Neutral Citation Number: [2021] EWCA Civ 887

Case No: A2/2021/0072

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
MR JUSTICE CAVANAGH
UKEAT.0216/20

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/06/2021

Before :

LORD JUSTICE BEAN
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE WARBY

- -

Between :

SABRINA STEER	**Appellant**
- and -	
STORMSURE LTD	**Respondent**
-and-	
THE SECRETARY OF STATE FOR INTERNATIONAL TRADE AND MINISTER FOR WOMEN AND EQUALITIES	**Interested Party**

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Christopher Milsom (instructed by **Harrison Clark Rickerbys Ltd** and by **Bindmans**) for the **Appellant**
James McHugh (instructed by **Markel Law LLP**) for the **Respondent**
Mathew Purchase QC (instructed by **Government Legal Department**) for the **Interested Party**

Hearing dates : 25 & 26 May 2021

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Approved Judgment

Lord Justice Bean:

1. English law does not generally keep contracts of employment in force against the wishes of either party. There is a statutory prohibition in s 236 of the Trade Union and Labour Relations (Consolidation) Act 1992 against orders for specific performance or injunctions compelling an employee to attend for work; and, save in the remarkable case of *Hill v C A Parsons & Co* [1972] Ch 305, employees have not been granted injunctions in the courts to prevent, still less to suspend, their dismissal except in cases where a procedure laid down by the contract of employment has not been followed: see *Chhabra v West London Mental Health NHS Trust* [2013] UKSC 80; [2014] ICR 914.

2. Employment tribunals have even more limited powers to make orders to prevent or suspend a dismissal. They have never had the power to grant injunctions, whether final or interlocutory. They can make orders for re-instatement or re-engagement where they have held at a final hearing that an employee has been unfairly dismissed, but as a general rule they cannot grant any interim relief to keep a contract of employment alive pending that final hearing.

3. When the unfair dismissal jurisdiction of industrial tribunals was established by the Industrial Relations Act 1971, there were no exceptions to that general rule. The first exception, creating a right to seek interim relief where a dismissal is alleged to have been on grounds relating to trade union membership or activities, was created by s 78 of the Employment Protection Act 1975. It has been extended to eight other categories of workplace representative cases, such as dismissal for being a health and safety representative or a workforce representative under the Working Time Regulations 1998. In addition a right to claim interim relief in what are generally known as whistleblowing cases (that is to say those in which the reason or principal reason for dismissal is alleged to have been that the claimant made one or more protected disclosures) was introduced by the Public Interest Disclosure Act 1998.

4. The Appellant, Ms Steer, alleges that she has been actually or constructively dismissed on grounds tainted by sex discrimination. With the support of the Equality and Human Rights Commission ("EHRC") she contends that the remedies available to her include a right to seek interim relief. She accepts that no such right appears on the face of the Equality Act 2010. However, Mr Milsom on her behalf submits that the failure of domestic law to make provision for interim relief in discrimination and victimisation cases amounts to discrimination against women, in breach of Article 14 of the European Convention on Human Rights, read together with Article 6, Article 8, and/or Article 1 of Protocol 1 ("A1P1"). He argues that this problem can be remedied by reading a right to claim interim relief into domestic legislation, alternatively that this court should declare the 2010 Act incompatible with the Appellant's Convention rights in so far as it fails to make interim relief available.

5. As Cavanagh J, who heard the case in the Employment Appeal Tribunal, observed, if the appeal succeeds, the legal landscape regarding the remedies available in discrimination and victimisation cases will change significantly. Although the jurisdiction of employment tribunals is derived entirely from statute, the effect would be that an interim remedy will be created in a far wider range of cases than those expressly provided for by Parliament.

Facts and procedural history

6. The Appellant was employed by the Respondent from 12 March 2020 until 15 July 2020. She alleges that she was subjected to sexual harassment, consisting of inappropriate conduct related to her sex, from a fellow employee, and that the Respondent failed adequately to protect her from this harassment. In June 2020 she presented a grievance, which she claims was not adequately investigated. She also requested to work from home to safeguard herself from unwanted harassment. She contends that the Respondent reacted unfavourably to this request because of unwarranted sex-based assumptions related to her ability to juggle work at home with her child-care responsibilities. She was eventually permitted to work at home, but was instructed to install screen-shot monitoring software, which she says was an implicit attack on her integrity and an unjustified intrusion into her private life. The Appellant alleges that she was notified on 9 July 2020 that her working hours were to be reduced to 60% because she also had child-care responsibilities. She contends that such a unilateral change amounted to an express dismissal, alternatively that she has been constructively dismissed; and that her dismissal amounted to sex discrimination and to victimisation for protected acts (namely the lodging of the grievance and the decision to work at home).

7. Ms Steer also alleged that she was dismissed for making a protected disclosure and that this was an automatically unfair dismissal, contrary to section 103A of the Employment Rights Act 1996 ("ERA"). She presented a claim to the employment tribunal ("ET") on 30 July 2020, and sought interim relief, both in relation to her whistleblowing claim and to her sex discrimination/victimisation claims. On 30 July 2020, Employment Judge Lewis wrote to the parties, listing an interim relief hearing for 11 August 2020, but only in relation to the whistleblowing claim.

8. By an email dated 30 July 2020 the Appellant sought reconsideration of the ET's decision not to make provision for an interim relief hearing relating to the discrimination/victimisation claims. The ET replied by letter dated 6 August 2020. The letter made clear that EJ Lewis was only listing the interim relief application in relation to the whistleblowing claim and stated that the ET did not have jurisdiction to grant interim relief in the discrimination/victimisation claims. The letter also said that the Appellant's application for reconsideration would be dealt with after the hearing of the interim relief application relating to whistleblowing on 11 August 2020.

9. Ms Steer's solicitors filed an Appellant's Notice with the Employment Appeal Tribunal ("EAT") on 6 August 2020. This came before HHJ Auerbach on the paper sift. Judge Auerbach directed that there should be a Preliminary Hearing.

10. The Appellant had withdrawn her application to the ET for interim relief in relation to her whistleblowing claim. She and the EHRC, who by this time were supporting her, wished the point of law at the heart of this appeal to be heard before the EAT and if necessary on a further appeal. The interim relief hearing in the ET listed on 11 August 2020 was vacated, and at a case management hearing on 7 September 2020 EJ Lewis stayed the proceedings in the ET pending the outcome of the appeal.

11. The Appellant sought to appeal to the EAT on three grounds. The first and substantive ground was that the ET had erred in law in deciding that it did not have the power to grant interim relief in discrimination and victimisation claims arising out of

dismissals. The other two grounds were procedural in nature, namely that the ET erred in law in concluding that it had no jurisdiction to order interim relief for contraventions of the Equality Act 2010 ("EA 2010") without first hearing from the Appellant, and that the ET decision was inadequately reasoned.

