Neutral Citation Number: [2019] EWCA Civ 2180

Case No: A2/2018/2684

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Employment Appeal Tribunal
HHJ Eady QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/12/2019

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LADY JUSTICE ROSE
and
LADY JUSTICE SIMLER

- -

Between:

FIONA TIPLADY	**Appellant**
- and -	
CITY OF BRADFORD METROPOLITAN DISTRICT COUNCIL	**Respondent**

- -
- -

The **Appellant** appeared in person
Mr Simon Lewis (instructed by **the Bradford MDC City Solicitor**) for the **Respondent**

Hearing date: 17 October 2019

- -

Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. The Appellant, Mrs Fiona Tiplady, was at the time material to these proceedings a Senior Planning Officer employed by the Respondent, the City of Bradford Metropolitan District Council. Between February 2014 and September 2016 she and her husband had extensive dealings with the Council about problems affecting a property owned by them at Haworth, which is within the Bradford metropolitan district: the property was identified before us simply as "Number Three". The dealings comprised two episodes, the "sewer episode" in 2014 and the "shed episode" in 2016. In brief:

   (1) The sewer episode arose out of the discovery by Mr Tiplady of a sewer running under Number Three which he believed was venting dangerous gases. Although the sewer belonged to Yorkshire Water ("YW"), he and Mrs Tiplady maintained that the Council's responsibilities were engaged because it posed an environmental health hazard. They were extremely dissatisfied both with YW's proposals about what needed to be done about the sewer and with the position of the Council's Environmental Health Department ("EHD"), which did not believe that there was any risk requiring the use of its powers.

   (2) The shed episode arose out of a complaint made to the Council that an outbuilding was being constructed at Number Three without planning permission. Mr and Mrs Tiplady did not believe they needed planning permission because the construction constituted permitted development under the GPDO. Council staff were refused access to the property in order to take measurements. The Council eventually applied for and was granted a search warrant, which was executed on 14 September 2016.

   It will be apparent that neither episode had, as such, anything to do with the employment relationship between Mrs Tiplady and the Council: they concerned the exercise of the Council's powers as a local authority.

2. Mrs Tiplady was unhappy about what she perceived as the unreasonable way in which the Council and its staff handled both episodes, culminating in the issue and execution of the search warrant. On 16 September 2016 she lodged a formal grievance, and on 21 October she resigned.

3. On 15 February 2017 Mrs Tiplady presented a claim in the Employment Tribunal ("the ET") complaining of unfair (constructive) dismissal – both "ordinary" unfair dismissal, by reference to section 98 of the Employment Rights Act 1996, and "automatic" unfair dismissal under section 103A, i.e. by reason of her having made protected disclosures (as defined in Part IVA of the Act). She also complained of sixteen detriments occurring between 2014 and 2016, to which she said the Council had subjected her by reason of the same disclosures.

4. As regards the detriment claims, Mrs Tiplady's case was based on section 47B of the 1996 Act. Sub-section (1) reads:

> "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."

By sub-section (1A) a worker also has the right not to be subjected to any such detriment "by another worker of [his or her] employer in the course of that other worker's employment"; and by sub-section (1B) the employer will be (in effect) vicariously liable in respect of any such detriment. Mrs Tiplady did not at any stage in the proceedings before the ET specify whether she was relying on sub-section (1) or sub-sections (1A) and (1B), and nothing turns on the point for our purposes. I should note, because it is relevant to points considered below, that section 47B is one of a number of sections falling under Part V of the Act, which is headed "Protection from Suffering Detriment in Employment". Apart from the making of protected disclosures the protected acts include such matters as doing jury service (section 43), acting as a health and safety representative (section 44) and insisting on the rights accorded by the Working Time Regulations (section 45A).

5. The claim was heard over six days in November 2017 before an ET in Leeds chaired by Employment Judge Davies. Mrs Tiplady appeared in person, and the Council was represented by Mr Simon Lewis of counsel. By a Judgment sent to the parties on 4 December 2017 all Mrs Tiplady's claims were dismissed. A request for a reconsideration was dismissed by EJ Davies on 12 January 2018. I wish to say that the Tribunal's Reasons are admirably clear and thorough (notwithstanding the accidental omission of explicit findings about one of the detriments alleged, which was subsequently corrected under the *Burns/Barke* procedure).

6. It is unnecessary that I should summarise at this stage the basis of the ET's reasons for reaching its conclusions. The only point that I need to note is that one of the elements in its reasoning as regards the whistleblower detriment claim was that most of the detriments of which Mrs Tiplady complained concerned how the Council had dealt with the sewer and the shed episodes and had accordingly been suffered by her in her capacity as a householder and not as an employee. This has been referred to before us as the "employment field point". I discuss it fully below. I should also, in fairness to the Council, record that the ET found no serious criticism of its conduct as regards either episode. It is in fact clear from its findings that Mr Tiplady's conduct towards the Council and its staff in relation to both episodes was unreasonable and his correspondence highly intemperate, and that the same is true of Mrs Tiplady, though not to the same extent.

7. Mrs Tiplady appealed to the Employment Appeal Tribunal ("the EAT"). Her appeal was initially rejected on the papers by HH Judge Peter Clark under rule 3 (7) of the Employment Appeal Tribunal Rules 1993 (as amended). Following a subsequent oral hearing under rule 3 (10), at which Mrs Tiplady again represented herself, HH Judge Eady QC, by a judgment promulgated on 5 November 2018, allowed the appeal to proceed only on a single ground relating to the Tribunal's reasoning as regards constructive dismissal.

8. Mrs Tiplady sought permission to appeal to this Court against the EAT's refusal to allow her appeal in respect of whistleblower detriment to proceed. Henderson LJ gave permission on a single ground relating to the employment field point. That is the

appeal before us. As before the ET, Mrs Tiplady appeared in person and the Council was represented by Mr Lewis.

