign the grievance. There was reference to up to 50 'wishing' to do so but they did not sign. Further, the grievance was not submitted for and on behalf of the BME network. Having regard to the nature of the interests affected, the Tribunal concluded that the collective grievance was not, having regard to the Tribunal's conclusion on the objective element of whether the disclosure tended to show a breach of a legal obligation, of a very important interest. Having regard to the nature of the wrongdoing, the Tribunal concluded there was no disclosure of deliberate wrongdoing. Finally, with regard to the identity of the alleged wrongdoer, Ms Burns was not a doctor nor a senior figure in the Trust.**
>
> **(150) The collective grievance was potentially a protected act. There was no express reference to discrimination, or the Equality Act or the claimants' race. The Tribunal noted however that there were references to the BME network which was, by definition, a network serving the interests of black and minority members. There was also a reference to a stereotypical view of BME members. The Tribunal concluded that it could be interpreted as an allegation under the EqA S. 27 (2) (d). However, the Tribunal concluded based on its findings above and its conclusions in particular paragraphs 55, 56 and 149, that it was a false allegation and made in bad faith and thus disqualified from protection under S.27(3).**"

22. The tribunal went on to find that the further collective grievance of 26 June 2015 (concerning the procedure adopted by the respondent at that point), and the complaints lodged by GMB on 2 and 27 July 2015, were not protected disclosures, but were protected acts. The tribunal then continued:

> **"(159) Notwithstanding the Tribunal's conclusions on protected disclosures and the first alleged protected act (12 January 2015), the Tribunal went on to consider**

> **its conclusions in the alternative as if the four asserted protected disclosures and all protected acts were found to be qualifying protected disclosures or protected acts, though with regard to chronological causation being possible – an alleged detriment could only follow a protected disclosure or protected act which had already been made. The Tribunal accepted, broadly, that the respondent's witnesses and relevant decision makers, had knowledge of the communications asserted to be protected disclosures or protected acts. There was no challenge from the respondent in this regard. The claimants were questioned about whether Ms Hill QC was aware of their previous litigation and said they were not aware if she was. The Tribunal concluded that Ms Hill QC was not made aware by the respondent, it was not in the terms of reference."**

23. After addressing an issue concerning comparators, the tribunal worked through its conclusions in relation to each of the matters that were the subject of discrete complaints of detrimental treatment, by way of direct race discrimination, victimisation and/or in relation to protected disclosures, cross-referring to the paragraphs of the list of issues setting out the factual conduct complained of.

24. In relation to the report of Ms Hill QC the live complaints were of victimisation and detriment on the ground of having made protected disclosures, direct race discrimination having been withdrawn. The conduct complained of was identified in the list of issues as: (a) her failure to refer to the grievances of 3 and 27 July 2015 "or identify them as protected acts / protected disclosures which amplified the Cs complaint of 12 January 2015" and (b) her findings in relation to the collective grievance of 12 January 2015 and her failure to identify it as a protected act / protected disclosure.

25. Under a sub-heading referring to those complaints and issues the tribunal said the following:

> **"(163) In the light of the findings above, the reason why Ms Hill QC did not consider the communications of 2 July 2015 and 27 July 2015 and the reason why she reached her findings in relation to the collective grievance of 12 January 2015 and her failure to identify them as protected disclosures or protected acts, was not because the claimants had made a protected disclosure or because they had done a protected act. The complaints raised in both 2 July and 27 July communications from the GMB were primarily concerning the appointment of Ms Hill QC to act as the investigator, the DAW being the vehicle of resolution and the consolidation of all the grievances. In particular, the Tribunal had regard to the proposed outcome sought in the 2 July communication which was the appointment of somebody else and the abandonment of the current investigation. It would have been wholly inappropriate and irregular for Ms Hill to adjudicate on her own appointment to do the investigation and was out with her terms of reference. That was a matter for the Trust in relation to which the Tribunal has already made its findings and conclusions. The thrust of the 27 July communication was about the alleged scope of the investigation. That was already known and clear. It did not require separate attention. The Tribunal has given extensive consideration itself in**

its findings above with regard to Ms Hill QC's findings in relation to the collective grievance of 12 January 2015.