12. At a preliminary hearing on 17 November 2020 Cavanagh J ("the judge") refused permission on the procedural grounds but directed that the substantive ground should proceed to a full hearing. He emphasised that, were it not for the special features of this case, he would not have granted permission to appeal at all. He was, exceptionally, granting permission before the case had been fully argued at the ET stage, and in circumstances in which there had been no examination of the underlying merits even to the extent of determining whether the discrimination and victimisation claims had a "pretty good chance" of success (this being the test for interim relief laid down by the EAT more than 40 years ago in *Taplin v C Shippam Ltd* [1978] ICR 1068). However, he allowed the substantive ground to be heard at a full hearing because it raised a pure point of law, of public importance, in which the Appellant was supported by the EHRC.

13. It is right to make clear, as the judge did, that this appeal is concerned with a point of law on assumed facts. The Respondent denies that it has treated the Appellant unlawfully, and in particular denies that it was unsympathetic to her because of her child-care responsibilities, or that it failed to respond adequately to her grievance. There are major disputes of fact between the parties. No assessment of the pleaded claims of discrimination and victimisation has been made even to determine whether they satisfy the "pretty good chance of success" test. No findings adverse to the Respondent have been made and, in the words of the judge, "the allegations of the Appellant remain just that, allegations".

Legislation on interim relief

14. I gratefully adopt Cavanagh J's account of the legislation conferring interim relief jurisdiction on ETs:-

> "27. Interim relief is available for certain types of claim. It applies where the claimant is complaining about being dismissed. The claim for interim relief must be made within seven days of the effective date of termination. The mechanism for interim relief applies in the same way in relation to all types of claim for which interim relief is available. The ET sets up an urgent hearing, as soon as is practicable. At the hearing, the ET will only provide interim relief if it appears to the ET that it is likely that on determining the complaint the Tribunal will find in the claimant's favour. As I have said, this means that the ET must satisfy itself that the claimant has a pretty good chance of success at the final hearing.
>
> 28. Rule 95 of the Rules of Procedure Regulations states that the Tribunal shall not hear oral evidence at the interim relief hearing, unless the ET directs otherwise. The default position, therefore, is that there will be no oral evidence. The issue of interim relief will be decided by reference to the pleadings, submissions,

written statements, and the review of a relatively small number of documents.

29. If the ET decides that interim relief should be granted, the employer is asked whether it is prepared to re-instate the claimant or, if not, to re-engage the claimant in another job on terms and conditions which are not less favourable than those which would have applied if the claimant had not been dismissed. If the employer indicates that it is prepared to re-instate the claimant, the ET makes an order to this effect. If the employer indicates that it is prepared to re-engage the claimant, and the claimant agrees, the ET makes an order for re-engagement. If the claimant does not agree to re-engagement, and the ET considers the refusal to be reasonable, the ET will make an order for the continuation of the claimant's contract of employment. If the ET considers that the refusal is unreasonable, the ET will not make any order. If the employer refuses to agree to re-instatement or re-engagement, or the employer does not attend the interim relief hearing, the ET will make an order for the continuation of the claimant's contract of employment.

30. An order for the continuation of the claimant's contract of employment means that the contract of employment will continue in force for the purpose of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters, and for the purpose of determining for any purpose the period for which the employee has been continuously employed, until the final determination or settlement of the claim. The ET specifies an amount which must be paid by the employer during each normal pay period. Such payments are taken into account for the purposes of calculation of damages for breach of contract or compensation for the breach of the relevant statutory right. The employer is not required to permit the claimant to carry on working.

31. The net effect of these provisions, therefore, is that a claim for interim relief, if successful, does not mean in practice that the ET will require the employer to permit the claimant to carry on working pending the determination or settlement of his or her claim. It is not the equivalent of a mandatory injunction or specific performance of the obligation to provide work. Rather, it means that the claimant will continue to receive his/her salary and other benefits in the period up to determination of claim or settlement. This is a valuable benefit, because it can take a number of months before a claim is finally determined (or even longer in complex cases, especially when there is a backlog of claims before the ET). It means that the claimant has a financial cushion whilst s/he is waiting for his/her claim to be heard. It is particularly valuable, because the employee will not have to

repay the monies received, even if his or her claim ultimately fails. It also means that the employer has an ongoing financial commitment, which may mean that the employer is more amenable to settlement.

32. Interim relief was originally introduced by the Employment Protection Act 1975, and was limited to claims in which the alleged reason for dismissal was actual or proposed trade union membership or authorised union activities. It was introduced as a way of deterring lightning strikes which used to be a feature of the industrial relations landscape when a trade union official or activist was dismissed for trade union activities. In *Bombardier Aerospace/Short Brother v McConnell and others* [2008] IRLR 51 (Northern Ireland Court of Appeal), Girvan LJ said, at paragraph 7, that the purpose of interim relief was to "preserve the status quo until the full hearing" and that:

> "The interim relief provisions were a response to the problem of dismissals of trade unionists which have the potential to generate suspicion of victimisation which on occasions can result in industrial unrest and industrial action. As pointed out in *Harvey on Industrial Relations and Employment Law* at paragraph 593, an application for interim relief is intended to head off industrial trouble before it begins or at least before it becomes too serious by allowing an employment tribunal to give a preliminary ruling at an emergency hearing."

33. Provision is made for interim relief in sections 128-132 of the ERA 1996, and in the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A"), sections 161-167. There is also provision for interim relief in the Employment Relations Act 1999, section 12, and in the Employee Study and Training (Procedural Requirements) Regulations 2010 (SI 2010/155) ("the 2010 Regulations").

34. Pursuant to ERA section 128, an interim relief claim can be brought if the reason for dismissal is:

> (1) Carrying out specified health and safety activities (such dismissal is automatically unfair under ERA 1996, sections 101(1)(a) and (b));
>
> (2) Acting as a representative of members of the workforce for the purposes of Schedule 1 to the Working Time Regulations 1998 (ERA 1996, section 101A(d));
>
> (3) Acting as a trustee of an occupational pension scheme (ERA 1996, section 102(1));

> (4) Acting as an employee representative for redundancy or TUPE purposes (ERA 1996, section 103);
>
> (5) Making a protected disclosure (ERA 1996, section 103A);
>
> (6) Being made redundant, when the selection was made on the basis that the claimant was seeking trade union recognition (TULR(C)A, Schedule A1, paragraph 162); and
>
> (7) The claimant was on a blacklist (ERA 1996, section 104F).
>
> 35. Pursuant to TURL(C)A, section 162, interim relief is available if the claimant was dismissed on grounds relating to union membership or activities (which is automatically unfair pursuant to TULR(C)A, section 152)."