THE DECISIONS OF THE ET AND THE EAT

9. I confine myself to those parts of the reasoning of the tribunals below which are relevant to the employment field point.

10. The ET found that Mrs Tiplady had made some protected disclosures, though not all those that she claimed. The issues then were (a) whether the Council had subjected her to all or any of the alleged detriments and (b), if so, whether it did so on the ground that she had made those disclosures or any of them. The employment field point is relevant to the first of those issues because it is concerned with what kind of detriment is caught by section 47B. At paras. 3.6-3.7 of its Reasons, as part of its self-direction on the applicable legal principles, the ET considered a submission from Mr Lewis for the Council that "the protection afforded by s. 47B is confined to detriments to which a worker is subjected as a worker, rather than in their private or non-work capacity". After a careful discussion, which I need not reproduce here, it accepted that:

> "… the detriment must be *in the employment field* [original italics]. The mere fact that a person happens to work for the body in question is not enough: the detriment must be in the employment field and does not include detriment in the private or personal capacity."

11. The Tribunal proceeded to apply that test in reaching its decision on the sixteen detriments in respect of which Mrs Tiplady claimed. At the risk of being over-laborious, I will briefly summarise its reasoning on each:

(1) The first detriment consisted of an e-mail sent by one Council employee to another about how it should handle the sewer episode. The Tribunal found, at para. 4.42 of the Reasons, that the sending of the e-mail did not constitute a detriment. It continued, at para. 4.43:

> "In any event, even if this had amounted to a detriment, the Tribunal did not accept that this was in the course of the Claimant's employment. It arose out of and was in the Tribunal's view plainly confined to the private issues relating to the sewer and pipes at Number Three. It had nothing whatever to do with the Claimant's employment."

(2) This detriment concerned the holding and conduct of a meeting by Mr Pearson, the Deputy City Solicitor. EJ Davies, in her response to the *Burns/Barke* request referred to above, said that the Tribunal had found that that did not constitute a detriment but also that, even if it had,

> "… [i]t did not fall in the field of employment. It was a step taken to try to resolve the private issues relating to Number Three. The Claimant's involvement was as a householder, not as an employee."

(3) This detriment consisted of an entry in the log of the Environmental Health Department which Mrs Tiplady said mischaracterised her complaint relating to the sewer episode. The Tribunal found that this too did not constitute a detriment; but it continued, at para. 4.80:

> "Even if this was a detriment, the Tribunal considered that it did not fall in the field of employment. It was part and parcel of the private issues relating to Number Three. The Claimant's involvement was as householder and her coincidental status as an employee was irrelevant."

(4) This detriment concerned an internal e-mail between Mr Pearson and another Council employee. The Tribunal found that it did not constitute a detriment, but it also said, at para. 4.81:

> "Furthermore, even if there were a detriment, again it was not in the employment field. Mr Tiplady was raising an unconnected matter in one of his numerous e-mails addressing the issues at Number Three. Mr Pearson explained that he would respond separately on that issue. That was nothing to do with the Claimant's employment."

(5) This detriment was what was said to be an unlawful entry to the property by two Council employees who Mrs Tiplady claimed were working in secret for the financial advantage of YW. Again, the Tribunal found that she had suffered no detriment, and also that in any event the conduct of the employees in question had nothing whatsoever to do with any protected disclosure. However, it also found, at para. 4.83:

> "Even if there was a detriment the Tribunal again found that it was not in the field of employment. This visit related exclusively to the issues Mr and Mrs Tiplady were raising with the Council in their capacity as householders and had nothing to do with the Claimant's employment."

(6) This detriment was said to consist in one of the Council's employees, a Mr Lodge, refusing to investigate or take action in relation to the sewer episode. The Tribunal found that Mrs Tiplady had suffered no detriment and that in any event the conduct of the employee in question was not affected by the alleged protected disclosure. It also said, at para. 4.82:

> "Even if there was a detriment, the Tribunal again considered that this was not in the employment field. Mr Lodge was visiting a property in his capacity as an EH Manager dealing with issues relating to the property owned by the Claimant and Mr Tiplady. The Claimant's coincidental employment by the Respondent was irrelevant."

(7/8) The Tribunal dealt with these two detriments together. Both concerned an e-mail sent by another Council employee, a Mr Jackson, to Mrs Tiplady which she characterised as dishonest and intimidatory. The Tribunal rejected that

characterisation and held both that Mrs Tiplady had not been subjected to any detriment and that in any event the e-mail was not written in response to any protected disclosure. It also found, at para. 4.93:

> "Even if there had been a detriment, again the Tribunal found that it was plainly not in the field of employment. Mr Jackson was responding to the Claimant's concerns about matters relating to the property of which she was joint owner, concerns that she raised in that capacity."

(9) This detriment arises out of a complaint made by Mrs Tiplady and her husband to the Local Government Ombudsman ("the LGO") about their treatment by the Council. The Council sought comments on the complaint from some of the staff concerned. One of them, a Mr Eaton, mentioned in his comments that Mrs Tiplady's file as an employee did not show her as residing at the property. This was said to constitute a detriment because it "maligned her to the LGO with an unrelated employment issue". The Tribunal held that this did not constitute a detriment and that it had nothing to do with any protected disclosure. However, it did say, at para. 4.102 that if it had constituted a detriment:

> "… the Tribunal would have found that this was in the employment field, because it related to the Claimant's obligations under her contract of employment to notify her employer of any change of address and it seems to the Tribunal that that created a sufficient connection."

