Neutral Citation Number: [2022] EAT 11

Case No: EA-2020-000447-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 October 2021

Before :
THE HONOURABLE MRS JUSTICE STACEY

- -

Between :

CITIZENS ADVICE MERTON AND LAMBETH LTD **Appellant**

- and -

MR P MEFFUL **Respondent**

- -
- -

Mr R Kohanzad (instructed by Peninsula Business Services Ltd) for the **Appellant**
Mr P Mefful the **Respondent**

Hearing date: 21 & 22 October 2021

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JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION

VICTIMISATION

WHISTLEBLOWING, PROTECTED DISCLOSURES

The tribunal had been entitled on the evidence to conclude that the respondent's interim CEO had taken the decision to dismiss the claimant on 19 March 2012 and the respondent's challenge to the ET's findings of fact on the dismissal decision therefore failed.

However the tribunal erred by then taking into account matters that post-dated 19 March 2012 in their analysis of the reason for dismissal. The tribunal also misdirected itself on the issue of causation in the direct disability discrimination claim (s.13) and discrimination arising from disability (s.15(1)(b)) and the victimisation (s.27 **Equality Act 2010)** claims.

THE HONOURABLE MRS JUSTICE STACEY:

1. The appellant in this case, the Citizens Advice Bureau Merton and Lambeth Limited, was the respondent before the ET. It seeks to appeal the decision of EJ Elliott and lay members, Ms S Dengate and Ms B Brown, of 23 January 2020 heard in the London South office of the Regional Employment Tribunals.

2. That tribunal found that the claimant, Mr P Mefful, who is the respondent to this appeal, was unfairly dismissed and subject to unlawful disability discrimination, both direct disability discrimination and discrimination because of something arising in consequence of disability, the act complained of being dismissal.

3. I shall continue to refer to the parties as they were before the tribunal. There have in fact been three previous appeals to the EAT in the long history of the case in the nine years since the claimant was dismissed. The previous three were brought by the claimant, and this fourth appeal is the first brought by the respondent.

4. The claimant was employed as a specialist service manager at Merton and Lambeth CAB from 19 January 2004 to 15 August 2012, when he was dismissed, ostensibly by reason of redundancy. He brought ET proceedings in November 2012, challenging the dismissal decision on grounds that it was unfair under section 98 of the **ERA 1996** and was also automatically under section 103A **ERA 1996** on the basis that on 17 November 2011 at a grievance hearing, he told trustees of the respondent that he was being bullied and sexually harassed by his line manager the Chief Executive, Ms FP. That was alleged to be a protected disclosure under the **Act.**

5. He also alleged disability discrimination, both direct contrary to section 13 of the **EqA 2010** and discrimination because of something arising from his disability (section 15 **EqA 2010**). He finally brought a complaint of victimisation under section 27 **EqA 2010**, relying on the same complaint to the trustees on 17 November 2011 as a protected act under section 27 of the **EqA 2010**.

6. The respondent challenged whether the claimant was disabled within the meaning of the **EqA**, and the

case was listed for a preliminary hearing when the claimant was found by the tribunal not to be a disabled person. The claimant appealed that decision to this tribunal (the claimant's first appeal), who remitted the case back for re-hearing before what I understand was a differently constituted tribunal. At the re-hearing the claimant was found to be disabled on account of both a hearing impairment and an impediment to his left shoulder. The claimant then applied to amend the claim form to add an individually named respondent, Mr Stuart Davidson, who had been the respondent's interim CEO between December 2011 and June 2012.

7. The application was refused by the tribunal. The claimant appealed that decision to this tribunal (the claimant's second appeal), unsuccessfully, as it was found to have been a perfectly proper case management decision of the tribunal in accordance with the tribunal's case management powers.

8. The full merits hearing then took place in October 2017 before EJ Elliott and lay members, Ms S Dengate and Ms B Brown (the 2017 decision). The tribunal identified three summary issues for determination, set out in paragraph 18 of the tribunal's judgment (the October 2017 Judgment).

> "a. What was the reason for dismissal, was it because the claimant made a protected disclosure or was it for redundancy?
> b. Was the claimant victimised by being dismissed because he had done a protected act, namely his complaint of being bullied and sexually harassed.
> c. Was the claimant dismissed because of his disability (direct discrimination) or because of something arising from his disability (section 15 claim)."

The parties agreed that these were the issues for determination.

9. A large number of preliminary issues raised by the claimant were dealt with at the outset of the October 2017 Hearing, including an application by the claimant to amend the claim, an application to adduce more documents and an application for the respondent's response to be struck out. Having dealt with those issues, the tribunal considered the substantive issues, heard the evidence and submissions and made findings of fact. Since the respondent conceded that the claimant had been unfairly dismissed and did not advance a positive

case, the tribunal concluded that the claimant had indeed been unfairly dismissed contrary to section 98(4) **ERA 1996**.

10. The tribunal concluded and accepted the respondent's explanation that the dismissal was by reason of redundancy, and the tribunal went on to make no reduction for contributory fault and no reduction on account of **Polkey**, but they rejected the claimant's claim that the redundancy was a sham and that the real reason for dismissal was his disability, victimisation or protected interest disclosure, and sought to list the case for a remedy hearing.

11. That remedy hearing has not yet taken place. The claimant appealed the tribunal's judgment, (the claimant's third appeal), which was heard before HHJ Eady QC (as she was then) and members on 21 June 2019. The appeal was allowed. It was found that the ET had failed to engage with the claimant's case that the redundancy exercise was a sham, and they had not tested the respondent's reason for dismissal in light of the statutory definition of redundancy under section 139 of the **Act**, and whether there was a redundancy situation, and if not, what other reason it was.

12. The case was remitted back to the same tribunal to consider the real reason for dismissal, and the EAT helpfully set out a number of questions to be addressed by the ET in its judgment, principally, who made the decision to dismiss, when was it made, and what were the reasons for dismissal, and invited the tribunal to make further findings.