(164) The Tribunal had regard to *Pasab Ltd t/a Jhoots Pharmacy and another v Woods* 2012 EWCA Civ 1578 in which the Court of Appeal considered whether a Muslim employee, who was dismissed following her remark that she worked at a 'little Sikh club' suffered unlawful discrimination. The Court of Appeal upheld the EAT which had allowed the employer's appeal against a finding of unlawful victimisation. The EAT focused on the "reason why" Mrs Woods was dismissed. It pointed out that the Tribunal accepted that the true reason for dismissal was Mrs Jhooty's belief that Mr Woods had made a racist comment. In the EAT's view, it was not open to the Tribunal, having accepted this, to impute some different reason to Mrs Jhooty based on its own assessment of the meaning of Mrs Woods' remark. The EAT concluded that if the remark was viewed by Mrs Jhooty not as a protected act but as an offensive racist comment, then the reason for dismissal was not that Mrs Woods had done a protected act, "but some other feature genuinely separable from the implicit complaint of discrimination". The Court of Appeal upheld the EAT's decision. The Court held that, in effect, the Tribunal found that Mrs Woods was dismissed because Mrs Jhooty believed she had made a racist remark. In a strict causative sense, Mrs Woods was dismissed because she made a remark which the Tribunal considered objectively to be a complaint of discrimination. However, the protected act was not the reason why Mrs Jhooty acted as she did. Hallett LJ stated: "I fail to see how it can be said that the reason why the appellant was dismissed was because she was claiming the respondents were themselves racist or discriminatory. It was the other way round. The appellant was dismissed because it was thought she was a racist. A 'protected act' played no part, certainly no substantial part in the dismissal."

(165) It appeared to the Tribunal that this case was on all fours with *Jhoots*. Even if the claimants' collective grievance did amount to a protected act, which the Tribunal have concluded it did not, it was not the reason why Ms Hill QC found as she did.

(166) In relation to the communications of 2 and 27 July 2015, there was no detriment to the claimants, thus the burden of proof (protected disclosure) did not shift. If it did, the Tribunal was satisfied the protected disclosure did not materially influence the respondent's (or Ms Hill QC's) decision . The burden of proof did not shift for the victimisation claim as there was no detriment; alternatively, the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of a protected act.

(167) In relation to the collective grievance, there was a detriment to the claimants – the outcome of Ms Hill QC's investigation. If the Tribunal had concluded that there was a protected disclosure or a protected act, the burden of proof would have shifted to the respondent. If it did, based on its findings, conclusions and analysis above, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision. The burden of proof did not shift for victimisation claim as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation (via Ms Hill QC too) was cogent and in no sense whatsoever because of a protected act."

26. In relation to the complaints relating to Dr Findlay's dismissal decision the tribunal said this:

> **"(185) In the light of the findings above, the reason why Dr Findlay dismissed the claimants was not because of the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The Tribunal concluded the reason why Dr Findlay dismissed the claimants were as set out in the Tribunal's findings in paragraph 95 above namely that the charge of victimisation was upheld which he considered to be bad faith; the charge of repeated refusal to comply with instructions to cooperate in the Ms Hill QC investigation was upheld – which were gross misconduct individually or together and the latter was also was a breach of mutual trust and confidence which had led to a breakdown in the employment relationship. Notwithstanding the claimants' absence, Dr Findlay undertook his responsibility comprehensively, including questioning Mr Carter and Mr Maccario and anticipating questions that may have arisen from the claimants. The Tribunal concluded that Dr Findlay acted with independence of mind and reached his own view in relation to the motive for the collective grievance. Contrary to the assertions about Dr Findlay's agenda, he was new to the Trust, since the takeover, he had no personal knowledge of the claimants nor could be said to be dwelling on the historical issues/processes since 2014.**
>
> **(186) There was a detriment to the claimants – the claimants were dismissed. If the Tribunal had concluded that there was a protected disclosure, the burden of proof would have shifted to the respondent. If it did, based on its findings, conclusions and analysis above, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision. The burden of proof did not shift for the direct race discrimination claim or victimisation claim, as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act."**

27. The tribunal found that the dismissal was unfair in one respect. When challenging the appointment of Dr Findlay to hear the disciplinary charges the claimants had alleged that he had made negative remarks in the past, such that he was not impartial. This was investigated by Ms Farmer, who spoke to individuals identified by the claimants. She concluded that there was no reason to remove Dr Findlay. The claimants had requested copies of her notes, but in the event the notes were not provided until after the appeal hearing. The tribunal found that this rendered the dismissal unfair.

28. However, the tribunal went on to find that, had the notes been provided sooner, there was no prospect whatsoever that this would have made any difference to the outcome, and the claimants would still not have attended any hearing, and still have criticised the involvement of both Dr Findlay and Mr Viggers. The tribunal also held that their persistent refusal to co-operate and participate was insubordinate and unreasonable, culpable and blameworthy, such that the basic and compensatory awards should be reduced by 100%. Finally, the tribunal found that the claimants were in

fundamental breach of contract, so that their claims of wrongful dismissal failed.

