Neutral Citation Number: [2024] EAT 197

Case No: EA-2021-SCO-000058-SH

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street, Edinburgh EH3 7HF

Date: 12 December 2024

Before:

THE HONOURABLE LORD FAIRLEY

Between:

MR MALCOLM FORD

Appellant

- and -

THE SCOTTISH MINISTERS

Respondent

- -
- -

Mr Mark Allison, Advocate (instructed by Livingstone Brown) for the **Appellant**
Dr Andrew Gibson, Solicitor (Morton Fraser MacRoberts LLP) for the **Respondent**

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Hearing date: 27 August 2024

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JUDGMENT

SUMMARY

Public interest disclosures – detriment – causation

Unfair dismissal – "reason" for the dismissal – connection to protected discosures

The appellant was dismissed for the stated reason of misconduct. He made an application to the Employment Tribunal in which he claimed *inter alia* that he had been subjected to detriment on the ground of having made protected disclosures (section 47B of the **Employment Rights Act, 1996**) and that he had been unfairly dismissed (sections 98 and 103A **ERA**). The tribunal dismissed all of his claims.

Four grounds of appeal were advanced. The appellant submitted that the tribunal had erred in its approach to detriment and causation in relation to two of his section 47B allegations (grounds 1 and 2), and had further erred in finding that his dismissal was fair (grounds 3 and 4).

Held: The criticisms of the tribunal's approach to two of the appellant's section 47A claims were well founded, but no error of law was apparent in the tribunal's approach to the claim of unfair dismissal. The appeal was allowed on grounds 1 and 2 and the case was remitted to the same tribunal to consider the four issues set out at paragraph 59 below. The appeal on grounds 3 and 4 was refused.

The Honourable Lord Fairley:

Introduction

1. The appellant was employed by the Scottish Public Pensions Authority ("SPPA") as a pensions administrator. His employment commenced on 29 April 2002 and ended with his dismissal on 18 June 2019. The stated reason for his dismissal was misconduct.

2. The appellant presented claims to the Employment Tribunal in which he submitted that (i) he had been subjected to detriments on the ground of having made protected disclosures (section 47B **ERA**); and (ii) his dismissal was either automatically unfair in terms of section 103A **ERA** or unfair in terms of section 98 **ERA**. A hearing took place before a full tribunal sitting at Edinburgh over eight days in March 2021 with a further day for deliberations in May of that year. In a reserved Judgment dated 25 May 2021, the tribunal dismissed all of the appellant's claims.

3. Following an amendment of his proposed grounds of appeal at a rule 3(10) hearing, the appellant was permitted to advance four grounds of appeal against the tribunal's decision. Grounds 1 and 2 relate to the issue of detriments on the ground of having made protected disclosures. Grounds 3 and 4 relate respectively to the two claims of unfair dismissal.

4. Before the tribunal, the appellant relied upon a large number of the alleged disclosures and detriments. The following summary of the tribunal's findings of fact and conclusions refers only to matters relevant to the grounds of appeal. For ease of reference, the tribunal's numbering references for the relevant protected disclosures has been retained.

The tribunal's factual findings and conclusions

5. Prior to 2015, the appellant worked in the specialist area of NHS injury benefits. In 2015, the SPPA took over the administration of injury benefits for police officers and firefighters. From 2015, the appellant's area of responsibility was expanded to include police and firefighter injury benefit claims.

6. The appellant formed the view that a number of police injury benefit cases transferred to the SPPA were in a "poor state". Prior to 2013, such cases had been dealt with separately by the eight individual police forces across Scotland. The appellant formed the view that, as a result, there were inconsistencies in the way that the relevant regulations had been applied. These included issues with the treatment of transferred-in service, the instruction of periodical medical examinations of those in receipt of benefit, and checks on the impact of DWP benefits. The appellant and his colleagues identified what they believed to be a number of over and under payments of benefit.

7. On 2 August 2016, the appellant sent an e-mail to a senior manager in which he expressed concern that the SPPA may not have been correctly applying the Police (Injury Benefit) (Scotland) Regulations, 2007. On 4 August 2016, the appellant e-mailed the respondent's Operations Manager, Ms Guthrie, to request a meeting. At the resultant meeting (which took place between 4 and 10 August 2016), the appellant expressed his concerns about the way in which police injury benefit claims were being dealt with (disclosure 1).

8. On 8 December 2016, the appellant had a meeting with the respondent's HR Manager, Ms Heatlie. The meeting was arranged because Ms Guthrie had advised Ms Heatlie that the appellant was unhappy about not having been successful in an application for promotion, and also because he had concerns about how the SPPA was paying certain pensions. Prior to their meeting, the appellant had told Ms Heatlie that he was feeling stressed and anxious. There was insufficient time to conclude the meeting on 8 December and it was therefore continued to 14 December. The outcome was a referral of the appellant to Occupational Health.

Alleged detriment on the ground of disclosure 1

9. On 7 March 2017 the appellant e-mailed Ms Guthrie to repeat his concerns that benefits were still not being paid correctly. At some point prior to 7 March 2017 (the date of which the tribunal was unable to identify) a suggestion seems to have been made by the respondent that the appellant should be moved away from the Injury Benefits team. In his e-mail of 7 March 2017 to Ms Guthrie, the

appellant responded to that suggestion, stating:

> "I would feel unfairly punished and embarrassed to be seconded out of the Injury Team after 16 years. I am genuinely trying to stop the SPPA acting outwith the law and trying my best to stop the SPPA being open to charges of gross negligence and maladministration."