13. On the remittal back, which took place in January 2020, the tribunal unanimously decided that the claims for unfair dismissal and disability discrimination dismissal succeeded, as already mentioned, and made findings in the alternative concerning victimisation and protected interest disclosure, and it is that judgment that the respondent now appeals (the respondent's first appeal), resulting in this fourth EAT hearing in this long-running matter (the 2020 decision).

14. I shall start with the facts and note at the outset that the evidence before the tribunal consisted of the claimant on his own behalf, and for the respondent two live witnesses, the interim CEO, Mr Stuart Davidson,

and a Ms Tina Harris, who is a trustee of the respondent and someone who had been at both the 17 November 2011 grievance hearing (we will come on to that in a moment) and had arguably been the ostensible decider of the claimant's appeal against dismissal. On behalf of the respondent there were written signed statements from two former trustees, Pauline Dawkins and Anthony Nicholas, and an unsigned statement from Maggie Bartlett. There was no evidence however from Ms FP, the CEO. I take the facts from both the 2017 and 2020 decisions of the tribunal, since they dovetail neatly together and the tribunal, in recognition of the task allocated to it by the EAT after the claimant's third appeal, made further findings of fact in its second substantive liability decision.

15. The story starts in 2003, when neither Ms FP nor the claimant worked for the respondent. They had what the tribunal described as a "romantic relationship" which the claimant said had been ended by him some months later. In 2004, both the claimant and Ms FP became employees of the respondent, Ms FP as the Chief Executive (CEO) and line manager of the claimant who was the specialist service manager.

16. From 2005 onwards, the claimant was concerned about his level of pay and parity as with other employees and complained to the Chief Executive on a number of occasions, threatening to take it up with the trustees if necessary.

17. We can fast-forward to 2010, when the organisation was in considerable difficulty. In December 2010, all 20 plus members of staff had been placed at risk of redundancy, and the tribunal record (paragraph 17) the problems the organisation was encountering. However although all staff were put at risk of redundancy in December 2010, the redundancy exercise did not go through at that time, but in late 2011, the respondent had failed two out of three key audits, and its financial situation was in crisis. At that point there were three posts in the senior management team: the CEO, the operations manager and the claimant's role. The operations manager left around that time and in January 2011 the claimant requested a temporary pay rise on the basis that he considered he was undertaking additional responsibilities as a consequence of the operations manager's departure. He did not receive an additional payment.

18. The respondent was facing imminent administration or insolvency if it did not implement changes to its budget and carry out a restructure to address the multiple organisational failings. (See paragraph 71 of the 2017 judgment). The respondent was facing suspension and even termination of its membership of Citizens Advice following the failure of the quality of advice and organisational audits. Expulsion from the membership of Citizens Advice would have prevented the respondent from tendering for new commissions, and that would have been likely to result in many more redundancies, and the respondent was in the bottom three per cent of the performance tables for CABx in the United Kingdom.

19. Against the backdrop of the wider organisational difficulties, in the autumn of 2011 problems arose concerning the claimant specifically when the CEO sent an email to him on 21 September 2011 asking for an explanation for what she described as "unauthorised absences" asserting that the claimant had not been in touch with her to explain his continued absence. He had been away from the workplace from 30 August to 19 September. She asked him to contact her urgently to discuss, and there was a threat of disciplinary action if he failed to do so.

20. The claimant replied stating that he was considerably aggrieved by her email and said that he had in fact spoken to her on the telephone on 30 August and he had explained his absence was for childcare reasons and that he had had to request emergency leave. The claimant wished to raise a grievance about what he considered to be a false accusation of unexplained absence from work if she did not rescind the letter of 21 September 2011.

21. The email was not rescinded and there was further correspondence between them. The claimant said in evidence that he considered that the CEO was acting in blatant abuse of her position, and in an email dated 31 October 2011, he said this:

> "On another note, I have come to believe that your attempts to ostracise me and manage me out of the service might not be unconnected to my personal relationship and history with you … Of course, anything I bring to the attention of the trustees will be backed up

with graphic evidence."

22. The tribunal found that the claimant was saying nothing more than that he could prove the fact of the affair, and made a finding of fact that the reference to graphic evidence was to text messages that he said would prove the fact of their affair, rather than anything more sinister.

23. The Chief Executive duly passed the claimant's grievance on to the trustees and on 17 November 2011 a grievance meeting took place before two trustees, one of whom was Ms Harris, who was a witness before the ET (the grievance having been progressed a little slowly, it has to be said, by the Chief Executive). At that meeting, the claimant alleged that Ms FP had been bullying him which he said he attributed to his ending of the relationship in 2003/4, and that he considered it to be a form of sex harassment (the 17 November disclosure).

24. The respondent initially denied that any such complaint had been made, and Ms Harris's witness statement was along those lines, but the respondent conceded in closing submissions that the claimant had indeed made that allegation at that meeting and that Ms FP had told the trustees about the fact of a prior relationship with the claimant in any event.

25. The tribunal found that the 17 November 2011 disclosure was a protected act under the **EqA 2010** and at paragraph 146 of the judgment stated as follows:

> "Protected act
>
> 146. The respondent submitted that the claimant did not say that he was being subjected to sexual harassment by Ms FP and that as such, his disclosure at the 27 November 2011 grievance hearing cannot amount to a protected act under section 27(2)(d) of the Equality Act. Our finding above is that the claimant complained about bullying and harassment and that he made the link between that bullying and his past relationship of a sexual nature with FP. We also found that the claimant said at the grievance hearing that the bullying and harassment might be a form of sexual harassment because of the past relationship. This is

enough on our finding to amount to an allegation that FP had contravened the Equality Act 2010 and we find that the claimant did a protected act on 27 November 2011."