The Grounds of Appeal

29. There were initially six numbered grounds of appeal. The net outcome of consideration of them on the initial sift and at a rule 3(10) hearing, was that two grounds, one of which was amended, were permitted to proceed to this full appeal hearing. They are expressed as follows:

> **"(1) The ET's conduct of the proceedings amounted to a breach of natural justice and/or a procedural irregularity in that:**
>
> **(i) It concluded that the claimants had acted in bad faith within the meaning of section 27(3) of the Equality Act 2010 on the basis of a case that was neither pleaded by the respondent or put to the claimants during the course of the hearing. Accordingly, the claimants never had an opportunity to give evidence or make submissions on a serious conclusion which goes to their probity as human beings and their professional standing and integrity;**
>
> **(ii) It descended into the arena on behalf of the respondent to advance a case which was not before it, contrary to the well-known authorities, see Chapman v Simon [1994] IRLR 124, CA.**
>
> **(iii) Its finding of bad faith related to the claimants' interpretation of Ms Burns' grievance dated 4 February 2014, as set out in their collective grievance dated 12 January 2015, which was not a pleaded issue in the case, and neither was it in the list of issues;**
>
> **(iv) It also reached conclusions on the issue of bad faith on the basis of the respondent's pleaded case which were not put to the claimants during the course of the hearing, despite the claimants' counsel drawing this to the ET's attention on several occasions. In essence, the respondent made a tactical decision not to cross-examine the claimants on its pleaded bad faith allegation and in the normal course of events such an allegation would be deemed to have been abandoned;**
>
> **(2) The ET also erred in law and/or reached conclusions which were not open to it on the evidence in that it found that:**
>
> **(i) even if the claimants' grievance of 12 January 2015 was a protected act within the meaning of section 27 of the Equality Act 2010, that was not the reason that Ms Henrietta Hill QC found that they had a case to answer, without providing reasons, or sufficient reasons why it concluded that the claimants' grievance was severable in the way enunciated by the EAT in Devonshire;**
>
> **(ii) the claimants' case was 'on all fours' with Pasab Ltd t/a Jhoots Pharmacy v Woods [2012] EWCA Civ 1578, in circumstances where Pasab could easily be distinguished on its facts; and**
>
> **(iii) it did not afford the claimants the opportunity to address it on Pasab.**
>
> **(iv) it concluded that the fact that the 12 January 2015 collective grievance was put in writing was separable from the grievance itself was perverse in that one can say:**

(a) 'My goodness that was certainly wrong'.
(b) 'It is irrational, or flies in the face of informed logic.' "

Discussion and Conclusions

30. It appears to me that ground 1 raises, in substance, two points of challenge in respect of the tribunal's finding that the collective grievance of 12 January 2015 was raised in bad faith within the meaning of section 27(3) of the **2010 Act**. The first is that it was wrong to make such a finding, because the bad faith point was not part of the respondent's pleaded case. The second is that it was a procedural irregularity for the tribunal to make such a finding, as the claimants had not been cross-examined on the point. Ground 2, in summary, challenges the tribunal's conclusion that, even if that grievance was a protected act, Ms Hill QC concluding that there was a case to answer was not an act of victimisation, on the basis that that conclusion of the tribunal (i) was not *Meek*-compliant; (ii) was based on an erroneous finding that the case was on all fours with **Pasab**; (iii) unfairly relied on **Pasab** when that authority had not been raised prior to the decision; and/or (iv) was perverse.

31. I had the benefit of extensive and detailed skeleton and oral arguments. It is not necessary for me to attempt to summarise these in a separate section of this decision. In the discussion which follows I will refer to what appear to me to have been the most significant and material contentions.

32. I will start with ground 1, and, first, the pleading point. The relevant legal context is this.

33. A protected disclosure is defined by section 43A of the **1996 Act** as a qualifying disclosure, as defined by section 43B, which is made in accordance with any of sections 43C to 43H. Section 43C concerns qualifying disclosures to the employer or other responsible person. Originally it referred to such a disclosure made "in good faith", but those words were removed in 2013 (although, by another amendment, if a detriment complaint succeeds, and the tribunal finds that the disclosure was not made in good faith, that may lead to a reduction in compensation under section 49(6A)). Section 27 of the **2010 Act** provides that victimisation includes subjecting someone to a detriment because they have done a protected act. That includes making an allegation, whether or not express,

that someone has contravened the **2010 Act**. However, section 27(3) provides that making a false allegation is not a protected act if the allegation is made in bad faith.

34. Mr Elesinnla submitted that the onus was on the respondent to plead a bad faith point, if it was taking one. He referred to **Saad v Southampton University Hospitals NHS Trust** [2019] ICR 311 (the facts of which arose pre-2013) and earlier authorities discussed there. He submitted that these authorities showed that, in the context of a victimisation complaint, the essence of bad faith is dishonesty. He argued that this needed to be specifically pleaded in that context, setting out the basis for the contention that the claimants did not believe the allegation. The respondent's pleading, the re-reamended grounds of resistance, did not, he argued, plead bad faith in relation to victimisation.

35. I consider first, then, the relevant contents of that pleading. Under a sub-heading: "Race discrimination" it addressed the complaints of both direct discrimination and victimisation. These included, at paragraph 49, a denial that the collective grievance was a protected act. There then followed a number of paragraphs under the heading: "Whistleblowing". These included a denial that the collective grievance was a protected disclosure, but it was also pleaded at paragraph 56 that, if it was, then any detriment was not because the claimants had made a protected disclosure. It was pleaded that: "[t]he collective grievance was an act of victimisation, done in bad faith, designed to punish Ms Burns and advance the position of Dr Lyfar-Cissé in her dispute with Ms Burns." That pleading was later repeated in relation to the section 103A unfair-dismissal complaint.