(The judge went on to describe two further categories of case which I need not set out in this judgment.)

15. Sections 128-130 of the 1996 Act provide:

> "**128.—Interim relief pending determination of complaint.**
>
> (1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and—
>
> (a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—
>
> (i) section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or
>
> (ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or
>
> (b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met,
>
> may apply to the tribunal for interim relief.
>
> (2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).
>
> (3) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.

(4) The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing.

(5) The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so.

129.— Procedure on hearing of application and making of order.

(1) This section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find—

(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—

(i) section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or

(ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or

(b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met.

(2) The tribunal shall announce its findings and explain to both parties (if present)—

(a) what powers the tribunal may exercise on the application, and

(b) in what circumstances it will exercise them.

(3) The tribunal shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint—

(a) to reinstate the employee (that is, to treat him in all respects as if he had not been dismissed), or

(b) if not, to re-engage him in another job on terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed.

(4) For the purposes of subsection (3)(b) "terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed" means, as regards seniority, pension rights and other similar rights, that the period prior to the dismissal should be regarded as continuous with his employment following the dismissal.

(5) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.

(6) If the employer—

(a) states that he is willing to re-engage the employee in another job, and

(b) specifies the terms and conditions on which he is willing to do so,

the tribunal shall ask the employee whether he is willing to accept the job on those terms and conditions.

(7) If the employee is willing to accept the job on those terms and conditions, the tribunal shall make an order to that effect.

(8) If the employee is not willing to accept the job on those terms and conditions—

(a) where the tribunal is of the opinion that the refusal is reasonable, the tribunal shall make an order for the continuation of his contract of employment, and

(b) otherwise, the tribunal shall make no order.

(9) If on the hearing of an application for interim relief the employer—

(a) fails to attend before the tribunal, or

(b) states that he is unwilling either to reinstate or re-engage the employee as mentioned in subsection (3),

the tribunal shall make an order for the continuation of the employee's contract of employment.

130.— Order for continuation of contract of employment.

(1) An order under section 129 for the continuation of a contract of employment is an order that the contract of employment continue in force—

(a) for the purposes of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters, and

(b) for the purposes of determining for any purpose the period for which the employee has been continuously employed,

from the date of its termination (whether before or after the making of the order) until the determination or settlement of the complaint.

(2) Where the tribunal makes such an order it shall specify in the order the amount which is to be paid by the employer to the employee by way of pay in respect of each normal pay period, or part of any such period, falling between the date of dismissal and the determination or settlement of the complaint.

(3) Subject to the following provisions, the amount so specified shall be that which the employee could reasonably have been expected to earn during that period, or part, and shall be paid—

(a) in the case of a payment for any such period falling wholly or partly after the making of the order, on the normal pay day for that period, and

(b) in the case of a payment for any past period, within such time as may be specified in the order.

(4) If an amount is payable in respect only of part of a normal pay period, the amount shall be calculated by reference to the whole period and reduced proportionately.

(5) Any payment made to an employee by an employer under his contract of employment, or by way of damages for breach of that contract, in respect of a normal pay period, or part of any such period, goes towards discharging the employer's liability in respect of that period under subsection (2); and, conversely, any payment under that subsection in respect of a period goes towards discharging any liability of the employer under, or in respect of breach of, the contract of employment in respect of that period.

(6) If an employee, on or after being dismissed by his employer, receives a lump sum which, or part of which, is in lieu of wages but is not referable to any normal pay period, the tribunal shall take the payment into account in determining the amount of pay to be payable in pursuance of any such order.

(7) For the purposes of this section, the amount which an employee could reasonably have been expected to earn, his

> normal pay period and the normal pay day for each such period shall be determined as if he had not been dismissed."

The hearings in the EAT

16. At the preliminary hearing before Cavanagh J on 17 November 2020 the Appellant was relying on EU law as well as the ECHR. The appeal was treated as urgent because of an argument that the EAT's ruling on points of EU law (though not on points of human rights law) would be ineffective unless it was handed down before the end of December 2020 when the transitional provisions for the UK's withdrawal from the European Union were to come to an end.

17. At that stage only Ms Steer and the Respondent company were parties to the appeal. Cavanagh J directed that notice was to be given to the Government Legal Department to enable the Secretary of State to be represented at the final hearing. In the fairly short time available the GLD did not take any steps to become involved before the EAT, at least partly because of the pressures of the pandemic, and accordingly the judge was only addressed by Mr Milsom for the Appellant and Mr McHugh for the Respondent.

18. After hearing argument on 15 and 16 December Cavanagh J handed down judgment on 21 December 2020. Mr Milsom and Mr McHugh both recorded before us their appreciation of his having produced a 195-paragraph judgment addressing each of the many points of law raised before him in so short a time, and I would do the same: it is a characteristically careful and lucid judgment, even though I do not agree with the judge on every point.

19. Since the Appellant's three grounds of appeal to the EAT on EU law have not been pursued on appeal to this court I will only record the judge's conclusions on one of them, namely equivalence, because it is linked to part of the ECHR arguments raised before us. Cavanagh J held that claims for discrimination are comparable to claims by whistleblowers under what is now s 103A of the 1996 Act for the purposes of the doctrine of equivalence in EU law but that there was no breach of the equivalence principle caused by the unavailability of interim relief in claims for discrimination. He said at [128]:-

> "This is for two cumulative reasons. The first is that, in my view, taken in the round, the procedural/remedies features of discrimination/victimisation cases are no less favourable than the relevant features of s 103A claims. The second is, that even if I am wrong on the first point, the proviso applies, namely that the equivalence principle is not infringed because, even if the procedures/remedies for discrimination/victimisation claims are less favourable than for s 103A claims, they are not less favourable than for another similar action of a domestic nature, namely a claim for "ordinary" unfair dismissal, which does not have provision for interim relief."

The issues under the ECHR

20. Mr Milsom does not argue in this case that his client's rights under Articles 6, 8 or A1P1 of the Convention have been infringed without reference to Article 14, but

submits that the unavailability of interim relief in discrimination claims involving a dismissal amounts to unlawful discrimination in breach of Article 14 when read with Article 6, Article 8 or A1P1. He relies on the status of sex, alternatively on the Appellant's "other status" of being a person who claims that she was dismissed on discriminatory grounds.