26. At the same time the severe financial and organisational crisis with the problems and organisational difficulties mentioned above continued. A restructure was proposed because of the considerable financial problems and the pressing need to reduce costs. The tribunal found in its decision that the organisation was badly managed, there was poor supervision of the claimant, and that the claimant himself had poorly managed those who reported to him.

27. The Personnel Subcommittee of the trustees produced a document in November 2011 with a proposed restructure. In relation to the claimant's post, the proposed restructure was for the post to be deleted but for the post-holder, in other words the claimant, to be redeployed to become operations manager. The tribunal found that the intention at that stage was to delete the claimant's current role but to redeploy him into the newly created role.

28. The respondent then appointed Mr Davidson as an interim CEO in December 2011, and he was expected to implement a restructure and ensure greater compliance, accountability and efficiency for a period of six months until June 2012 when he then left.

29. Meanwhile, Ms FP, the substantive CEO post holder, was off sick for six months from 16 December 2011 until June 2012, when she then returned. There was a two-week overlap between her and Mr Davidson when he then left. FP also left the organisation at the end of 2012.

30. Mr Davidson commenced his task, once appointed, in December, and engaged in a restructure exercise and a consultation process in January and February of 2012. The tribunal found that the claimant did not engage in that process.

"The restructure proposal

75. On 10 February 2012 Mr Davidson wrote to the claimant (page 277) informing him of

the propose restructure. The letter enclosed the restructuring document proposal and a question and answer document to help set the context. Feedback was sought on the proposals by 24 February 2012 and the claimant was informed that feedback would be provided at a face-to-face meeting on the evening of Monday, 27 February 2012. The letter explained that at this meeting Mr Davidson would present an overview and there would be an opportunity to raise further questions. The letter said in bold, that all staff and volunteers were invited to the meeting.

76. The claimant did not attend this meeting on 27 February 2012 which was held between 6pm and 7:55pm (notes page 282-288). He said it was because all staff were there that he had to "hold the fort" and answer the telephone. Mr Davidson said that the meeting had deliberately been arranged after business hours so that all staff could attend and Ms Harris's evidence was that unusually all three branches of the respondent CAB were closed to allow this important meeting to take place with all staff.

77. The claimant also said that he did not attend because he already knew about the proposals and the meeting would not tell him anything he did not already know. Ms Harris's evidence was that it was important for him to attend to hear what others said and potentially to answer questions from the members of staff who reported to him. We prefer the respondent's evidence as Mr Davidson and Ms Harris corroborated one another and the meeting was held outside business hours. We find that it was the claimant's choice not to attend the meeting; all staff were invited and arrangements were made to allow them to attend and had he wished to attend, he was not prevented from doing so.

78. On 9 March 2012 the Trustee Board Chair Mr Mark Nelson wrote to all staff including the claimant regarding the restructure. The letter enclosed a briefing following the meeting on 27 February 2012. Mr Nelson informed the staff that they would be proceeding with a restructure as they believed it would deliver the benefits necessary to secure the future of the respondent. Mr Nelsons said that the Board had decided that they would not implement

a more robust and sustainable business structure. The letter was signed by Mr Davidson. On the same date, Mr Nelson sent a letter to the claimant refusing his request for a salary uplift. The letter was emailed to the claimants by Mr Davidson.

Consultation process

79. The claimant was invited to a meeting on 12 March 2012. By way of consultation in that meeting, the claimant suggested that he should either be assimilated into the newly created post of Business Manager or the junior post of Volunteer Development Manager. The claimant considered that the newly created post of Business Manager was suitable alternative employment because it was an amalgamation of his post of Specialist Services Manager and that of Operations Manager. The claimant considered it unfair and unreasonable that he should have to undergo competitive selection for the Business Manager's role.

80. The claimant was on leave in March and went of sick in April 2012. He did not return until 9 July 2012.

81. On 16 March 2012 the claimant appealed the decision not to increase his salary (299). The appeal was considered by Mr Nelson who wrote to the claimant on 14 April 2012, again the letter was signed by Mr Davidson. The salary increase was refused because the view was the claimant had failed to provide hard evidence that he had been fulfilling the Operations Manager's role (page 328a)."

31. The claimant was sent proposals about the restructure on 10 February and asked for his feedback. The proposal was that the claimant's post would be deleted and that a new post of business manager post would be created at the same level as the claimant's then current role. Amongst other proposals a more junior post of volunteer development manager was also proposed. The claimant failed to respond either generally or as specifically concerned him and provided no feedback on the proposals. All staff were encouraged to attend an all-staff meeting -- it was set out in bold and capital letters in the invitation letter -- especially arranged at a

time so that all staff and volunteers could attend, with all three branches of the CAB being closed while the meeting was taking place expressly for that purpose. The claimant however did not attend that meeting, and when asked for an explanation by Mr Davidson, he said that he had not attended because he needed to "hold the fort".

32. That explanation was not accepted by the tribunal, nor indeed by Mr Davidson, because as they explain in paragraph 77, the meeting had been especially arranged so that none of the offices would be open at that time, and the explanation given by the claimant to the tribunal about why he did not attend that meeting was because he said he already knew about it and he would not learn anything and nothing to do with holding the fort.

33. There was then either a one-to-one or small-group meeting on 12 March 2012 with Mr Davidson, where the claimant stated that he should be assimilated into the newly created post of business manager or the more junior post of volunteer development manager, and he said to Mr Davidson that he considered it to be both unfair and unreasonable that he would have to undergo a competitive selection for the post.