36. So, while it is correct that the denial that the collective grievance was a protected act did not *at that point* include an assertion that it was done in bad faith, the later paragraphs expressly did so. Although the assertion appears in the paragraphs dealing with the claimed protected acts, the actual communications relied upon as protected acts and as protected disclosures were identical. Reading the pleading as a whole, this was, in my view, sufficient to put the claimants on notice that the respondent was advancing a bad faith case in relation to the collective grievance for the purposes of both the protected-disclosure detriment complaints (where it would only be relevant to remedy,

should it arise) and the victimisation complaints. No further detail was required. "Bad faith" in this context just means "dishonest", in the sense of not believing the allegation to be true.

37. I turn to the other strand of ground 1, being the contention that it was a procedural irregularity for the tribunal to find that the claimants were not in bad faith, as that specific contention was not put to either of them in cross-examination. To determine this ground requires a consideration of (a) the relevant principles of law; (b) the particular issue in this case on which this ground bites; and (c) what actually happened at the hearing.

38. As to the law on the procedural point, I was referred to a number of authorities, but a lengthy doctrinal exegesis in the present decision is not necessary. It is not always the case that it is wrong for a tribunal to consider and determine a point that has not been put in cross-examination. But, given the seriousness of an allegation of dishonesty, if the bad faith finding was a material part of the tribunal's reasoning, then it would be unfair to the claimants, if the point had not in the course of their cross-examinations, in substance, been fairly put. See: **Secretary of State of Justice v Lown** [2016] IRLR 22 at [49] – [51]; **City of London Corporation v McDonnell** [2019] ICR 1175 at [50].

39. Turning to the substantive law, in order for a claimant to succeed in a complaint of victimisation the tribunal must find both that they did a protected act and that they were subjected to a detriment because they did that act. The bad faith point goes to the first question, as an allegation which would otherwise amount to a protected act will not do so if it is false and made in bad faith. The bad faith question concerns the state of mind of the *claimant*, and in particular whether they were dishonest in the sense that they did not believe in the truth of the allegation they were making.

40. A different point relates to whether the treatment complained of was "because" they did that act. That turns on the motivation of the *respondent* in doing the thing that is claimed to be the act of victimisation. In some cases, the respondent may assert that what motivated it was not that the claimant did the protected act as such, but what it knew or believed to be his particular motivation for

doing so. In **Saad** at [40] **HM Prison Service v Ibimidun** [2008] IRLR 940 was cited as an example of that. However, **Saad** at [49] cautions against attaching weight to the motivation of the claimant when considering whether *he* was in bad faith for the purposes of a victimisation complaint.

41. In summary, evidence of the claimant's motivation for doing the claimed protected act, or what the respondent believed it to be, may be relevant when determining the *respondent's* motivation. But in order to establish bad faith for the purposes of deciding whether the act *was* a protected act, the focus should be on the distinct question of whether the allegation was one which the *claimant* did not believe to be true. Where that distinct issue is material to the respondent's case, and then the tribunal's decision, a claimant needs to be fairly cross-examined upon it as a distinct matter.

42. What happened at the hearing in this case? Following an earlier direction I had in my bundle statements from the first claimant, and from the respondent's solicitor, Mr Millard, and a collective reply from the three members of the tribunal. Messrs Elesinnla and Kibling were also, of course, both there, and both traded their own recollections during the course of oral submissions before me. However, I bear in mind that neither of them had put in a witness statement to the EAT.

43. Mr Elesinnla objected that Mr Millard's statement cited from what he said were the respondent's notes of the hearing, but without properly exhibiting them, nor was there a statement from their author. But it seems to me that Mr Millard was simply referring to them as fairly expressing his own recollection. Further, while not admitting their accuracy, Mr Elesinnla did not positively assert that they were, on any point, wrong; and, in fact, he contended that they assisted him.

44. I start with a passage in the tribunal's actual decision which touches on this topic, as follows.

> **"(10) On day four of the hearing the respondent was permitted to rely on one additional issue in relation to whether the right to be accompanied grievance was raised in good faith. Given the latitude extended to the claimant to date (in respect of which Mr Elesinnla had stated the Tribunal had been very even-handed), this was permitted. The claimant raised that the issue regarding the delay in the disciplinary investigation was not in fact an issue in the case. This had not been raised before and was only raised during the cross examination of Mr Kalu on this issue. The Tribunal also confirmed that Mr Kibling's question put to Mr Kalu that**

> **the 27 July alleged protected act was false and not made in good faith was not permitted as it was not part of the respondent's pleaded case. However, this was subject to the Tribunal needing to be satisfied itself that S.27 Equality Act 2010 and section 43B Employment Rights Act 1996 were satisfied in relation to the requisite definitions for protected act and protected disclosure being met."**

45. The first claimant's account was to the effect that bad faith had not been put to him or to the second claimant, and that Mr Elesinnla raised this both during evidence and in closing submissions. Mr Millard's account was that it was agreed that the same questions did not need to be put to both claimants, and the second claimant's statement adopted that of the first claimant. (I interpose that this was broadly, but not entirely, common ground, and I was told that the first claimant was cross-examined for about two days and the second claimant for about 15 minutes. But Mr Elesinnla said that it was not agreed that he did not have to be cross-examined on bad faith.)