(10) This alleged detriment was that various Council staff had misled the LGO in their responses to her complaint. The Tribunal found that there was no such detriment and that in any event the acts complained of were not in any way influenced by any of the alleged protected disclosures. It also said, at para. 4.103:

> "In any event, these parts of the responses related entirely to the private matters concerning Number Three. They did not relate to the Claimant's employment and were not in the employment field."

(11) This detriment was the making by the Council of the application for a search warrant at Number Three. As to this, the Tribunal said, at para. 4.124:

> "The Tribunal found that the making of an application for a search warrant amounted to a detriment. Although it primarily related to a private dispute about Number Three, the Tribunal found that, arguably at least, this was to some extent a detriment in the employment field. That was because at the meeting on 14 July 2016 the Respondent had dealt with the Claimant in her capacity as an employee not just as a householder. It was only because she was a senior planning officer that she was given the opportunity to reconsider whether to allow officers to access her property. The application for the search warrant followed fairly swiftly after

> that meeting and the Tribunal could therefore see how it might be characterised as taking place in the employment field to some extent."

(The meeting of 14 July 2016 there referred to was a meeting between Mrs Tiplady on the one hand and Mr Jackson and a Mr Horsfall of the Council on the other: Mr Jackson had suggested such a meeting when it became clear that the Council would not be given access to Number Three because, as the Tribunal found at para. 4.114, "it was a sensitive matter because the property owner was employed by the Respondent".) However, at para. 4.125 the Tribunal went on to find that the decision to apply for the warrant was not influenced by any of the protected disclosures relied on.

(12) This detriment consists in the execution of the warrant, which Mrs Tiplady contended was unlawful because of various procedural failures. The Tribunal found, at para. 4.129, that there was a detriment. It continued:

> "The Tribunal had considerable doubts whether this was a detriment in the employment field. However, on the same basis as detriment eleven, the Tribunal was prepared to accept that there was some overlap with the Claimant's employment and that to some extent this might be regarded as a detriment in the employment field."

But it found, at para. 4.130, that "none of the protected disclosures played any part in what was done on 14 September 2016".

(13) This detriment consists of a letter from the Council expressing its view, following the inspection of Number Three on 14 September, that planning permission for the outbuilding was required. At para. 4.137 the Tribunal found both that the sending of the letter did not constitute a detriment and that it was not the result of any of the disclosures relied on. It also said:

> "Furthermore, it was not a detriment in employment in any event. It was further removed from the meeting on 14 July 2016, when the Claimant was given the opportunity to allow officers to inspect the site rather than the Respondent seeking a search warrant. The link with the Claimant's employment arguably created by that meeting seemed to the Tribunal no longer really to be in play. This was simply a letter to householders about the next steps in a potential enforcement matter relating to their property."

(14/15) I need not address these detriments because the Tribunal's reasoning in relation to them did not refer to the employment field point.

(16) This detriment consisted of the refusal of a request to attend a training course. At para. 4.107 the Tribunal accepted that that amounted to "a detriment in the employment field"; but it went on to find that it was not influenced by any of the alleged disclosures.

12. It will be apparent from that review that the ET relied on the employment field point in relation to ten of the alleged detriments – nos. (1)-(8), (10) and (13). But it will also be apparent that in each of those cases it was not its principal reason for rejecting Mrs Tiplady's case: in each, it made findings that she had not suffered a detriment at all and/or that any detriment suffered was not on the grounds of the protected disclosures, and the employment field point was only a fallback alternative. I will return to the implications of that presently.

13. Judge Eady in the EAT held that the ET's self-direction as to the law was correct. At para. 28 of her judgment she said:

> "Although not the only basis on which the ET rejected the Claimant's various 'detriment' complaints, this was plainly a factor that informed the ET's decision in a number of respects. Certainly, this was a case that raised difficult contextual issues given the background and the Claimant's position as both employee and householder. The start point must, however, be the statute under which the Claimant was seeking to pursue her claims. By Part V of the ERA, protection is afforded to *workers* and is expressed to relate to the suffering of the detriment *in employment*. The protection thus relates to the employment sphere (albeit it extends to workers and not just those who meet the definition of employee); it does not extend to the wider functions that might be performed by those who are employers as, for example, suppliers of goods and services to the public (customers or service users) at large. Workers employed by the employer might also be its customers or users of the services it provides but, in the normal course, there is a distinction between those relationships. Of course, in some cases, it may be that lines become blurred between an individual's position as a worker and other aspects of their life but there is no basis for thinking that, in the present case, the ET erred in declining to extend the protection afforded by the ERA to the Claimant as a private householder."

THE APPEAL

14. Paras. 2-3 of Mrs Tiplady's grounds of appeal read as follows:

> "*The 'private' ground for appeal*
>
> 2. This was labelled the 'Employment field misdirection' in the EAT appeal.
>
> 3. There is no law that precludes certain 'private' activities of employers to be immune from liability in PIDA claims. In particular the myth of employers having '*two hats*' where actions done while performing their administration functions have no liability and no requirement to conform with ERA detriment restrictions. In this case 'private' refers to the

> performances of public protection functions in the course of their work."

("PIDA" is a reference to the Public Interest Disclosure Act 1998, which inserted the whistleblower provisions into the 1996 Act.)

15. Henderson LJ when granting permission identified that as "ground 1" and held that it was arguable that the ET erred in law in directing itself that for the purpose of section 47B the detriment complained of "must be a detriment in the field of employment and does not include a detriment in the employee's private or personal capacity". He observed that it was a question of law of some importance on which there was no direct authority. He continued:

> "If this ground of appeal (ground 1) is determined in the Appellant's favour, she still has formidable difficulties of fact and causation to overcome, but as the EAT rightly recognised at para. 28 of its decision 'this was plainly a factor that informed the ET's decision in a number of respects'. On that basis, I am not persuaded that the Respondent Council's case on the facts and causation is necessarily so strong as to justify a refusal of permission to appeal to the EAT under Rule 3(10) for those reasons alone, even if the ET misdirected itself on this important issue of law."