21. The classic four-stage approach to considering whether there has been an infringement of Article 14 was set out by Lady Black *in R (Stott) v Secretary of State for Justice* [2018] UKSC 59; [2020] AC 51 at [8]:

> "In order to establish that different treatment amounts to a violation of article 14 , it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or "other status". Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking.
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> It is not always easy to keep the third and the fourth elements entirely separate, and it is not uncommon to see judgments concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations. Lord Nicholls of Birkenhead captured the point at para 3 of *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173. He observed that once the first two elements are satisfied:
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> 'the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact'."

22. Before the EAT it was conceded that the matter in question came within the ambit of Article 6; the judge therefore held that it was unnecessary for him to address the "somewhat more complicated questions" of whether it also came within the ambit of Article 8 and/or A1P1.

23. It was likewise conceded in the EAT that the Appellant had a relevant status for the purposes of Article 14. Cavanagh J referred to a previous decision of his own in *R (Leighton) v Lord Chancellor* [2020] EWHC 336 (Admin). Having done so he held:-

> "184. In my judgment, the relevant status is the "other status" of being an individual who wishes to bring a claim of dismissal/victimisation arising from dismissal, rather than the core status of gender. Applying the law as I summarised it in *Leighton*, the status of being a litigant in such a claim, or someone who wishes to bring such a claim, is capable of being an "other status". It is similar to the category of "persons who have brought a claim for discrimination in the County Court" which I held in *Leighton* to be a valid "other status" (see *Leighton* at paragraph 183). On the other hand, I do not think that the core status of gender is a relevant status for the purposes of these proceedings. The problem about which the Appellant claims - not being able to claim interim relief - is not specific to women, as it applies to anyone with any protected characteristic who wishes to bring a claim for discrimination/victimisation arising from dismissal. As I have said, every person has at least a few protected characteristics and so is potentially a person who might wish to bring a claim for discrimination/victimisation relating to dismissal. Mr Milsom submitted that being female was a core status because women are more likely to need to bring a discrimination complaint. He submitted that there is a passage in Baroness Hale's judgment in the *UNISON* case, at paragraphs 125-130, which shows that if women bring the majority of discrimination claims, then anything that is detrimental to such claims is indirectly discriminatory against women. I am not sure that the passage relied upon, which was obiter, goes that far, but in any event, I do not need to resolve the matter because I have found that the Appellant has a status for the purpose of Article 14."
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> 185. Mr Milsom suggested that the difference between a core status and an "other status" may matter, because the test for justification is stricter where a core status is concerned. This is because of what Lord Walker described as the "concentric circles" of statuses warranting protection under Article 14, in *R (RJM) v SSWP* [2008] UKHL 63, [2009] 1 AC 311: the rigour of the test for justification varies from status to status. However, in my judgment the standard of scrutiny would be essentially the same, whether the relevant status is gender or whether consists of claimants in discrimination/victimisation cases. Although it is not a core status, such claimants have an important status, since they are seeking to enforce fundamental rights."

24. Turning to the questions of analogous situation and justification Cavanagh J said:-

> "186. In my judgment, this is the paradigm type of case of the sort identified by Lady Black in *Stott* and Lord Nicholls in *Carson*, in which it would be artificial to look at the question of whether claimants in discrimination/victimisation claims are in an analogous situation with those who have s103A

claims separately from the question of justification. In other words, the real question is whether there are differences between the two categories of claims which justify the availability of interim relief for one but not the other.

187. As Mr Milsom submits, what needs to be justified is the difference in treatment: see *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42; [2008] 1 WLR 1434, at paragraph 38.

188. As for the standard of scrutiny, this is a matter on which submissions from counsel for the Government would have been welcome. This is not an issue which is concerned with public expenditure. It is to some extent concerned with the allocation of public resources, in that the extension of interim relief to some discrimination/victimisation cases will have an impact upon the Employment Tribunal system, in that it will increase the case-load. It involves a matter of political judgment. There has been much debate in recent case-law about whether the appropriate test is the conventional proportionality test (is it a proportionate means of achieving a legitimate aim?) or the stricter test pursuant to which the court will not interfere unless the treatment is manifestly without reasonable proportion. However, in my judgment, this is a case in which there is no material difference between the application of the conventional proportionality test, giving appropriate weight to and respect to the judgment of the executive or legislature, and the "manifestly without reasonable foundation" test (see *R (Drexler) v Leicestershire CC* [2020] EWCA Civ 502, at paragraph 76, and *R (Adiatu) v HM Treasury* [2020] EWHC 1554, at paragraph 62).

189. In any event, the question of what standard of justification is applicable in this case is moot, because, whatever it is, no justification is established, or even put forward. The burden is on the respondent, or the Government if it has intervened, to put forward the aim that the difference in treatment is directed towards, and then to show that the means adopted is proportionate. The Government has not intervened and so has not put forward any justification. Frankly, and entirely properly, Mr McHugh on behalf of the Respondent has said that he is not in a position to advance any particular justification. His client is a private sector business which has no reason to be privy to the reasons why interim relief is available for some employment claims but not for others.

190. In these circumstances, I do not think that it is appropriate for me to speculate about what potential justifications there might be. I have set out a number of considerations at paragraphs 151-158 of this judgment which may or may not be the reasons for the availability of interim

> relief for s103A cases, but not discrimination/victimisation cases, and which may or may not mean that the difference in treatment is proportionate. It may be relevant, when evaluating any potential justifications, that the procedures and remedies for discrimination/victimisation claims arising from dismissal provide an effective remedy, even without interim relief. But, as I said in that section of this judgment, I am not in a position to evaluate the potential justifications, at least not without assistance from submissions and perhaps evidence on behalf of the Government.
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> 191. It follows that I am not saying that the difference in treatment is incapable of justification. Rather, the position is that, through no fault of its own, the Respondent has been unable to satisfy the burden of justifying the difference in treatment for Article 14 purposes. In the absence of a justification being put forward, the breach is established: see *Gilham*, at paragraphs 36 and 37.
>
> 192. It follows that the Appellant has succeeded in establishing that the difference in treatment relating to interim relief as it affects those who bring a claim, or who wish to bring a claim, in relation to discrimination/victimisation arising from dismissal, and those who bring a claim or who wish to bring a claim for automatic unfair dismissal under ERA s103A, is a breach of ECHR Article 14, when read with Article 6."