46. Mr Millard also wrote that cross-examination of the first claimant was frequently challenging and difficult. He then said this:

> **" …there was an exchange at the end of Mr Kalu's evidence in which Mr Elesinnla raised an issue over the extent to which bad faith was suggested in relation to the various grievances … . Mr Kibling confirmed that bad faith, in terms of victimisation and protected acts, was in issue in relation to the 12 January 2015 Collective Grievance (reasonable belief was in issue for a large number of alleged protected disclosures from a whistleblowing perspective). Mr Elesinnla then said bad faith had not been put and Employment Judge Khalil determined it was pleaded and this was a matter for submissions."**

47. He then set out the respondent's note of the exchanges to that effect.

48. The tribunal's collective response to the EAT's enquiry included the following:

> **"1 The respondent's counsel was curtailed in his cross examination of the claimant's evidence in so far as his questioning related to the alleged protected acts of 12 January and 27 July 2015. This was upon the claimant's counsel's objection to a line of questioning not pleaded.**
>
> **2 However, this was subject to the Tribunal needing to be satisfied itself that S.27 Equality Act 2010 (and S.43B of the Employment Rights Act 1996) applied (or was not disapplied). This was clear from the contemporaneous noted and indeed the current recollection of the Tribunal today. It was also made express/explicit in paragraph 10 of the Tribunal's judgment."**

49. The Tribunal also stated that paragraphs [149] and [150] were conclusions it felt it was entitled

to reach on a proper application of the law. **"The Tribunal was entitled to apply S. 27(3) Equality Act 2010. The claimant's submissions to the contrary were considered, but rejected."**

50. Mr Elesinnla submitted that nowhere was it suggested that bad faith, in the sense of dishonesty, was in fact put to either claimant. He contended that this was no mere formality. Had either of them been asked, there was much that they might have said about why they did believe that Ms Burns' grievance made a discriminatory imputation against members of the BME group.

51. Mr Kibling submitted that, following an intervention from Mr Elesinnla, he was not allowed to put bad faith in relation to the January grievance. The hearing was tense and fractious, not helped by the fact that it was conducted remotely. But, he submitted, the entire case was about bad faith, the claimants' refusal to accept or engage with any process at any stage, and so forth, and it was a theme which ran through the entire cross-examination. There was cross-examination in relation to the January grievance and the respondent's case was, overall, sufficiently put. Mr Elesinnla submitted that the judge only prevented bad faith from being put in relation to the 27 July grievance, because it was not part of the respondent's case in relation to that. The reasons at [10], the first claimant and Mr Millard were all correct on this point. The tribunal's letter at point 1 was in error.

52. Standing back, the following picture emerges to me. At a certain point Mr Elesinnla intervened in Mr Kibling's cross-examination to protest that he should not be allowed to put a bad faith question, as this was not part of the respondent's case. In the ensuing exchanges with the judge Mr Kibling confirmed that bad faith was only asserted in relation to the January collective grievance, not in relation to the two July grievances. The judge duly noted that this had been clarified. Mr Elesinnla then protested that the bad faith point in relation to the January grievance had not so far been put to the first claimant at any point in the course of his cross-examination. The judge said that, if so, that was a matter for submissions. The judge effectively moved the cross-examination on.

53. I consider that Mr Elesinnla was acting properly in raising a point about the extent of the

respondent's case on this point and also to flag up that it was his position that bad faith needed to be specifically put to the witness. I also consider that Mr Kibling properly attempted to do so. But the net outcome of the intervention and the judge's handling of it, was that Mr Kibling was moved on and told, effectively, that this was a point that could, and now should, be left to submissions. I see no basis for criticism of either counsel. The issue is whether the outcome was fair to the claimants.

54. I have some sympathy for the judge. This was and is a hard fought dispute about alleged discriminatory conduct on both sides in which the parties' feelings plainly ran high. Managing a remote hearing can be additionally challenging and arduous. However, the bad faith point needed to be put to the witness and Mr Kibling should have been permitted to put it. It was not sufficient for the tribunal to take the view that, once the extent of the issue had been clarified, the matter could be left to submissions, and that the tribunal would have to determine the section 27(3) issue in any event.

55. Nor do I think that it is a sufficient answer that there was general cross-examination about the claimants' *motivations* or, no doubt, a whole range of related matters about aspects of their conduct during the course of the various stages of events. The issue of whether they honestly believed the allegations of discrimination on the part of Ms Burns made in the January collective grievance to be true was a distinct point that needed to be put. It was not fair to them that the tribunal found them to be in bad faith in that regard, when Mr Kibling had not been permitted to put that specific point.