34. Meanwhile the claimant's request for a temporary pay increase remained a live concern. The claimant was informed at the 12 March meeting with Mr Davidson about the restructure that his request for a temporary pay rise was refused, as he had not provided hard evidence that he had been filling the operation manager's role. Just one week later after that meeting on 19 March 2012, Mr Davidson sent an email to a fellow trustee, Mr Gold, setting out his thoughts, which the tribunal referred to at paragraphs 27 and 28 of their judgment:

> "27. The claimant took us, in his written submission, to page 303 of the bundle, an email dated 19 March 2012, in which Mr Davidson said to the Trustee, Mr Gold, on the subject of "*Depleted Reserves …*" that he had made a number of assumptions, one of which was -- "*we lose PM in Apr but retain additional staff costs for ... [others]*". There was no option or assumption in that email of retaining the claimant and the cost consequences of this. The plans were based on "losing" the claimant in April."

> 28. The claimant submits that this email shows a prior decision to dismiss him, and we agree. This email of 19 March 2012 was sent before the claimant had been sent the Job Description and Person Specification for the newly created Business Manager role. It was on 23 March 2012 (letter page 310) that the claimant was invited to interview for this role, which was to take place on 4 April 2012. On 19 March 2012, Mr Davidson had already plans based on an assumption that the claimant would not remain in post. We find that the decision to dismiss was made no later than 19 March 2012. We make further findings below as to the reason for dismissal."

35. The significant point about it is that the tribunal found that the concluded view of Mr Davidson at that point was that the claimant would be dismissed in April and that all the plans thereafter were predicated on the claimant no longer being an employee and not remaining at the organisation, either his current role or any other role. A classic fair accompli in other words.

36. The claimant in this appeal adopts and stands by these paragraphs in the tribunal's decision in his response to the appeal. What the claimant's case effectively was is that on the tribunal's finding that it was a "done deal" on 19 March 2012 as evidenced by the email from Mr Davidson, everything thereafter was a sham. I can therefore take the subsequent events more briefly.

37. The claimant was invited to apply for the business manager role. He objected to not being automatically slotted in but reluctantly agreed to a telephone interview, which took place on 4 April, but he did not wish to come into the office for it. He received a risk of redundancy letter on 18 April. He was informed that he had not been shortlisted for the business manager role on 23 May 2012 and then received notice of redundancy on 28 May 2012.

38. However the redundancy was put on hold at that stage because the claimant was off sick, having commenced a period of sick leave sometime in April (the date is not specified in the tribunal decision, either the 2017 decision (see paragraph 80) or the 2020 decision (see paragraph 24) but is immaterial for the purposes

of this appeal) and did not return from sick leave until 9 July 2012. Both the redundancy process and his dispute as to whether he should be slotted into the business manager role was put on hold whilst he was off sick.

39. The claimant returned to work on 9 July 2012. He was interviewed on 25 July 2012 and was unsuccessful. On 14 August 2012, he was sent a letter signed by FP (by now back in post) saying that he was being dismissed by reason of redundancy. The claimant appealed that letter on 21 September 2012, and the appeal was purportedly considered by Ms Harris. He received the appeal outcome letter on 7 December 2012, when his appeal was rejected. The tribunal found that the appeal was not dealt with at all professionally by the respondent, and Ms Harris appeared unaware of what decision was being appealed or what the grounds of appeal were and was not able to assist with the respondent's pleaded case.

40. The claimant has accepted all along that his post was deleted and that it was necessary for his post to be deleted in the restructure. His complaint was about not being slotted into the business manager role, as he saw it as the same role that he was doing already: it constituted suitable alternative employment. Initially, the respondent had challenged the claimant's assertion, but during the hearing before the ET in 2017, the respondent conceded that the post should have been offered to him on a trial period for three months. I was puzzled by the reference to three months, because under the statutory provisions a 28-day trial period of available suitable alternative employment is required, but perhaps there is something in the contract about three months or a redundancy policy. Its period of time may not be important, but what was important was that the respondent made the concession that the claimant should have been given a trial period in the business manager role.

41. The tribunal in 2017 accepted that the respondent had established that there was a genuine redundancy situation and that the claimant was dismissed for a redundancy reason, thus satisfying the test in s.98(2) ERA 1996. But the tension between the concession that the business manager role was suitable alternative employment and that he should have been offered the role on a trial period and the redundancy finding led to the claimant's third appeal before this tribunal and its conclusion that the case should be remitted back for reconsideration of the dismissal decision.

42. In relation to disability, the second tribunal decision which found that the claimant was disabled is not in the bundle, and I am not aware of the details of the impairment – possibly tinnitus or a shoulder problem - found nor the effect of the impairment on the claimant's normal day to day activities and it was agreed by the parties that it was not relevant for the purposes of this appeal.

43. The date of knowledge of disability was found by the tribunal to be before the date of dismissal of 14 August 2012. The tribunal found that the claimant had spelt out the problems with his shoulder in July 2012, and referred to an email that the claimant sent to Mr Davidson on 10 January 2012 about a very serious pain (in paragraph 103 of the 2017 decision). The email said:

> "*You may not be aware, but since May of last year I have had a constant unbearable discomfort that is constantly shooting pain from my neck into my left arm and shoulder setting; I'm currently taking medication for this but the pain is constant and sometimes unbearable.*"

So, the tribunal found that Mr Davidson had read that email but did not make a finding about the precise date of knowledge as follows:

> "104. This email alerted Mr Davidson to the fact that the shoulder condition had persisted at that stage for eight months and that the claimant was in considerable discomfort and taking medication for the pain which was sometimes on bearable.
>
> 105. In relation to the claimant's absence sickness, we adopt the findings of the tribunal in the case between the same parties, case number 2302813/2015, paragraph 5. The claimant had two significant periods of absence during his employment, the first being in 2010 for a period from 9 November 2009 to 10 January 2010. The second period was in 2012 due to pain with his shoulder and subsequently due to a hearing impairment. The tribunal in case number 2302813/2015 found that in 2012 the claimant was off sick for 63 working

days due to his disability from 4 April to 8 July 2012. By the date of the claimant's dismissal in August 2012, the shoulder condition has lasted for more than 12 months. We saw his sick notes in the bundle from pages 30 to 32."