16. Mrs Tiplady faces a fundamental difficulty in pursuing her appeal on ground 1, which is the only ground for which she has permission. As noted at para. 12 above, none of the detriment claims was dismissed exclusively (or indeed even mainly) on the basis of the employment field point; and it would seem to follow that even if the ET's self-direction on that question was wrong it would make no difference to the outcome because the other bases on which they were dismissed are not, and cannot be, challenged.

17. When that point was put to Mrs Tiplady she understandably relied on Henderson LJ's observation quoted at para. 15 above, and the statement from the judgment of the EAT to which he refers, and submitted that the ET's error on the employment field point rendered its reasoning on the other aspects of the detriments claims unsafe. I am afraid I cannot accept that. The ET's conclusions that Mrs Tiplady had not suffered the detriments alleged, or, if she had, that they were not on the ground of a protected disclosure, are entirely self-contained, and I can see no basis on which they could be affected by the view taken by it on the employment field point. When Judge Eady said that that point "informed the ET's decision in a number of respects", I very much doubt if she meant to suggest anything different: I think that all she meant was that the point was deployed in relation to many of the detriments alleged. But in any event I am sure that the alleged self-misdirection by the ET as regards the employment field point cannot affect its decision as regards the detriments claim or, therefore, the result of the appeal. Since that is the only point on which Mrs Tiplady has permission the appeal must be dismissed.

18. I have considered whether in those circumstances it would be right for this Court to address the employment field point, particularly since we have not had the benefit of submissions from counsel on both sides. On balance, however, I think we should do

so. As Henderson LJ says, the point is one of some importance (though one which may not arise all that often in practice) and there is no authority directly covering it. Despite her lack of legal expertise, Mrs Tiplady was able to advance cogent submissions on the point.

THE EMPLOYMENT FIELD POINT

THE PARTIES' CASES IN OUTLINE

19. I start with Mrs Tiplady's submissions. She contends that there is nothing in the language of section 47B saying a detriment must be suffered "in the employment field": it simply says "any detriment". Nor is there any justification for implying such a restriction. An employer will often have it in its power to harm a worker in their private capacity as well as in their capacity as an employee, and where that is done because they have made a protected disclosure it is in accordance with principle and the policy of the Act that they should be accorded protection: the crucial concept is of abuse of the employment relationship. It was a "myth" to say that an employer could wear "two hats" and was only liable for things done wearing its hat as an employer. She emphasised that although in the present case the alleged detriments consisted in the way that a local authority exercised particular statutory powers (i.e. as regards environmental health and planning), the supposed distinction could apply in many other types of case. Various examples were canvassed in the course of oral argument. One example might be an NHS Trust which gave inferior care to a whistleblowing employee who became a patient at one of its hospitals. Others would be where the employer waged a campaign against a whistleblower via social media, or where a co-worker who was a next-door neighbour of a whistleblower harassed them at home. Such detriments might, she said, be every bit as damaging as detriments inflicted on a worker in their capacity as such, and there was no reason to suppose that Parliament did not intend that whistleblowers should be protected against them.

20. Mr Lewis in response essentially adopted the reasoning of the EAT. As appears at para. 28 of her judgment, quoted at para. 13 above, Judge Eady attached decisive importance to the fact that Part V of the 1996 Act affords "protection … to *workers* and is expressed to relate to the suffering of detriment *in employment*": the latter reference is to the title of Part V (see para. 4 above). She could also have added that the detriment has to be inflicted by the employer – or, under sub-sections (1A) and (1B), a co-worker. So the context is, obviously, the employment relationship, and Mr Lewis submitted that it followed that the statute plainly referred only to detriments suffered by a worker in that capacity.

THE AUTHORITIES

21. Although, as I have said, there is no authority directly on this issue, there is one decision on an arguably analogous question arising under section 47B; and both parties also relied on decisions relating to the similar (but not identical) provisions of the discrimination legislation. Before considering those cases I should by way of preliminary identify the structure and key provisions of the Equality Act 2010 and the predecessor statutes and statutory instruments (I will say "statutes" for short).

22. The pre-2010 statutes each began by defining "discrimination" and identifying the protected ground and then proceeded in separate Parts to proscribe discrimination on

that ground (a) in the "Employment Field", enforceable in the employment tribunal (or, originally, the industrial tribunal ("the IT")) and (b) in "Other Fields", enforceable in the County Court. I will take section 6 (2) of the Sex Discrimination Act 1975 as an example of the primary provision proscribing discrimination against employees. It fell under Part II ("Employment Field") and read (so far as material):

> "It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her —
>
> (a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or
>
> (b) by dismissing her, or subjecting her to any other detriment."

The particular point to note for our purposes is the proscription at (b) of subjecting the employee to "any *other* detriment". It is implicit in that language that subjecting to a detriment is the overall genus of proscribed act, and that dismissal and, I think, also the particular acts identified under (a) are simply species within that genus, albeit particularly identified (no doubt because they are regarded as the most important).

23. The structure of the 2010 Act is essentially the same. It too is divided into different Parts dealing with discrimination in different kinds of relationship (though the term "field" is no longer used), with the employment tribunal having jurisdiction in cases concerning "Work" (which is the heading of Part 5) and the County Court having jurisdiction in cases concerning "Services and Public Functions" (Part 3), "Premises" (Part 4), "Education" (Part 6) etc. The equivalent to section 6 (2) of the 1975 Act and its various pre-2010 cognates is section 39 (2), which reads:

> "An employer (A) must not discriminate against an employee of A's (B)—
>
> (a) as to B's terms of employment;
>
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
>
> (c) by dismissing B;
>
> (d) by subjecting B to any other detriment."