25. Finally, on remedy, the judge said:-

> "193. … The only potential remedy that the EAT could grant would be to read words into the EA 2010 in a way which reversed the effect of the breach of Article 14, in order to give the domestic legislation a conforming interpretation in accordance with the HRA, section 3. However, as section 3 states, a conforming interpretation can only be adopted "so far as it is possible to do so". For the reasons given earlier in this judgment, I have taken the view that it is not possible for a conforming interpretation to be applied to the ERA 2010, because that would cross the line between interpretation and quasi-legislation, and because to do so would require the EAT to take decisions for which it is not equipped and would give rise to important practical repercussions which the EAT is not equipped to evaluate.
>
> 194. It follows that I must dismiss the Appellant's appeal relating to Article 14 of the ECHR.
>
> 195. For the reasons that are set out in this judgment, the Appellant's appeal is dismissed. The Claimant has sought permission to appeal to the Court of Appeal on the ECHR point. Since I have held that there has been a breach of Article

> 14, it is appropriate to grant permission to appeal so that the Court of Appeal may have the opportunity to consider this issue and, if considered appropriate, grant the declaration of incompatibility which the EAT does not have jurisdiction to grant. Accordingly, I have granted permission to appeal."

The appeal to this court

26. The judge gave written reasons for his grant of permission to appeal. He wrote:-

> "The appellant seeks permission to appeal in relation to the Article 14 ECHR ground. I concluded that there had been a breach of Article 14, but that it was not possible to grant relief for this breach because:
>
> a) it was not possible to apply a conforming interpretation to the Equality Act 2010 so as to read in a right to claim interim relief for claimants in discrimination/victimisation claims arising from dismissals; and
>
> b) the EAT does not have the power to grant a declaration of incompatibility.
>
> I have granted permission to appeal so that the Court of Appeal can consider the Article 14 issue and, if the court finds there to be a breach, the Court can consider whether to make a declaration of incompatibility. This appeal raises a point of law of general public importance.
>
> For the avoidance of doubt I grant permission not only so the Court of Appeal can consider whether to make a declaration of incompatibility but also so that the court can consider the other two grounds raised in the application for PTA, namely whether the relevant status for the purposes of the Article 14 challenge is sex, and whether it is possible to apply a conforming interpretation to the Equality Act 2010.
>
> Finally, as explained in the judgment, I did not hear full argument on the potential justification, if any, for the difference in treatment, as regards interim relief, between discrimination/victimisation claims concerning dismissals and s.103A claims for unfair dismissal arising from protected disclosures. The Government Equalities Office was given the opportunity to intervene in the appeal to the EAT but did not do so. Given the wide general importance of this case the parties should make contact once again with the Government Legal Department so as to provide the GLD with a copy of this judgment and order and to give the GLD and the Government Equalities Office the opportunity to consider whether they wish to apply to intervene at the Court of Appeal stage."

27. The GLD was duly notified pursuant to CPR 19.4A that the Appellant was seeking a declaration of incompatibility and was supplied with a copy of the judgment and the judge's order which I have just recited. (If anyone reading this judgment now or in the future wonders what this case has to do with international trade, the answer is nothing: it is simply that currently a single individual is both Minister for Women and Equalities and Secretary of State for International Trade). The Secretary of State duly sought to take part in the appeal.

28. Although initially some procedural quibbles were raised the case has very sensibly been argued before us on its merits. The Secretary of State cannot be bound by concessions as to the law made on behalf of the Respondent company in the EAT. We are not concerned with whether the Respondent has in fact discriminated against Ms Steer – as noted, that is an issue yet to be tried – but with whether the relevant legislation infringes her human rights. Moreover, since the Secretary of State is entitled to address the court on the compatibility of the legislation we are considering with the ECHR, it would have been artificial to exclude Mr Purchase from making submissions on the issues of law generally, and Mr Milsom did not argue that he should be so excluded. I am grateful for the assistance we received from all three counsel in the case.

The grounds of appeal

29. Mr Milsom submits that the judge was wrong to find that the Appellant could not rely on the core status of sex for Article 14 purposes, and further erred in holding that the duty of purposive construction could not extend to reading down the Equality Act 2010 so as to render it Convention-compliant by making interim relief available in discrimination cases. Alternatively, he submits that as a last resort this court should (as the judge could not, sitting in the EAT) make a declaration of incompatibility.

30. For the Secretary of State Mr Purchase, supported by Mr McHugh for the Respondent, submits that there has been no contravention of Article 14 at all and that the appeal should be dismissed for any or all of the following reasons:-

    i) The subject matter of the case does not fall within the ambit of a substantive Convention right and accordingly Article 14 does not apply;

    ii) The Appellant was not treated differently on any prohibited ground within the meaning of Article 14;

    iii) The Appellant and her comparator (a hypothetical dismissed whistleblower) are not in analogous situations;

    iv) The absence of a right to seek interim relief in a claim under the 2010 Act is justified;

    Mr Purchase also submitted that it is not possible to read down the relevant legislation so as to confer such a right.

Ambit

31. Notwithstanding the concession made by Mr McHugh and accepted by Cavanagh J in the EAT, I do not agree that this case comes within the ambit of Article 6. Lord Walker of Gestingthorpe said in *Matthews v Ministry of Defence* [2003] 1 AC 1163 at [142]

that it is "clear that Article 6 is in principle concerned with the procedural fairness and integrity of a state's judicial system, not with the substantive content of its national law".

32. In *Kehoe v UK* [2008] 2 FLR 1014 the father had stopped making child support payments to the mother. She could not bring a court claim against him directly because the Child Support Act 1991 required her to use the Child Support Agency (CSA) as a "collection service"; and the CSA's backlog of cases meant that substantial arrears built up. She complained that the 1991 Act had deprived her of access to the courts to enforce her civil rights and to that extent was therefore incompatible with Article 6. The ECtHR rejected her claim. She had not been denied access to a court, as she could have brought judicial review proceedings against the CSA or the Secretary of State seeking an order directing them to take appropriate and expeditious action. The court repeated at [47] the familiar phrase that "Article 6 does not impose any requirements as to the contents of domestic law".

33. I accept Mr Purchase's submission that the Appellant does not have any right to interim relief under domestic law, and that her complaint that the ET cannot make an order for interim relief is thus not within the ambit of Article 6.

34. As to Article 8, however, the position is less clear cut. In *Wandsworth LBC v Vining* [2017] EWCA Civ 1092; [2018] ICR 499, in the course of a detailed consideration of Strasbourg case law, Underhill LJ said at [47] that "the mere fact of termination of employment is not sufficient of itself to make article 8 applicable", and that in paragraph 109 of *Martinez v Spain* (2014) 60 EHRR 35 the Grand Chamber had clearly stated that the Convention confers no general right to employment or to the continuation of employment. He continued:

> "In none of the cases did the ECtHR say that article 8 was engaged by the mere fact of dismissal but rather it went on to consider whether the consequences of that particular dismissal made article 8 applicable (in *Volkov* the effect on the applicant's reputation of dismissal for breaching the judicial oath; in the *IB* case the stigmatisation and impact on the applicant's private life; in *Boyraz* the effect on the applicant's identity, self-perception and self-respect; in *Sidabras* the stigma, the impact on creating future social relations and the difficulty of obtaining future employment)."