56. This part of this ground therefore succeeds. The tribunal erred in concluding that, because the claimants were, with respect to the January 2015 grievance, in bad faith, that did not amount to a protected act, because of this procedural irregularity.

57. I turn to ground 2. This relates to the tribunal's decision to dismiss the two complaints of victimisation relating to Ms Hill QC's conduct (as agent of the respondent), which I have described at [24] above. The tribunal identified, at [159] and [165], that it considered these complaints on the assumption that (contrary to its finding) the January 2015 collective grievance *was* a protected act.

The tribunal's conclusions in relation to these complaints, at [163] to [167], also plainly drew on its earlier findings about the Hill report, in particular at [55] and [56], which I have also earlier set out; and these passages in its decision must be read as a whole.

58. The first of these two complaints was that Ms Hill QC victimised the claimants by not mentioning in her report, the 2 and 27 July GMB communications, which are said to have "amplified" the January collective grievance. As to that, as I have set out, the tribunal noted that the 2 July complaint contested the procedure being used and the appointment of Ms Hill QC. The tribunal stated that it would have been beyond her terms of reference to adjudicate on that; and that the 27 July email was about the scope of the investigation, which was already clear. Those points drew upon the earlier factual findings, including as to the stage at which Ms Hill QC was appointed, and as to the content of the 2 and 27 July communications (and, I would add, were in accordance with Ms Hill QC's own identification of her terms of reference, in a passage in her report that was in my bundle). The tribunal also referred to its earlier substantive findings about the contents of the report generally.

59. Mr Elesinnla made the point in submissions to me, that the July complaints were among the materials before Ms Hill, and that, forensically, later events *can* sometimes cast light back on earlier ones. He contended that these documents indeed did so. But the issue raised by this ground is whether the tribunal erred by not inferring (or explaining why it did not infer) that Ms Hill QC's failure to refer to the GMB complaints in her report was because of the (actual or claimed) protected acts. Given the tribunal's foregoing findings, the fact that the claimants did not themselves participate in her investigation, and the fact that she was no more automatically obliged to refer in her report to every piece of evidence presented to her, than the tribunal itself was obliged in its decision to refer to every piece of evidence before it, I do not think the tribunal needed to say more about why it did not uphold this complaint. Its decision in relation to it was not non-*Meek*-compliant, nor was it perverse.

60. I turn then to the challenge to the tribunal's conclusion that, even if the collective grievance was a protected act, the protected acts were not the reason why Ms Hill QC concluded that there was

a case to answer in relation to it. In my bundle was the passage from the report in which Ms Hill QC specifically discussed Ms Burns' complaint that the January grievance was an act of victimisation. She considered the definition of this concept in the DAW policy and worked through each of its elements. She did not consider there to be a case to answer that the grievance had been motivated or significantly influenced by Ms Burns' sexual orientation. She also accepted that the allegations may well have been made in good faith and represent the genuine views of the signatories. But she concluded "on further reflection" that this was not the real issue. She observed that "the reality is that these views could have been expressed in ways other than the formal lodging of a grievance against Ms Burns, and it seems to me on further reflection that the taking of this step does cross the line into the area of potential bullying."

61. It must be remembered that the nub of the complaint before the tribunal was that Ms Hill QC decided that there was a case to answer in relation to the January grievance, *because* the claimants had made that allegation (or because of the other protected disclosures). This ground, and Mr Elesinnla in argument, asserted that Ms Hill QC, and then the tribunal when considering those complaints, both purported to rely upon an untenable distinction between the substance of the allegation made in the grievance, and the fact that it was raised in the form of a collective grievance. This is captured by the contentions, in sub-ground (iv) (added by amendment), that the tribunal had perversely concluded that "the fact that [the grievance] was put in writing" was "separable from the grievance itself", and, in sub-ground (i), that the tribunal had insufficiently explained that conclusion.

62. What is being referred to here is the strand of the jurisprudence concerned with victimisation, protected-disclosure detriment and structurally cognate legal complaints, in which the respondent's defence is that what motivated it was not the substantive protected act, disclosure, or equivalent, but some feature of the claimant's conduct related to it, but nevertheless separate from it. This line of authority has recently been reviewed by the Court of Appeal in **Kong v Gulf International Bank (UK) Limited** [2022] ICR 1513. Simler LJ (with whose reasons the other members of the court gave

short concurring speeches) concluded her analysis of these authorities in this way:

> **"57. Thus 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. Were this exercise not permissible, the effect would be that whistle-blowers would have immunity for behaviour or conduct related to the making of a protected disclosure no matter how bad, and employers would be obliged to ensure that they are not adversely treated, again no matter how bad the associated behaviour or conduct."**
>
> **58. Likewise, what was said in *Martin*, about being slow to allow purported distinctions between a protected complaint and *ordinary* unreasonable behaviour, is also not a rule of law. There is no objective standard against which behaviour must be assessed to determine whether the separability principle applies in a particular case, nor any question of requiring behaviour to reach a particular threshold of seriousness before that behaviour or conduct can be distinguished as separable from the making of the protected disclosure itself. The phrases used in the authorities (in the context of trade union activities, victimisation and whistleblowing) capture the flavour of the distinction, but were not intended to be treated as defining, and do not define, those cases where separability would or would not apply. They cannot properly be read in this way. In the wide spectrum of human conduct that might be relied on by decision-makers, each end of the spectrum is easy to identify as Phillips J observed in *Lyon*: gross misconduct or conduct that is "wholly unreasonable, extraneous or malicious" at one end; and wholly innocent, blameless conduct at the other. Between those two ends of the spectrum difficult questions of fact arise, and the conduct and circumstances of the particular case will require close consideration. But the authorities provide no factual precedent or objective standard against which to assess the conduct relied on in a particular case.**
>
> **59. The statutory question to be determined in these cases is what motivated a particular decision-maker; in other words, what reason did he or she have for dismissing or treating the complainant in an adverse way. This factual question is easy to state; but it can be and frequently is difficult to decide because human motivation can be complex, difficult to discern and subtle distinctions might have to be considered. In a proper case, even where the conduct of the whistle-blower is found not to be unreasonable, a tribunal may be entitled to conclude that there is a separate feature of the claimant's conduct that is distinct from the protected disclosure and is the real reason for impugned treatment.**
>
> **60. All that said, if a whistle-blower's conduct is blameless, or does not go beyond ordinary unreasonableness, it is less likely that it will be found to be the real reason for an employer's detrimental treatment of the whistle-blower. The detrimental treatment of an innocent whistle-blower will be a powerful basis for particularly close scrutiny of an argument that the real reason for adverse treatment was not the protected disclosure. It will "*cry out*" for an explanation from the employer, as Elias LJ observed in *Fecitt*, and tribunals will need to examine such explanations with particular care."**

63. In the present case the tribunal considered Ms Hill QC's conclusion, that there was a case to answer that the collective grievance was an act of victimisation, to have been reached "after much reflection". It was there plainly echoing and accepting her own words. It also said that it considered that her conclusion was reached "with care and after consideration of all the material before her." The tribunal went on to refer to a number of features of the factual matrix which it regarded as supportive of its own view as to the motivation behind the raising of the collective grievance being retaliatory, and to punish Ms Burns for having complained about Dr Lyfar-Cissé's conduct. It is clear, reading this passage as a whole, that the tribunal considered that these same features supported Ms Hill QC's conclusion that there was a case to answer on this particular aspect of the matter.

64. In short, the tribunal was plainly of the view that Ms Hill QC wrote what she did because it truly reflected her considered conclusion that, whilst there was not a case to answer on other points, there *was* on this point; and not because she was influenced (consciously or not) by the claimants having made the allegation that they did, as such, nor by any other protected act relied upon. I consider that, reading these passages in the tribunal's decision together and as a whole, that conclusion on the part of the tribunal was sufficiently and clearly explained. It is *Meek*-compliant.

65. Nor is that conclusion in my judgment perverse. Mr Elesinnla made the point that the claimants were perfectly entitled to raise a grievance using the respondent's procedures, and he took issue with whether to do so could be properly characterised as bullying, as defined in the DAW procedure. But that does not mean that the tribunal was bound to take the view that Ms Hill QC could not have properly concluded that there was a case to answer in relation to their conduct in this regard, distinct from the substantive concern raised by the collective grievance. Applying the guidance in **Kong**, given all the features of Ms Hill QC's report, and the factual features of events following Ms Burns' original grievance, which the tribunal highlighted, its finding of fact that Ms Hill QC was motivated by factual features distinct from the allegation itself was entirely proper.

66. The two middle strands of ground 2 relate to the tribunal's discussion of **Pasab**. Taking first

strand (iii), I do not consider that there was any procedural irregularity in the tribunal failing to invite submissions on that authority. The tribunal did not rely upon it for any distinct proposition of law, over and above the so-called "separability" point, which was in play, and the subject of submissions. It simply used **Pasab** an illustration or example of a case in which what motivated the employer was not that the employee had done what was claimed to be a protected act, but what the employer judged to be her own improper motivation in making the remarks that she did about her colleagues. So, in the present case, said the tribunal, even if the collective grievance amounted to a protected act, it was not the reason why Ms Hill QC "found as she did".

67. Sub-strand (ii) contends that **Pasab** was not, factually, "on all fours", but could be readily distinguished on its facts. For good measure Mr Elesinnla told me that he considered that it was wrongly decided. But none of that gets this ground home, given that, to repeat, this authority was not relied upon for any peculiar point of law that was not in play, and the tribunal in any event reached a conclusion on this complaint that was sufficiently explained and properly reached.

68. For all these reasons ground 2 fails.

Outcome

69. This decision was provided in draft under embargo terms to both counsel, and I invited submissions as to the appropriate order that I should make arising from it.