It will be seen that, although the structure is rather different, the substance is the same as in the predecessor legislation, including the reference at (d) to "any other detriment".

24. I turn to the cases, taking them in chronological order.

Paget

25. In *Paget v Essex County Council* EAT/75/93 the claimant was employed by the council as a social worker. Her daughter became ill. She had difficulty in providing proper care for her while continuing to work. Her manager suggested that she take compassionate leave. She brought proceedings in the industrial tribunal under the Sex Discrimination Act 1975. The basis of the claim was unclear from her pleadings, but the IT understood it as a complaint that she and her daughter were not receiving proper care from social services and held that such a claim fell outside its jurisdiction.

26. The decision of the EAT (HH Judge Hargrove QC presiding) is not very fully reasoned. It set aside the decision of the IT, and Mrs Tiplady sought to rely on it for that reason. However, it seems to have done so on the basis only that the complaint (or part of it) was that the suggestion by the manager that the claimant take compassionate leave constituted a detriment suffered by her as an employee. It appears to have accepted, though there is no discussion of the point, that in so far as the complaint was about the failures in the provision of social care by the council the IT would indeed have had no jurisdiction. To that extent it assists the Council rather than Mrs Tiplady.

Shamoon

27. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2013] ICR 337, the applicant, who was a Chief Inspector in the Royal Ulster Constabulary, claimed that she had been subjected to a detriment because she was a woman, contrary to article 8 (2) of the Sex Discrimination (Northern Ireland) Order 1976, which was in substantially identical terms to section 6 (2) of the 1975 Act which I have quoted above. The detriment complained of by the applicant consisted of her being denied the opportunity to perform appraisals on constables in her division. The Court of Appeal of Northern Ireland had held that that did not constitute a "detriment" because it entailed no "physical or economic consequence". One of the issues before the House was whether that was correct. That issue is principally addressed in the speech of Lord Hope, at paras. 31-37 (pp. 348-350). He started by referring to the earlier decision of the House in *Chief Constable of the West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065, which concerned a complaint that the employer had failed to provide the applicant with a reference on the ground of his race, contrary to section 4 (2) of the Race Relations Act 1976 (the equivalent of section 6 (2) of the 1975 Act): that refusal had been held to constitute a detriment. Lord Hope noted (see paras. 32 and 34) that both in *Khan* and in the instant case the statutory cause of action was "discrimination in the field of employment". That phrase clearly derives from the titles to Part II of the 1976 Act and Part III of the 1976 Order, which were in both cases "Discrimination in the Employment Field". He continued, at para. 34 (p. 349 E-F):

> "So the first requirement, if the disadvantage is to qualify as a 'detriment' within the meaning of article 8(2)(b), is that it has arisen in that field. The various acts and omissions mentioned in article 8(2)(a) are all of that character and so are the words

> 'by dismissing her' in section 8(2)(b). The word 'detriment' draws this limitation on its broad and ordinary meaning from its context and from the other words with which it is associated. *Res noscitur a sociis.*[1]"

He went on, at para. 37 (p. 350 B-C), to note that the treatment of which the applicant complained – performing appraisals – was plainly "in the field of her employment".

28. Mr Lewis understandably relied heavily on the passage which I have quoted from para. 34 of Lord Hope's speech. But it cannot be treated as determinative of the employment field point in the present case, for two reasons:

(1) Although the word "detriment" is common to both the discrimination legislation and the whistleblower provisions, the "context and … other words with which it is associated" are not identical. Specifically, section 47B (1) of the 1996 Act contains no associated words such as "promotion, transfer or training" or "dismissing" of the kind to be found in section 6 of the 1975 Act and its cognates: if you prefer the Latin, there are no *socii*.

(2) The facts in *Shamoon* did not raise the issue which we are considering here. The detriment complained of was plainly in the course of the applicant's work as a Chief Inspector. That means that what Lord Hope said, which was of an essentially introductory character, must be taken to be *obiter*. It also means that he did not have to consider exactly what is meant by saying that a detriment "has arisen in the employment field".

I return to both points below.

Woodward

29. In *Woodward v Abbey National Plc* [2006] EWCA Civ 822, [2006] ICR 1436, the claimant brought proceedings in the employment tribunal under section 47B of the 1996 Act claiming that she had suffered various detriments after the termination of her employment. The ET, following the decision of this Court in *Fadipe v Reed Nursing Personnel* [2001] EWCA Civ 1885, held that it had no jurisdiction to entertain a claim about a detriment which had occurred after the employment relationship had ceased. This Court referred to the subsequent decision of the House of Lords in *Rhys-Harper v Relaxion Grounp Plc* [2003] UKHL 33, [2003] ICR 867, which held that the discrimination legislation extended to detriments suffered by former employees. Ward LJ, with whom Maurice Kay and Wilson LJJ agreed, held that that reasoning must be applied equally to whistleblower claims. He said, at para. 59 of his judgment (p. 1454 G-H):

> "Victimisation [sc. under the discrimination legislation] is established by showing inter alia the discrimination of the employee by 'subjecting him to any other detriment' – see s. 6(2) of [the Race Relations Act 1976] and s. 4(2) of [the Disability Discrimination Act 1995]. Under s. 47B of [the

[1] This Latin maxim is simply a pithy way of expressing the point made in the previous sentence.

> Employment Rights Act 1996] a worker likewise has the right 'not to be subjected to any detriment'. Although the language and the framework might be slightly different, it seems to me that the four Acts are dealing with the same concept, namely, protecting the employee from detriment being done to him in retaliation for his or her sex, race, disability or whistle-blowing. … All four Acts are … dealing with victimisation in one form or another. If the common theme is victimisation, it would be odd indeed if the same sort of act could be victimisation for one purpose, but not for the other."