35. I am prepared to assume for present purposes that the present case falls within the ambit of Article 8. In those circumstances it is unnecessary to consider whether it also falls within the ambit of A1P1.

Status

36. I agree with Cavanagh J that the fact that a dismissed claimant in a whistleblowing case can claim interim relief, whereas a dismissed claimant in a sex discrimination case cannot, does not amount to discrimination on the grounds of sex. Any dismissed whistleblower, whether male or female, can make an application for interim relief. Any discrimination claimant who has been dismissed, whether male or female, cannot do so.

37. I turn to the issue of "other status". *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681 was a claim by widowers that the denial to them of certain benefits payable to widows was a breach of their rights of Article 14 read together with Article 8 or A1P1. Widowers who had petitioned the European Court of Human Rights (ECtHR) before the Human Rights Act 1998 came into force had had their claims settled by the UK Government, but the Government had declined to pay off those who only petitioned Strasbourg after the 1998 Act came into force or who had not petitioned at all. Lord Hoffmann, with whom the other members of the House of Lords agreed so far as relevant for present purposes, said at [65] that the Article 14 argument failed for a number of reasons:

> "The first question is whether discrimination by reference to whether or not someone has started legal proceedings is covered by article 14 at all. In *R (S) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39; [2004] 1 WLR 2196, 2213, paras 48-49, Lord Steyn (with the agreement on this point of all other members of the House) said that article 14 required discrimination to be by reference to some status analogous with those expressly mentioned, such as sex, race or colour. (See also *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, 732-733, para 56.) Being a person who has started legal proceedings does not readily appear to qualify as a status."

38. Mr Milsom submits that "things have moved on" since the decision in *Hooper*. In *Stott* Lady Black said at paragraph 80:-

> "As to the argument that the characteristic needs to be analogous to those listed in Article 14, this is difficult to pursue too far in the light of the ECtHR's acceptance that a prison sentence of a particular length can be within the Article. I have no difficulty in accepting that when considering an as-yet unconsidered characteristic a court will have in mind the nature of the grounds it was thought right to list specifically, but the case law that the court cited in *Clift v United Kingdom* demonstrates a strict *ejusdem generis* interpretation would be unduly restrictive."

She added in the next paragraph:

> "Although not open-ended, the grounds within Article 14 are to be given a generous meaning".

39. It is so well known as to be a matter of judicial knowledge that the overwhelming majority of claimants alleging sex discrimination are women, but this does not mean that the availability of a particular remedy in a type of claim, such as whistleblowing, which (so far as we know, though no statistics are available) is brought by women and men in roughly equal numbers, and the unavailability of the same remedy in a sex discrimination claim, constitute a difference of treatment on the grounds of sex or some form of indirect discrimination against women. Otherwise this would lead to a comparison between every form of litigation brought approximately equally by men and women with sex discrimination claims.

40. For example, let us suppose for the purposes of argument that claims for personal injuries in road traffic accidents are brought approximately equally by men and women. Personal injury claimants have some advantages by comparison with discrimination claimants but also some disadvantages. The differences are many and various, and it is sufficient to point to a few. Personal injury claimants in road traffic cases can claim interim payments under the Civil Procedure Rules. If their case is strong enough they can apply for summary judgment. If the respondent is untraceable or uninsured they have a remedy against the Motor Insurers' Bureau. On the other hand, they bear the burden of proving negligence; may be the subject of a finding of contributory negligence; and have to sue in the county court or High Court where they are at risk as to costs. I do not consider that a discrimination claimant is entitled to say that the unavailability in her case of certain remedies given to a road traffic accident victim amounts to a breach of her rights under Article 8 read with Article 14 of the ECHR.

41. Moreover, if the Appellant were right and interim relief had to be made available in tribunal claims for discrimination, or at least sex discrimination, following a dismissal, the next test case would surely be brought by a male claimant for "ordinary" unfair dismissal. He would argue that the availability of interim relief to sex discrimination claimants who have been dismissed (overwhelmingly women) but not to ordinary unfair dismissal claimants (about half of whom, let us assume, are men) constituted indirect discrimination on the grounds of sex or of his status as a litigant in a particular type of claim. He might also seek to argue that the capping of compensation in ordinary unfair dismissal cases is similarly discriminatory; and likewise the requirement for ordinary unfair dismissal claimants to have at least two years' continuous service with the respondent employer.

42. In my view the observations of Lord Hoffmann in *Hooper* are still good law. The reason why a claimant in a discrimination case cannot claim interim relief is because she has not brought one of the small and select group of substantive claims in which Parliament has conferred jurisdiction on the ET to grant interim relief. The fact that a particular remedy is available in litigation of type A but not of type B does not constitute discrimination against the claimant in a type B case on the ground of her status as a type B claimant.

43. That conclusion means that the appeal must fail, but I will nevertheless go on to consider the issues of analogous situations, less favourable treatment and justification.

Analogous situations

44. Mr Milsom did not argue that the Appellant is in an analogous situation to that of a claimant dismissed for trade union activity or on a similar representative ground such as those related to health and safety. Rather his chosen comparator was a dismissed whistleblower who can seek interim relief under ERA s 103A.

45. There are dicta in some cases pointing to similarities between whistleblowing claims and discrimination claims, though not in the present context. In *Woodward v Abbey National (No 1)* [2006] EWCA Civ 822; [2006] ICR 1436 Maurice Kay LJ said at [59] that:

> "Although the language and the framework might be slightly different, it seems to me that the four Acts [the Public Interest

> Disclosure Act 1998, which introduced remedies in whistleblowing cases, the Sex Discrimination Act 1975, the Race Relations Act 1976, and the Disability Discrimination Act 1995] 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. This is made explicit by the long title to the Public Interest Disclosure Act 1998, which is, as I have already set out: "An Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation." All four Acts are, therefore, 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."

46. The comparison drawn by Maurice Kay LJ is at a fairly high level of generality. Certainly a claimant who alleges that he or she has been dismissed for whistleblowing is similar to a claimant who alleges that he or she has been dismissed as an act of victimisation in the EA 2010 sense, that is to say as a result of the claimant having previously made an allegation of discrimination in good faith. But victimisation cases are only a subset of discrimination claims, and in many other discrimination cases the similarity with whistleblowing is much less.