44. When the same tribunal considered the matter again in 2020 on remission back, it faithfully set out what it had been ordered to do by this tribunal as set out in their judgment at paragraph 3:

"The terms of the remission were set out in the EAT's Order made on 4 July 2019 as follows:

The ET is to reconsider the question: what was the real reason for the claimant's dismissal? In determining that question, the ET will need to decide: who made that decision and when. It will need to keep in mind that the existence of a redundancy situation is not determinative of the question whether the claimant was dismissed by reason of redundancy -- a question that will need to be answered in the light of the statutory definition (section 139 Employment Rights Act 1996) and upon the determination of what was in the mind of the decision taker at the relevant time. In this case, the ET will need to engage with the question whether the business manager position was in fact substantially the same as the claimant's post, such as to counter the suggestion that there was a diminishing need for employees to carry out work of the particular kind the claimant was employed to do. Even if it is found that the position was not simply the claimant's role under a different title, the ET will need to determine why it had then been decided that the claimant would not be permitted to trial the role when it was conceded before the ET that this should have been done? Was this by reason of his protected act, his protected disclosure or by reason of disability discrimination (direct or under section 15 Equality Act 2010). As the parties agree, there is no need for the ET to revisit the other findings of fact already made or the conclusions that are undisturbed by the EAT's Judgment on this appeal."

The 2020 tribunal was thus asked to focus on the issue of the real reason for the claimant's dismissal.

45. On revisiting the evidence and considering the further submissions of both parties on the evidence previously before it, the tribunal found, firstly that the claimant's position was not redundant (see paragraph 38). The business manager position was all the claimant's role, so there was no diminution in the requirement for employees to carry out work of a particular kind (s.139(b)(i) ERA 1996). The import of the tribunal's decision is that it was the same job in all but name. Secondly, that it had been Mr Davidson who had taken the decision that the claimant be dismissed. He had been engaged as the interim CEO to devise the strategy and take the tough decisions to ensure the survival of the organisation so that it would meet the audit requirements. So, even though he left at the end of June 2012 after the two-week handover when FP returned, everything thereafter was the implementation of decisions made by Mr Davidson.

46. The fact the dismissal decision was set in stone by Mr Davidson in March 2012 explained the respondent's conscious decision not to progress the grievance or address the claimant's performance issues. There was no need when the decision had been made that the claimant would be dismissed anyway, so it explained all the subsequent actions of the respondent. The tribunal found the primary reason for dismissal, which it set out in paragraph 71 and 72 as follows:

> "71. There was a PM [a reference to the claimant by his initials] Strategy towards dismissal. They chose not to refer him to OH because they did not wish to give the claimant the impression that they may be prepared to engage with reasonable adjustments and thus retain him. They did not wish him to "misconstrue" the referral. They did not intend to consider the extent to which his ill health and therefore his disability may have impacted upon his performance or engagement. The reason the claimant was not engaging with the redundancy process was, as we have found above, because he was off sick with a disability related condition. We therefore find that the claimant's disability had a significant and substantial influence on the decision to dismiss. We therefore find that he was dismissed both because of his disability and because of something arising from his disability, namely his absence.

> 72. In wider terms the respondent did not wish to deal with the managerial issues raised by the claimant's continued employment, had he been allowed to trial and succeed in the new role. Those managerial issues also included his grievance which we found to be both a protected act and a protected disclosure. We find that the primary reason for the dismissal was their view that he lacked capability and engagement which they did not wish to manage, for example with an OH referral which we find was a disability related reason."

47. In summary, the tribunal found that the primary reason for the claimant's dismissal was the respondent's view that he lacked capability and engagement, which they did not wish to manage, and that the decision had been made on 19 March by Mr Davidson. So, the primary reason for dismissal was the non-engagement and lack of capability. They then went on to find that there was both direct disability discrimination and section 15 discrimination, because the claimant's disability had a significant and substantial influence on the decision to dismiss.

48. The tribunal then went on at paragraph 73 to say:

> "73. If we are wrong about this, we find that the need to deal with the grievance which was a protected act and a protected disclosure, was a further reason for his dismissal."

49. Paragraph 74 deals with the burden of proof and found that the claimant had established a *prima facie* case that the respondent had not disproved:

> "74. We find that the claimant established a prima case of discrimination because there was the concession on the failure to allow him to trial the role when he was off sick and this was attributed as failing to engage. He had never been appraised or told of any poor performance, yet we were told that his poor performance was the reason for dismissing him. The burden of proof passed to the respondent and as our findings above show, they did not provide a non-discriminatory explanation for their treatment of the claimant."

Those were the findings of the tribunal in both 2017 and as augmented in 2020.

Grounds of Appeal

50. Grounds 1, 3 and 4 principally challenge the tribunal's findings of fact, while grounds 2, 5, 6 and 7 are matters of law. During the course of yesterday's hearing, both parties applied to amend their grounds of appeal and response, and having seen in writing the terms of both amendments sought, both parties very sensibly each consented to the other's proposed amendment.

51. The respondent's amendment was to add an alternative position that if the decision to dismiss the claimant taken in March 2012 was because of the claimant's failure to engage, that decision cannot have been discriminatory because, firstly, pre 19 March 2012 failure to engage did not arise in consequence of the claimant's disability; and secondly, the respondent did not have knowledge of the claimant's disability until he went off sick in April 2012.

52. The claimant's amendment was to argue that paragraph 73 is not an alternative finding since it is clear from the overall readings of the ET that its intention in respect of its judgment is that the claimant's case in respect of victimisation and whistleblowing succeeded in any event. Both those amendments were granted, and I have considered both those points.