He thus held that the phrase "detriment in employment" in the title to Part V must be understood to mean "in the employment relationship" and could extend to detriments suffered in connection with that relationship even after it had terminated: see para. 64 (p. 1455G). At para. 68 (p. 1456 F-G) he said:

> "If one seeks for the underlying purpose of section 47B one has to start with the Act which introduced the measure. The public interest, which led to the demand for this Act to protect individuals who make certain disclosures of information in the public interest and to give them an action in respect of that victimisation, would surely be sold short by allowing the former employer to victimise his former employee with impunity. It simply makes no sense at all to protect the current employee but not the former employee, especially since the frequent response of the embittered exposed employer may well be dismissal and a determination to make life impossible for the nasty little sneak for as long thereafter as he can. If it is in the public interest to blow the whistle, and the Act shows that it is, then he who blows the whistle should be protected when he becomes victimised for doing so, whenever the retribution is exacted."

I should say, in the interests of clarity, that it is clear from the context that in using the term "victimisation" Ward LJ did not have in mind its technical use in the discrimination legislation (see now section 27 of the 2010 Act), but simply being subjected to a detriment in respect of a protected characteristic or act. It also seems clear that although his specific reference was to section 47B his reasoning would apply to the other kinds of conduct protected by Part V.

30. Mrs Tiplady said that *Woodward* showed the Court taking a wide view of the statutory language on the basis that Parliament must have intended to proscribe retaliation against a whistleblower at whatever point in time it occurred, and she submitted that the same reasoning required treating the term "detriment" as covering things done outside "the employment field": the essential policy of the Act was to prevent whistleblowers from being punished. I see the point, but the fact remains that the questions of the temporal reach of the proscription and of the kind of act to which it applies are different, and *Woodward* cannot be treated as decisive of the question before us.

31. In other respects, in fact, *Woodward* might be thought to assist the Respondent, because the foundation of Ward LJ's reasoning is that in principle the scope of the discrimination and whistleblower legislation should be the same, notwithstanding the differences of "language and framework": see in particular the passage quoted from para. 59 of his judgment. That would be a potential answer to the first of the two points about *Shamoon* which I make at para. 28 above. I return to this below.

Martin

32. The facts of *London Borough of Waltham Forest v Martin* [2011] UKEAT 0069/11 are closer to those of the present case, but they arise under the Race Relations Act 1976. The claimant, who was black, was employed by the council as a bus driver. In his capacity as a resident of the borough he made false claims to the council for housing benefit and council tax benefit. It decided to prosecute him. The claimant contended that that constituted a detriment within the meaning of section 4 (2) of the 1976 Act and that the decision had been made because of his race. The EAT (Keith J, siting alone) held that the ET had no jurisdiction in relation to the alleged detriment because it was not "in the employment field": the prosecution was against the claimant "as a local resident". Keith J relied in particular on the passage from Lord Hope's speech in *Shamoon* which I have set out at para. 27 above. He then referred to the distinction between Parts II and III of the 1976 Act, headed respectively "Discrimination in the Employment Field" and "Discrimination in Other Fields", and made the point that if the decision to prosecute had indeed been made on the ground of the applicant's race he could have brought a claim in the County Court under Part III. He continued, at para. 22:

> "… [T]hat must apply in my opinion even in those cases where the public authority happens to be the employer of the person against whom the prosecution is to be brought. If it were otherwise it would mean that employees of those public authorities who have prosecutorial powers would have additional rights over other members of the public who are prosecuted, because they, unlike the latter, would be able to pursue claims of discrimination in the Employment Tribunal. It would also mean that employees of those public authorities, which have other powers (for example, local planning authorities), would have additional rights over other members of the public who have their planning applications refused, because they, unlike the latter, would be able to bring claims of discrimination in connection with the processing of their planning applications in the Employment Tribunal. Parliament could not have intended that to happen."

(The reference to planning authorities turns out to have been prescient.) Keith J's reasoning makes explicit the distinction apparently recognised by the EAT in *Paget*.

33. Mr Lewis, again, relied heavily on that decision. Although it is not binding on us, he submitted that it was plainly correct so far as the 1976 Act goes, most obviously because it was applying (as a matter of *ratio*) what Lord Hope had said in *Shamoon*. Although the further reasons at para. 22 of Keith J's judgment are advanced in the context of a discrimination claim he submitted that they have equal force in the

context of a whistleblower claim. Mrs Tiplady, by contrast, submitted that even if *Martin* was correctly decided it was in relation to different legislation. The distinction goes beyond the particular point made at (1) in para. 28 above in relation to *Shamoon*, because in *Martin* the 1976 Act gave the claimant a remedy under a different Part, whereas there are no equivalent provisions in the 1996 Act giving whistleblowers protection against detriments outside the employment field: she submitted that that cannot have been what Parliament intended.

Anastasiou

34. Mrs Tiplady referred us to the decision of the EAT in *Western Union Payment Services Ltd v Anastasiou* [2014] UKEAT 0135/14, a whistleblower case in which one of the detriments found is described by Judge Eady QC, at para. 6 (4) of her judgment, as "the [employer's] intervention in the Claimant's bankruptcy proceedings in the US". She observed that it was hard to see how that could have been a detriment which the employee suffered "in the employment field". The judgment was not concerned with that issue, and there are accordingly no further facts. In those circumstances it is impossible to reach a sensible view on the question. But even if Mrs Tiplady is right, the point does not assist us since the judgment contains no reasoning on the issue.