47. More recently, in *Timis v Osipov* [2018] EWCA Civ 3281; [2019] ICR 655 this court held that a claimant could obtain damages against individual respondents for causing detriment (namely his dismissal) by reason of his making a protected disclosure, at the same time as obtaining a judgment for compensation against the employer, a company which had become insolvent, for unfair dismissal under s 103A. At [69] Underhill LJ said:

> "I would add that if Mr Stilitz [counsel for the employer] were right the scheme of protection for whistleblowers will be less effective than for victims of other kinds of discrimination and victimisation at work. As noted at para 33 above, under the 2010 Act dismissal is simply another form of detriment for which both the employer and any responsible co-workers are potentially liable: claims are commonly brought against individuals as well as employers, and occasionally it is the individual who ends up having to pay, either because the employer is insolvent or because it has established a reasonable steps defence. That point is not in itself decisive because (again, as noted above) there is a limit to the extent to which it is right to try to assimilate the two schemes; but *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." [emphasis added]

48. Mr Milsom relied strongly on the italicised words. Underhill LJ was, however, using them in the context of accessory or secondary liability of individual tortfeasors where the primary respondent is the employer. I do not read them as being a general statement

of the view that whistleblowing claims as a whole are essentially similar to discrimination claims as a whole.

49. By contrast, in *Kuzel v Roche Products Ltd* [2008] ICR 799 Mummery LJ said at [48]:

> "'The thinking behind the association of protected disclosure and discrimination is that both causes of action involve acts or omissions for a prohibited reason. Unfair dismissal and discrimination on prohibited grounds are, however, different causes of action. The statutory structure of the unfair dismissal legislation is so different from that of the discrimination legislation that an attempt at cross fertilisation or legal transplants runs a risk of complicating rather than clarifying the legal concepts.'

50. I propose to follow the advice of Lord Nicholls in *Carson* and Lady Black in *Stott.* Rather than attempt to give a "yes" or "no" answer to the question of whether the Appellant's situation and that of a dismissed whistleblower are analogous, I regard it as preferable to ask whether, to the extent that they are, the difference in treatment is justified. But before the Respondent or the Secretary of State has to show justification, the Appellant must demonstrate that she has been less favourably treated than her comparator would have been: which brings us to what may conveniently be called the package principle.

Less favourable treatment: the package principle

51. If the whistleblower claimant and discrimination claimant were in analogous situations the next question would be whether the difference in the remedies available to them constitutes less favourable treatment of the discrimination claimant. The authorities make it clear that this question should be viewed as a whole. In *Totel v Revenue and Customs Commissioners* [2018] UKSC 44; [2018] 1 WLR 4053 Lord Briggs said at [31]:-

> "Less favourable treatment is not, of course, established merely because the procedure for one type of claim contains a restriction or condition which is absent from the procedure for another type of claim. It is common to find that different claims are subjected to a package of procedural requirements, such that some of those affecting claim A are less favourable, but others more favourable than those affecting claim B."

52. *Totel* concerned the principle of equivalence under EU law, but I see no reason why it should not apply in human rights law to a comparison of the remedies available in different types of claim, if that is indeed (contrary to my views on "status") an exercise which properly falls within Article 14 of the ECHR. Cavanagh J noted in his judgment at [110] a number of respects in which the requirements for discrimination or victimisation claims are more favourable to claimants than those in whistleblowing claims under s 103A:-

> (1) *Time limits*. Although the primary time limit is the same, three months from dismissal, the discretion to extend time for bringing claims for

discrimination/victimisation when the tribunal considers it just and equitable to do so is considerably more favourable to claimants than the "reasonably practicable" test applicable in unfair dismissal cases (though I note Mr Milsom's point that an interim relief claim must be launched within seven days of the dismissal);

(2) *Burden of proof.* In a discrimination/victimisation case, the shifting burden of proof provided for by EA s 136 applies. In *Kuzel v Roche* Mummery LJ regarded it as a more favourable burden for claimants than the burden that applies in unfair dismissal cases;

(3) *The reason for dismissal.* In a s 103A case, the claimant must show that the protected disclosure is the reason or principal reason for the dismissal. In a discrimination case the question is whether the protected characteristic or act was an 'effective cause';

(4) *Third party liability*. In a discrimination case, a claim can be brought against an individual who may be jointly and severally liable with the employer. In a claim for unfair dismissal brought under s 103A, this is not possible, although a claim can be brought under s 47B against an individual for causing detriment, as shown in *Timis v Osipov*;

(5) *Injury to feelings*. A payment for injury to feelings may be made in a discrimination/victimisation case, but no such payment is available in an unfair dismissal claim, whether whistleblowing or "ordinary". See *Dunnachie v Kingston upon Hull City Council* [2004] UKHL 36, [2004] IRLR 727;

(6) *Contributory fault*. A deduction for contributory fault may be made in a s 103A case (ERA, s 123(6)), but it is not clear whether a deduction for contributory fault may be made in a discrimination/victimisation claim, or at least whether the circumstances in which such a deduction may be made are as broad as they are in unfair dismissal cases.

53. In the section of his judgment dealing with EU law the judge held at [111] that:-

> "Taking into account all of the various procedural/remedies features of discrimination/victimisation claims and of s103A claims, including interim relief, in my judgment it is not the case that the procedural/remedies requirements of discrimination and victimisation cases are less favourable than those that apply to s103A claims. Whilst the right to claim interim relief is a real benefit, it does not, in my view, outweigh the procedural and remedies advantages of discrimination/victimisation claims, as described above. It is necessary to take a practical and realistic approach to this comparison. If this is done, then, in my opinion, the features of discrimination/victimisation claims which are more favourable to claimants are considerably more valuable in practice than the countervailing features of s103A claims."

54. I agree; and the same applies for the purposes of an ECHR Article 14 comparison. The interim relief point cannot sensibly be viewed in isolation. Viewing the package as a

whole the Appellant is not treated less favourably than her hypothetical whistleblowing comparator.

Justification

55. If, contrary to the view I have taken on status and less favourable treatment, the Appellant had succeeded thus far, it would be necessary to consider at the final stage of the *Stott* analysis whether the non-availability of interim relief to discrimination claimants has been shown to be justified.

56. If the Appellant is right, her case has identified a major defect in employment law which has existed at least since the coming into force of the Human Rights Act in October 2000. By this time Parliament had first provided for interim relief in trade union activity/membership cases in 1975, extended it to whistleblowers by the 1998 Act (which came into force in 1999), but not extended it to claimants under any of the three discrimination statutes then in force. Mr Milsom emphasised that Parliament has never voted on, nor even debated, any proposal to extend interim relief to discrimination cases. The legislature, he argues, "simply did not apply its mind to the issue". He argues that cases about the deference due to decisions embodied in primary statute are therefore inapplicable.