Appeal grounds 1, 3 and 4

53. Grounds 1, 3 and 4 naturally fall to be dealt with together. The argument in ground 1 - was the finding of the dismissal decision being predetermined and made on 19 March 2012 inconsistent with the finding of direct discrimination and discrimination arising from disability - goes like this: if the dismissal decision was made on 19 March, for the reason (and when I say reason, I mean the set of facts known to the employer up to that point) cannot have been the claimant’s failure to engage in a redundancy consultation process, because that took place after 19 March 2012. I have set out in the chronology above that the at-risk-of-redundancy letter was sent out in April, and I have set out the respondent's alternate position in relation to 19 March, which is in its amendment. Mr Kohanzad made powerful submissions in support of his contention.

54. The claimant's submission was simply this: the 19 March 2012 date was a finding of fact that the respondent could not seek to go behind, and the tribunal's decision should have primacy. Again, I am grateful for the powerful and articulate arguments from the claimant.

55. Ground 3 challenges the tribunal's finding as to who was the dismissal decision-maker. The respondent submits that the tribunal conflated the role of Mr Davidson as the deviser of the strategy to ensure the claimant's dismissal with the identity of the dismissal decision maker, who was not necessarily the same person. Mr Kohanzad said that Mr Davidson cannot have been the decision taker, because Ms FP, was the author and signatory of the dismissal letter when Mr Davidson was no longer employed. So, it simply cannot have been him.

56. The claimant once again relies on the tribunal's decision, which he submits was a clear finding of fact that Mr Davidson was the decision-maker.

57. Ground 4 seeks to challenge the reason for dismissal. The respondent's submission is that it follows from ground 3 that the reason reached by the tribunal must be flawed, because if the decision was not taken by Mr Davidson but by Ms FP, then the discrimination claim must fail and the tribunal had failed to make any findings concerning Ms FP, relying on **CLFIS UK Limited v Reynolds** [2015] EWCA Civ 439, paragraph 36:

> "36. In my view the composite approach is unacceptable in principle. I believe that it is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act he is responsible has done an act which satisfies the definition of discrimination. That means that the individual employee who did the act complained of must himself have been motivated by the protected characteristic. I see no basis on which his act can be said to be discriminatory on the basis of someone else's motivation. If it were otherwise very unfair consequences would follow. I can see the attraction, even if it is rather rough-and-ready, of putting X's act and Y's motivation together for the purpose of rendering E liable: after all, he is the employer of

> both. But the trouble is that, because of the way the Regulations work, rendering E liable would make X liable too: see the analysis at para. 13 above. To spell it out:
>
> (a) E would be liable for X's act of dismissing C because X did the act in the course of his employment and – assuming we are applying the composite approach – that act was influenced by Y's discriminatorily-motivated report.
>
> (b) X would be an employee for whose discriminatory act E was liable under regulation 25 and would accordingly be deemed by regulation 26 (2) to have aided the doing of that act and would be personally liable.
>
> It would be quite unjust for X to be liable to C where he personally was innocent of any discriminatory motivation."

Since the tribunal had failed to make any findings concerning Ms FP, the conclusion of discrimination must fall away it was argued.

58. The claimant again relies on the tribunal decision saying the reason for dismissal is a finding of fact, it cannot be challenged, and the respondent has not satisfied the high hurdle of the perversity test in order to undermine that finding of fact.

Conclusions grounds 1, 3 and 4

59. My conclusions on grounds 1, 3 and 4 are as follows. There is no contradiction between the evidence that Mr Davidson was no longer the interim CEO when either the dismissal letter was sent to the claimant or when the claimant was informed of the appeal outcome, and of Mr Davidson having been the decision taker. It is apparent from paragraphs 69 to 74 of the tribunal's careful judgment that they accepted the respondent's evidence that they did not have confidence in the claimant's capabilities, nor his commitment, and the evidence of lack of commitment was apparent long before 19 March 2012 on the tribunal's findings of fact when Mr Davidson made the decision that the claimant would be dismissed. For example, the failure to respond to the

proposal letter in February 2012, the failure to attend the redundancy consultation meeting and giving a very questionable reason for not doing so. He had effectively refused to engage with the redundancy consultation process from the outset, even though he was one of only two members of the senior management team by that time. When I ask myself the question: are there sufficient findings based on the evidence from which the tribunal could reach that conclusion, the answer is yes. I agree with the claimant that there are and the tribunal was entitled to reach that conclusion.

60. Mr Kohanzad was skilful in his identification of each reference to lack of engagement in both tribunal decisions, and he is right to identify, that the pattern continued after 19 March 2012 and there are many examples that the tribunal has relied on post 19 March. But even if they had used those post 19 March examples to reinforce their conclusion, it is not the basis of their conclusion. There was an evidential basis and legitimate findings of fact for the tribunal to conclude that the dismissal decision was made on or by 19 March 2012 by Mr Davidson.

61. Mr Davidson was brought in to devise and decide a restructure to ensure the survival of the CAB. The stakes were high, if one thinks about the role of a CAB and the risk of the operation going into insolvency or administration and the loss to all the service users from that. The tribunal finding is effectively that from 19 March, the plan was set in stone, and everything else that followed is a rubber stamp, mere implementation not decision making. The ET was best placed to understand the motivation and fact of that decision, and in effect concluded that there was no further decision or independent decision maker thereafter. The fact that there are further examples of lack of engagement post 19 March do not undermine the tribunal's findings about 19 March.

62. The submission also overlooks the clear findings of fact by the tribunal that Mr Davidson made the decisions on the restructure and future shape of the organisation. It is what he had been engaged to do, and he took the material decisions. What happened thereafter was merely following through, and as already stated, merely rubberstamping of those decisions. It is well illustrated by the respondent's approach to the appeal procedure, much criticised by the tribunal, when Ms Harris was unable to explain what decision was being appealed, who made it and why the appeal had been rejected by her. Her evidence is perfectly explained by

the dismissal having been decided upon many months previously.