DISCUSSION

35. I find it most helpful to start with the position under the discrimination legislation. For the reason given at para. 28 (2) above, I do not believe that Lord Hope's statement in *Shamoon* formally constitutes binding authority. Nevertheless it is highly persuasive, and I respectfully believe that it is right: that is, I believe that the structure and language of the pre-2010 legislation means that the phrase "any … detriment" should be understood to refer to a detriment to which the employee has been subjected "in the employment field". As Lord Hope says, that imposes a limitation on the otherwise broad meaning of the phrase, and it has the result that some detriments to which an employee may be subjected by an employer on a protected ground can not be complained of in the ET.

36. Although the nature of the issue in *Shamoon* meant that Lord Hope did not have to explain in what kind of case such a detriment would fall outside the employment field, *Martin* provides a good example, and I believe it was correctly decided. Keith J rightly emphasises the importance of the distinction between the different Parts of the Act. The main difference in the 1976 Act was as to where complaints can be enforced – i.e. whether in the ET or in the County Court – though there were some substantive differences as well. If "detriment" were given an unlimited meaning it would mean that the selfsame act could form the basis of claims in both the ET and the County Court, but it is clear that Parliament intended that the various Parts of the relevant statutes should be mutually exclusive. The particular point that Keith J makes at para. 22 of his judgment about the importance of employees of public authorities not being in a better position than other citizens is also cogent, but it derives from the more basic point that it is an integral part of the structure of the legislation that it is necessary to characterise detriments as arising in either the employment field or some other field.

37. Although *Shamoon* and *Martin* were concerned with the predecessor legislation I have no doubt that the position is the same under the 2010 Act. The headings to the relevant Parts no longer use the language of "fields", but the division of protection between different kinds of relationship, enforceable in different tribunals, is retained, and the essential basis of Keith J's reasoning is unaffected.

38. Mrs Tiplady drew our attention to the fact that both the 2010 Act and its predecessors contain provisions excluding from the proscription of discrimination by employers discrimination in the way they afford access to "benefits, facilities and services" which they provide to (in summary) the public generally; and that there is no equivalent in section 47B. In the 2010 Act the relevant provision is paragraph 19 of Schedule 9, which reads (so far as material, and omitting immaterial qualifications):

> "(1) A does not contravene a provision mentioned in sub-paragraph (2) in relation to the provision of a benefit, facility or service to B if A is concerned with the provision (for payment or not) of a benefit, facility or service of the same description to the public.
>
> (2) The provisions are—
>
> (a) section 39 (2) …;
>
> (b)-(d) …
>
> (3)-(6) …"

As regards the predecessor legislation she referred in particular to section 4 (4) of the Race Relations Act 1976, which is in substantially the same terms. The intention is plainly that any claim as regards such discrimination should be brought under a different Part of the Act – most obviously (in the case of the 2010 Act) Part 3. In fact it appears that the employer in *Martin* sought to rely on section 4 (4), but Keith J preferred to decide the case on the more general ground identified above (see para. 26 of his judgment): I suspect he saw some difficulties in treating a prosecution decision as falling within the language of "benefits, facilities and services".

39. It might be argued, though I am not sure that this was quite Mrs Tiplady's point, that the fact that a provision of that kind was included in the legislation means that benefits, facilities and services provided to the public generally would otherwise fall within the terms of (in the case of the 2010 Act) section 39 (2), which would in turn mean that the entire genus "detriment" extended beyond the employment field save to the extent of any express limitation ; it would follow that *Martin* was wrongly decided (unless the facts of the case could have been brought within section 4 (4)), and that Lord Hope was wrong to regard the word "detriment" as being subject to any limitation. I would not accept that argument. The provision can be accounted for on the basis that the provision was necessary to remove any uncertainty about the position.

40. Accordingly, I believe that if this had been a discrimination claim based on, say, her sex, Mrs Tiplady could not have proceeded in the ET in respect of the detriments in question, because they did not arise in the field of "Work" (to use the terminology of Part 5 of the 2010 Act) but in a different field (namely "Services and Public

Functions", which are covered by Part 3). The question then is whether the same restriction applies to a claim under the whistleblower provisions.

41. I was initially attracted by Mrs Tiplady's argument that it was wrong to apply the approach required by the discrimination legislation to the provisions of Part V of the 1996 Act. There are, as she reminded us, clear warnings in the case-law that it is not possible straightforwardly to read across between the two legislative schemes: she referred to para. 33 of my judgment in *Timis v Osipov* [2018] EWCA Civ 2321, [2019] ICR 655 (p. 666 A-B), which quotes para. 48 of the judgment of Mummery LJ in *Kuzel v Roche Products Ltd* [2008] EWCA Civ 380, [2008] ICR 799 (p. 809 D-E). She is right to say that the phrase "any detriment" in section 47B (1) is subject to no express limitation in the sub-section itself (and the same goes for sub-section (1A)), nor does it contain any associated language of the kind on which Lord Hope relied in *Shamoon*. I see the force of the point that the hat which the employer is wearing when it subjects a whistleblowing worker to a detriment should be immaterial, and that all that should matter is that it has acted on the proscribed ground: if there is indeed an "employment field" requirement, it is satisfied by the fact that liability would depend on the existence of the employment relationship.

42. However, I have in the end concluded that the approach of the ET and of Judge Eady was correct. As Ward LJ observed in *Woodward*, despite the differences in their particular structure and language, the whistleblower legislation and the discrimination legislation are fundamentally of the same character: see para. 29 above. Likewise, at para. 26 of my judgment in *Royal Mail Ltd v Jhuti* [2017] EWCA Civ 1632, [2018] ICR 982[2], while I referred to Mummery LJ's warning in *Kuzel*, I also observed that the frequently used phrase "whistleblower discrimination" was not inapt, since the concept underlying section 47B was the same as that of the discrimination legislation; and I said that, that being so, it made sense to interpret identical language in the two statutes, where it occurred, in the same way (p. 991B). Similarly, in *Timis v Osipov* I observed, at para. 69 of my judgment (p. 677E), that even though it was not possible entirely to assimilate the statutory schemes of protection for whistleblowers and other workers with protected characteristics

> "… the two situations are nevertheless essentially similar and, other things being equal, one would expect Parliament to have intended to follow the same substantive approach in each".