70. Mr Kibling submitted that the procedural irregularity that I have identified at [56] above does not vitiate the judgment of the tribunal in respect of its rejection of the victimisation claims, which must therefore stand; and that the appropriate order is therefore that the appeal be dismissed. Mr Elesinnla submitted that the irregularity in this case is like those found in **McDonnell** at [51], which was characterised as a serious procedural irregularity, and in **NHS Development Authority v Saiger**, UKEAT/0167/15, [2018] ICR 297 at [113]. He submitted that as, in respect of ground 1, I have found a serious procedural irregularity on what, he suggested, "is now accepted as a central issue in the

case", it must follow that the proceedings were unfair to the claimants and amounted to a breach of natural justice. Accordingly "the whole case" should be remitted to a freshly constituted tribunal because the claimants had not had a fair trial, and for the reasons set out in **McDonnell** at [62] to [64].

71. My conclusions on this aspect are as follows.

72. In **McDonnell** the employment tribunal found that the claimant had been unfairly dismissed by reason of having made protected disclosures, and also ordinarily unfairly dismissed. The EAT held that the conclusion that the dismissal was by reason of protected disclosures was based on an erroneous interpretation of the evidence of the decision-maker, that was not put to that witness. The tribunal's finding based on that interpretation was also tantamount to a finding of bad faith. Relying on a number of authorities, including **Saiger**, the EAT held that the making of that finding, without the point having been put, therefore amounted to a serious procedural irregularity. The conclusion that the dismissal was by reason of the protected disclosures therefore could not stand.

73. However, the EAT also went on to hold that there was no serious procedural irregularity in relation to the finding that the claimant was ordinarily unfairly dismissed, and a separate ground of appeal relating to that conclusion was dismissed. See **McDonnell** at [57] to [58]. Whilst ultimately, at [64], the EAT extended the terms of remission to both unfair dismissal complaints, it did so because the reason for dismissal was a fundamental issue in relation to them both, and so the factual findings were "necessarily entwined to a significant extent."

74. Neither **Saiger** nor **McDonnell** indicates that a procedural irregularity of this sort in relation to a particular complaint or issue must necessarily be treated as rendering the whole proceedings unfair, or all other outcomes of them invalid. I observe that an irregularity of this sort does not intrinsically taint the whole trial in the way that, for example, a judge's personal connection to a party resulting in apparent bias would.

75. In the present case, as I have held, the specific finding that the January grievance was in bad

faith was tainted by a serious procedural irregularity. But the tribunal in any event considered the victimisation complaints in question on the assumption that, in addition to the other protected acts, the January grievance *was* a protected act; and it dismissed those complaints on the causation point. The irregularity affecting the tribunal's conclusion on the question of whether the January grievance was a protected act does not affect that separate and distinct conclusion. That conclusion was by itself fatal to those complaints, and, as ground 2, relating to it, has failed, it must stand.

76. Nor, for the same reasons, does the upholding of this strand of ground 1 have any wider ramifications for the tribunal's decisions on the other complaints. In particular, the other victimisation complaints were also considered on the assumption that the January grievance was a protected act, but dismissed for other reasons. Further, while it was contended, as part of the other strand of ground 1 of this appeal (the pleading point) that the tribunal had descended into the arena and taken the respondent's side, I did not uphold that strand of ground 1. Nor have I reached any other conclusion which indicates that the claimants did not get a fair hearing generally.

77. In discussion at the close of argument, Mr Elesinnla did indeed emphasise that it was his case that Ms Hill QC's report was central to what happened. It was his case that, if, following on from the result of this appeal, it was concluded that Ms Hill QC's report *did* amount to an act of victimisation, this would mean that the tribunal's conclusion in relation to the dismissal also could not stand, on the basis that her recommendation led to the MHPS investigation, which led to the disciplinary charges, which led to the dismissal, and that those subsequent decisions all relied heavily on her findings.

78. In my judgment, correctly analysed, the issue raised by that argument would be as to whether the Hill report could be said itself to have caused the dismissals, in the sense not of being merely what lawyers call a "but-for" cause, but also an effective or material cause; or whether the decisions of Mr Maccario and/or then Dr Lindsay (and/or any other event) broke the chain of causation. Had the outcome of this appeal led to a fresh finding upholding the complaints of victimisation relating to that report, that would have been a question for the employment tribunal then to consider at the remedy

stage; but in view of the conclusion I have come to on ground 2, the issue does not arise.

79. In conclusion, the claimants' partial success on ground 1 has no ramifications beyond the fact that the tribunal's bad-faith finding relating to the January grievance, and hence its conclusion that it was, for that reason, not a protected act, cannot stand. But as ground 2 has failed, the decision dismissing the victimisation complaints stands. I conclude that the appropriate order to make is therefore that I uphold one of the two parts of ground 1, do not uphold ground 2, and dismiss the overall appeal; and accordingly the employment tribunal's decision stands.