63. The findings that Mr Davidson was not a neutral attendee at various meetings after 19 March 2012, again very articulately relied on by Mr Kohanzad, do not support his argument. It simply demonstrates that Mr Davidson was making sure that the decisions that he had made were implemented and the trustees and others all agreed with him. It therefore follows that the tribunal has not been perverse in its approach to the evidence.

64. Grounds 3 and 4 - the correct decision-maker, and the reason for dismissal - are intertwined. They were findings of fact that the Tribunal was entitled to make on the evidence before it. Who made the decision to dismiss? It was Mr Davidson, because he devised the strategy and ensured its adoption by the organisation. There was no independent thought or decision-making thereafter when letters were sent, such as the dismissal letter or appeal outcome letters.

65. The delay in the implementation of the strategy was merely because of the claimant's absence on sick leave and does not alter the fact that the decision was made by Mr Davidson and it was merely followed through, by others, after he had left.

66. For the same reason as ground 3, ground 4(2) must fail. It is asserted that Mr Davidson could not be the decision-maker since he had left and that because Mr Davidson had left, and because he could not have been the decision-maker, the tribunal had therefore failed to consider the motivation of the actual decision-maker since the tribunal had not identified who that person was. However, that challenge must fail on two grounds: firstly, because the finding of fact is unimpeachable (Mr Davidson was the decision-maker); but secondly, even if it could be said that Ms FP was the decision maker or that Ms Harris was the appeal decision-maker, if that was the case, which I reject as a primary contention, even if that was right, the reason for their decision was because they were following Mr Davidson's strategy. That reason provides a complete answer to why the dismissal letter was sent and provides a seamless link back to Mr Davidson's decision.

67. Mr Kohanzad pointed to what he said was a tension between the case of **Jhuti v Royal Mail** [2019]

UKSC 55 and **Reynolds**, which he said was an important principle which should perhaps be resolved by the Supreme Court. I am not sure that I agree, but in this case he cannot go behind the tribunal's express and clear factual findings, and the point is academic in this case. In any event the factual premise in this case is entirely different to either **Jhuti** or **Reynolds**.

68. In **Jhuti**, the mischief sought to be addressed was deceit at an earlier stage in the dismissal process, so that unbeknownst to the decision-taker (who dismissed Ms Jhuti) he had made his decision on an erroneous factual basis because of the deceit of the other manager, and the Supreme Court understandably considered that the respondent should be held liable even though the individual decision taker was not personally at fault. That is not the case here, where everyone was in the loop.

69. In **Reynolds**, it was found that the individual who did the act complained of must him or herself have been motivated by the protected characteristic. In this case, the act complained of (the decision to dismiss) was made by Mr Davidson and the tribunal carefully analysed his motivation.

70. It therefore follows that I reject the appeal on grounds 1, 3 and 4 which are dismissed.

Grounds 2 and 5.

71. I will now take grounds 2 and 5 together, which are the challenge to the legal analysis of the tribunal to both direct disability discrimination and section 15 discrimination.

72. I shall deal with the respondent's amended ground first, since they have failed on their challenge to the findings of fact in grounds 1, 3 and 4. The argument is firstly that the claimant's failure to engage pre 19 March 2012 when the dismissal decision was taken cannot have arisen in consequence of disability and nor can it be direct discrimination as he was not a disabled person within the statutory definition before April 2012, and secondly, because it pre-dated the respondent's date of knowledge for section 15 EqA 2010 discrimination. The claimant once again relies on the reasoning of the ET and submits that paragraphs 71 and 72 in their judgment cannot be faulted for the reasons that they set out.

73. I agree with the respondent's submission that if one looks at the facts found pre-19 March 2012, it does not appear to sustain a conclusion of the dismissal decision being tainted with direct disability discrimination or s.15 discrimination. There is no connection in the tribunal's findings between the non-engagement and performance issues pre-19 March and disability. Although there is mention of a painful shoulder in January 2010, it is not linked to the failure to attend the all-staff meeting, the failure to provide feedback, or the assertion that there should be automatic slotting-in to the business manager role. Furthermore, it is also inconsistent with a claim for a temporary pay rise on the basis that the claimant is doing not only his own, but also the operation manager's, role.

74. The respondent's submissions in the alternative ground relied on must prevail, because in the reasons in paragraphs 71 to 72, the disability findings are all based on the period from April to July 2012 when the claimant was not at work and after the dismissal decision had been taken.

75. The respondent's challenge to those conclusions must succeed and the tribunal decision cannot stand. There was no evidence, or certainly no findings, to support the conclusion that there was disability related discrimination and direct discrimination in a decision made on 19 March 2012.

76. In case I am wrong in the primary conclusion and for the sake of completeness, I will next deal with the alternative bases put forward by the respondent in its original grounds. Firstly, it is alleged that there was an error of law in the approach to direct discrimination. The rationale for accepting the claimant's direct discrimination allegation was that because his sickness absence arose in consequence of his disability, his absence had a significant and substantial influence on the decision to dismiss the claimant, and therefore the tribunal found he was dismissed because of his disability. That is not a correct understanding of the definition of direct discrimination (see for example paragraphs 61 to 74 of **Chief Constable of Norfolk v Coffey** [2019] EWCA Civ 1061 and the tribunal has conflated the fact of disability with the consequences of disability – as observed by Underhill LJ in paragraph 74 of his judgment in **Coffey** the correct cause of action in such claims is s.15, not s.13. If, therefore, I am wrong on the principal challenge (that there was no evidence that the claimant's lack of engagement and performance issues were connected to disability), the direct discrimination finding cannot stand in any event, as there is no factual basis for the contention that the dismissal was because

of disability.

77. The second challenge in the alternative by the respondent is to s.15 discrimination and that the tribunal omitted to consider the justification defence in section 15(1)(b) and therefore failed to consider whether the dismissal was a proportionate means of achieving a legitimate aim.