43. Adopting that approach, in my view Parliament must be taken to have intended, when using the terminology of detriment in the discrimination legislation and in Part V of the 1996 Act, that it should have the same scope in both.[3] The point is reinforced by

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2 The decision of this Court in *Jhuti* has, very recently, been reversed by the Supreme Court – [2019] UKSC 55 – but the reasoning does not impact on the point in question.

3 The terminology of "detriment" in this context seems to have been used in the discrimination legislation – that is, in the Sex Discrimination Act 1975 and the Race Relations Act 1976 – before it appeared in the provisions which became Part V of the 1996 Act, none of which pre-date the 1990s. But I do not regard this as essential to the argument, which does not depend on there being conscious borrowing from one statute (or group of statutes) to another but on the broader point that Parliament must be taken to have intended a consistent approach, whichever came first.

the fact that, as Judge Eady pointed out, the title to Part V refers to detriment "in employment", though I would not regard that by itself as determinative. It is also not quite the whole picture to say that section 47B, unlike section 6 of the Sex Discrimination Act 1975 and its cognates, does not have any reference to "dismissal" or other specific detriments which can only be suffered as an employee. Sub-section (2) contains an anti-overlap provision which excludes from the scope of the section a detriment which "amounts to dismissal (within the meaning of Part X)". The effect of that provision is considered in detail at paras. 58-78 of my judgment in *Timis v Osipov* (pp. 673-680), but the point for present purposes is that the draftsman recognised that dismissal was a species of detriment: it was only for reasons of legislative history that they were covered by different Parts of the Act.

44. I accept of course that there is one important difference between "whistleblower discrimination" and the forms of discrimination proscribed by the 2010 Act (and its predecessors), namely that in the latter case the statute provides for protection in the context of other kinds of relationship beyond that of employer and worker. Thus in *Martin* if the council had indeed been influenced by the claimant's race in deciding to prosecute him, he would not have been left without any remedy but could have brought a claim in the County Court under Part III of the 1976 Act (or, now, under Part 3 of the 2010 Act); whereas there is no statutory provision preventing public bodies from discriminating against people who have blown the whistle on their activities.[4] But I do not regard that as a sufficient reason to construe the language of detriment differently. Rather, it seems to me simply to reflect the legislative choice to afford whistleblower protection only as between worker and employer and not to members of the public more widely. Once that choice is made, it makes sense that the scope of that protection corresponds to that provided to workers in the analogous field of discrimination.

45. There remains the question of how exactly a detriment is to be recognised as arising, or not arising, "in the employment field": what are the boundaries of the field ? Lord Hope did not have to consider this in *Shamoon*, and *Martin* was a plain case because it concerned the exercise of public powers which clearly fell in a different "field" under the 1976 Act. Broadly, the test suggested by Mr Lewis to the ET, and which it accepted, of asking in what "capacity" the detriment was suffered – or, to put the same thing another way, whether it was suffered by the claimant "as an employee" – seems to me likely to produce the right answer in the generality of cases. This is not strictly the same as the "two hats" analysis which Mrs Tiplady challenges, because the focus is not on the hat being worn by the employer but on that being worn by the employee; but in practice these may, if I may mix my metaphors, be two sides of the same coin. But I do not think the boundaries of the employment field should be drawn narrowly. Mrs Tiplady suggested, in order to illustrate how arbitrary the concept was, that it would mean that detriments would only be within the scope of section 47B if they occurred in the workplace or during working hours: I do not accept that that is the result. It may be a useful thought-experiment to ask whether, if the claim had been based on a protected characteristic under the 2010 Act rather than

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4 In fact, any such decision would probably be unlawful on other grounds, as would the other examples postulated by Mrs Tiplady; but of course I accept that such other claims, e.g. for judicial review or harassment, would be likely to be less convenient than a claim under the 1996 Act.

on the making of a protected disclosure, it would fall under a Part of that Act other than Part 5: if, say, the detriment was suffered by the claimant as a consumer of services or as a student or as an occupier of premises and thus would fall under Parts 3, 4 or 6, it could not be suffered as a worker. But I am chary about suggesting that that is a touchstone which will provide the answer in every case. There are bound on any view to be borderline cases, and I do not think that it would be right for us in this case to attempt any kind of definitive guidance. I would only add that I think it was sensible of the ET in this case to give Mrs Tiplady the benefit of the doubt as regards detriments (11) and (12).

46. I should note in this connection that Mrs Tiplady objected to the ET's frequent use of the term "private". In the particular contexts in which it did so it is clear that it was using "private" simply as a convenient way of referring to acts done "outside the employment field". Thus understood, it seems to me unobjectionable, but I accept that there could be cases in which it might not be a perfect antonym to "in the employment field". The same applies to its use at one point (see para. 11 (1) above) of the phrase "in the course of the Claimant's employment": that terminology comes with a certain amount of baggage which is liable to prove a distraction (quite apart from the fact that it is used for a different purpose in section 47B (1A)).

47. I turn, finally, to the application of that approach to this case. All of the detriments which the ET excluded on this basis plainly concerned Mrs Tiplady as a resident/householder seeking, or being subject to, the exercise of the council's powers as a local authority; and, that being so, they did not arise in the employment field. If this had been the decisive issue in relation to any of them the appeal would have failed.

DISPOSAL

48. I would dismiss this appeal.

Lady Justice Rose:

49. I agree.

Lady Justice Simler:

50. I also agree.