57. I do not accept this analysis. It is scarcely surprising that when the Private Member's Bill that became the Public Interest Disclosure Act 1998 was passing through Parliament, there was no general review of remedies in employment law. But that cannot be said of the Equality Act 2010. The Bill that became the EA 2010 was preceded by a consultation paper in 2007 and two Command Papers in June and July 2008 (one of these a response to the 2007 consultation). The Equality Bill itself was a major piece of Government legislation covering the whole of equality law, not only harmonising the three existing discrimination statutes but making numerous amendments including some strengthening of the available remedies. In those circumstances the judge was right to find that a positive decision must have been made that there was no need to add interim relief to the suite of remedies available to discrimination claimants. It is true that neither the 1975 Act nor the 1998 Act (nor any of the other statutory provisions extending interim relief to new categories of case, nor the consolidation Acts of 1978 and 1992) contains a section saying "interim relief shall continue to be unavailable in other types of tribunal claim", but that is simply a consequence of the British style of parliamentary drafting in which "no change" clauses are rarely included. Such a provision must in my view be taken as read.

58. It is unnecessary to embark on the question of whether the Appellant would have to show that this policy decision was "manifestly without reasonable foundation". Mr Purchase referred us to *Lawrence v Fen Tigers (No. 3)* [2015] UKSC 50; [2015] 1 WLR 3485, in which Lord Neuberger PSC and Lord Dyson MR said at [58] that:

> "…even in a field such as access to justice and legal costs the court, while being vigilant to protect fundamental rights, must give considerable weight to informed legislative choices, at least where state authorities are seeking to reconcile the competing interests of different groups in society".

59. It is sufficient to say that on many occasions since 1975 Parliament could have made interim relief available to claimants who allege that their dismissal was tainted by discrimination, but has chosen not to do so.

60. The rationale for where Parliament has drawn the line is not hard to find. Interim relief is a measure protecting employees who have done certain acts in a representative capacity, or on behalf of the workforce generally, or in the public interest. That is the common thread which links trade union activity, health and safety representation and whistleblowing claims and distinguishes them from cases (or at any rate the great majority of cases) brought by individuals alleging that they have been subjected to discrimination or unfairly dismissed.

61. Mr Purchase submits that the restriction of interim relief to the specified categories of claimants pursues the following legitimate aims: (a) protecting and encouraging those claimants who take steps in relation to collective rights or the public interest; (b) avoiding placing additional burdens on employers; (c) maintaining a fair balance within and between the different suites of rights and remedies available in different areas of ET jurisdiction; (d) maintaining an efficient and effective ET system for all litigants.

62. It is not for this court to say whether placing additional burdens on employers – or, as Mr Milsom would put it, conferring additional rights on employees who have been the victims of discrimination – is a good or bad thing: that is an assessment for Parliament to make. But I have no doubt that the amendment which Mr Milsom proposes would force very substantial changes in the way ETs work.

63. Section 128 of the ERA 1996, like the original provision in the 1975 Act dealing with trade union activity/membership dismissals, is designed to provide a very rapid remedy. The hearing must be arranged as soon as reasonably practicable in every case: there seems to be no discretion for a judge to say that a particular case does not seem important enough or meritorious enough to take precedence over other types of hearing. The employer need not be given more than 7 days' notice, which is a very short time to collect witness statements, especially in a case of any complexity. The ET is expressly prohibited by s 128(5) from adjourning the hearing save in special circumstances.

64. We were told that at an interim relief hearing the current practice is that the ET reads the witness statements, but does not hear oral evidence, and makes a decision as to whether on the material available the claim appears likely to succeed. If so, it must make an order for reinstatement or re-engagement, or, if the employer is not willing to have the employee back at work or does not attend the hearing, an order for the continuation of the contract. The tribunal has no power, for example, to order payment of a proportion of salary: it is all or nothing (see s 130). The ET can vary or revoke the interim order if there is a change of circumstances: s 131.

65. Interim relief applications are currently relatively rare: at most 150 per year are filed, most of which are not pursued to a hearing (the statistics are not entirely clear). Sex discrimination claims – not all, of course, involving a dismissal – numbered 9,427 in 2018-19 and 6,260 in 2019-20. Mr Milsom suggests that only a small proportion of claimants would seek interim relief, particularly since a claim has to be lodged within 7 days of the dismissal. That is a matter for speculation, but for my part I see no reason why any well-advised claimant in those circumstances would *not* seek interim relief. If granted, it amounts to summary judgment for the claimant's full salary until such time

as the ET can arrange a hearing on the merits, with no liability to repay the money if the claim is ultimately unsuccessful, and (it seems, since the contract remains in force) no duty to mitigate by seeking alternative employment. That is a very attractive proposition for a claimant.

66. The likely result of extending interim relief to sex discrimination cases, or to discrimination cases generally, would therefore be to force ETs into a substantial reordering of their listing priorities, and inevitably mean that delays in other types of hearing (including final hearings in discrimination claims) would increase.

67. One of the least satisfactory features of the ET system is that an unfairly dismissed claimant whose case is fought to a finish has no interim remedy available, but must wait many months for a hearing and an order for compensation. In many cases this causes serious hardship, and justice delayed is justice denied. One way to reduce the frequency of such injustices would be to devote greater resources to the ET system. Another would be to make some form of interim relief, not necessarily exactly on the s 128 model, available for all types of unfair dismissal; a third would be to make it available but only in cases of unfair dismissal said to involve discrimination. But these are not decisions for this court to make. We must give considerable weight to the choice which Parliament has made as to where to draw the line in the availability of interim relief. The difference of treatment between the Appellant and her hypothetical comparator is plainly justified.

Conclusion

68. I therefore conclude that (a) the fact that interim relief in the ET is available to a dismissed whistleblower but not to the Appellant is not discrimination on the grounds of sex; (b) neither is it discrimination on the grounds of "other status", since being a litigant in one type of case is not a status; (c) the remedies available to the Appellant, taken as a whole, are not in any event less favourable to her than those available to a dismissed whistleblower; and (d) even if they were, the difference in treatment by the legislature has been shown to be justified.

69. I add this by way of footnote. One way in which the Appellant puts her case is that she was constructively dismissed – in other words, that the Respondent company's conduct amounted to a repudiation of her contract of employment, and that she was entitled to accept that repudiation, terminate the contract and resign. It seems counter-intuitive that she should then be able to obtain an order from an ET that the same contract is to continue. But that conundrum was not debated in argument before us, and at the end of an already lengthy judgment I will say no more about it.

70. Despite the ingenuity and eloquence with which Mr Milsom advanced his case, I would dismiss this appeal. In accordance with an agreement made by all parties prior to this hearing, I would make no order as to costs.

Lady Justice Elisabeth Laing:

71. I agree.

Lord Justice Warby:

72. I also agree.