78. I agree that it does appear that the tribunal has not addressed the issues it was required to address in s.15(1)(b) EqA 2010 in its reasons. I cannot accept the claimant's submission that looked at holistically, it must have been on the tribunal's mind and they would have thought about it. It appears that the tribunal have overlooked the matter and not set out its conclusions on both whether the respondent had established a legitimate aim nor its conclusions on the issue of proportionate means. With respect to the tribunal, I do not consider that paragraph 74 of their judgment sufficiently addresses the issue.

79. I have read the submissions before the tribunal produced by the respondent, which address the issue of section 15(1)(b) at page 147 of the bundle, question 3, "ALTERNATIVELY, Was the unfavourable treatment a proportionate means of achieving a legitimate aim?" The respondent says:

> "A3. Yes - R needed to ensure that the organisation could survive with proper management and committed staff willing to go the extra mile - it was in the bottom 3% of CAB in the UK and was in special measures, about to close making 20+ staff redundant."
>
> Q4. Was there alternative measure the respondent could have taken?
>
> A. No, the claimant had refused to engage with the crisis showing no commitment, and the claimant had not provided any evidence of his capabilities, despite being asked on numerous occasions by S N [sic], [which I assume is a reference to S D, in other words, Mr Davidson]."

80. The tribunal have not addressed these questions and appears to have taken its eye momentarily off the

ball. That is a matter that they would need to consider, and it would need to be remitted back to them for consideration, but only if I am wrong in my primary contention relating to 19 March 2012.

Grounds 6 and 7

81. I shall take grounds 6 and 7 together, which is the challenge to the findings in paragraph 73 whistleblowing dismissal and victimisation findings. I have already stated that I have allowed the claimant's amendment (with the respondent's consent) to argue that this is not a finding in the alternative, so there are two issues: is it an alternative finding and did the tribunal approach the matter correctly.

82. The tribunal said:

> "73. If we are wrong about this [referring to the finding of disability discrimination dismissal], we find that the need to deal with the grievance, which was a protected act and protected disclosure, was a further reason for his dismissal."

83. In the actual judgment of the tribunal on page 1 of its decision (as opposed to the reasons for the tribunal's judgment), the tribunal only state that they had found there to be unfair dismissal and disability discrimination. There is no mention of victimisation, nor public interest disclosure and it thus follows that the tribunal have not upheld the complaints under s.27 EqA 2010 or automatic unfair dismissal for the reason of public interest disclosure (s.103A ERA 1996) as a primary conclusiion. So, it would appear that this is indeed an alternative finding, even though there is some tension between the phrase, "If we are wrong about this" and "a further reason" in paragraph 73. I am therefore satisfied that the tribunal have not found as a primary finding that there was a protected disclosure dismissal or a victimisation dismissal.

84. The claimant has not brought a cross-appeal so in a sense, there is nothing for the respondent to respond to. But the issue may arise in consequence of my allowing the respondent's appeal against the findings of section 13 and 15, since that is when an alternative scenario may come into play.

85. The respondent's submission was that the statutory wording of section 103A in relation to protected

interest disclosure is inconsistent with the finding of fact on the tribunal's reasons for dismissal, so it cannot stand, and secondly, that the lack of reasoning on victimisation coupled with inconsistent findings (going back to paragraphs 71 and 72) also mean a victimisation finding cannot stand and should therefore not be reopened in the remission back on s.13 and s15 EqA 2010.

86. The claimant submits that the tribunal was clearly troubled by the treatment of his grievance and that a number of its findings of fact in both decisions express that concern. He submits that since the tribunal has found, in the alternative, that his grievance is a further reason for dismissal, now that the disability discrimination finding has been set aside, the findings in paragraph 73 now take centre stage.

87. Dealing firstly with section 103A ERA 1996,

> "103A. Protected disclosure
>
> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, on the principal reason) for the dismissal is that the employee made a protected disclosure."

Therefore the protected disclosure must be the reason or principal reason for dismissal. Since I have upheld the tribunal's factual finding that the primary reason for dismissal, as they have called it, was the respondent's view that the claimant lacked capability and engagement, it must follow that the principal reason for dismissal cannot be the protected interest disclosure. The two simply do not marry up. The claimant's submission fails and there is no need for the tribunal to consider the matter further on remission back.

88. In relation to victimisation complaints, the wording of the statute is different in s.27 EqA 2010. Victimisation need not be the sole or the principal reason for the act of discrimination complaint or act of victimisation complained of. The subjection of a complainant to a detriment must be "because of" the protected act. The question of causation is whether victimisation had a significant influence (**Nagarajan v London Regional Transport** [1999] IRLR 572) on the less favourable treatment or whether, but for the protected act, the dismissal or detriment would not have happened (see **Ahmed v Amnesty International** [2009]

UKEAT/0447/08 and more recently Linden J in **Gould v St John's Downshire Hill** [2020] IRLR 863).

89. At the end of a very long hearing, with a sprawling mass of complaints and the raising of many procedural issues necessitating a long judgment, in an understandable momentary oversight in what was a subsidiary, alternative finding, I conclude that the tribunal have not fully engaged with the victimisation issue, and it is unclear on what basis they reached their conclusion.

90. In summary therefore the appeal is allowed in part. The finding of disability discrimination, both section 15 and section 13, must be set aside and revoked. The matter must go back for reconsideration on the narrow grounds on which the respondent has been successful. The tribunal may also need to revisit its approach to victimisation, which, depending on its conclusions on disability discrimination, may need to come into play. The precise scope of the terms of remission will be set out in a separate order.

91. Following the guidance in **Sinclair, Roche & Temperley v Heard** [2004] IRLR 763, the case should be remitted to the same tribunal who will be well able to assess the evidence from the previous hearings in a fair and impartial manner with their customary professionalism on the narrow points identified and it would wholly disproportionate to remit to a fresh tribunal.