10. The appellant met Ms Guthrie on 8 March 2017. The outcome of that meeting was a decision by Ms Guthrie to take the appellant away from police and firefighter injury benefit work and to place him on a secondment to the NHS awards team. In an e-mail to the appellant dated 9 March 2017, Ms Guthrie stated:

> "You will be undertaking a secondment to NHS awards team until the Police Injury issues raised have been satisfactorily resolved and I think that would be around 4 weeks. NHS awards have a high workload which I am keen to address and you will be assisting that team, alongside other work colleagues who are also helping out from other teams in operations as from Monday. This is not a punishment for bringing your concerns to my attention but is to give you a break from the casework with which you have concerns until they are resolved."

11. Although not mentioned in Ms Guthrie's e-mail, the tribunal found (para. 39) that another reason for the secondment of the appellant was a breakdown in his relationship with his line manager, Ms Scott.

12. The appellant was unhappy at being seconded. He regarded it as a punishment for speaking out about the police injury issues.

13. The tribunal found that concerns expressed by the appellant to Ms Guthrie in August 2016 – that the regulations applicable to police injury benefit claims were not being correctly applied – were protected disclosures (para.138). No cross-appeal against that conclusion is taken in this appeal.

14. On the question of whether the secondment of the appellant out of the Injury Benefit Team was a detriment on the ground of having made the protected disclosures, the tribunal stated:

> "We found that there was a link between the claimant raising the Police issue and being required to move. That was apparent from Ms Guthrie's e-mail to the claimant of 9 March 2017. However, we also found that there was tension between the claimant and his team leader, Ms Scott… It was credible that Ms

> Heatlie was concerned about Ms Scott's health. It was also credible that Ms Guthrie should want to move the claimant away from the casework with which he had concerns. We did not consider the fact of the claimant being required to move to be a detriment."

Disclosure 4

15. The appellant also had concerns about the way in which the firefighter injury benefit scheme was being administered and about an issue described as "final salary linking" (abbreviated to "FSL").

16. In or around the start of 2018, the appellant enlisted the support of an acquaintance, Mr Dunn, to submit an online form in Mr Dunn's name to Audit Scotland. The online form submitted by Mr Dunn referred to an "issue of concern". It was clear from the description of that issue that it related to police and firefighter injury benefits. Although the online form was submitted in the name of Mr Dunn it was, in fact, the appellant who had filled out the online form.

17. Mr Dunn and the appellant then attended a meeting with Audit Scotland on 30 March 2018. It was not clear to the tribunal how and when the appellant came to be invited to that meeting. In the course of the meeting, however, the appellant was spoken to by Audit Scotland separately from Mr Dunn. He outlined his concerns about the police and firefighter issues mentioned in the online form. In addition, he raised concerns about the FSL issue. The appellant and Mr Dunn both understood that Audit Scotland intended to refer the issues that had been raised to a pensions expert.

18. Another meeting was arranged for 19 June 2018 for Audit Scotland to discuss its conclusions with Mr. Dunn and the appellant. In advance of that meeting, Audit Scotland e-mailed Mr. Dunn on 7 June 2018 setting out its conclusions. It found that the SPPA was complying with the relevant legislation in relation to firefighters and FSL. The appellant disagreed, and was concerned that Audit Scotland had failed to consider the police issue.

19. Mr. Dunn and the appellant met Audit Scotland again on 19 June 2018. It does not appear that any new disclosures were made at that meeting. The appellant was clearly dissatisfied with the outcome of the meeting, however, and e-mailed Audit Scotland again on 20 June 2018 to repeat his concerns.

20. Before the tribunal, the appellant relied upon what was said by him at his meeting with Audit Scotland on 30 March 2018 as a protected disclosure. The tribunal found that the things said by the appellant at that meeting were indeed protected disclosures (para. 138). No cross-appeal against that conclusion is taken in this appeal.

Disclosure 5

21. On 13 June 2018, an e-mail was sent in Mr Dunn's name to the First Minister, and to the Cabinet Secretary for Finance, Economy and Fair Work. The e-mail was, in fact, written by the appellant. It referred to the same issues as had been referred to Audit Scotland (disclosure 5). It invited a representative of the Scottish Government to attend the meeting with Audit Scotland which was then scheduled for 19 June 2018.

22. Before the tribunal, the appellant relied upon what was said by him in the e-mail of 13 June 2018 as a protected disclosure. The tribunal found that the e-mail of 13 June 2018 contained protected disclosures (para.138). Again, no cross-appeal against that conclusion is taken in this appeal.

Alleged detriments on the ground of disclosures 4 and 5

23. On 27 February 2019, Ms Heatlie wrote to the appellant to advise him of an investigation into allegations about his conduct. The letter began with a general introduction (quoted by the tribunal at para. 87 of its reasons) as follows:

> "It has been brought to my attention that there are causes for concern over your conduct, which relate to allegations of insubordination; refusal to follow reasonable management instructions; misuse of official information; frustrating the implementation of policies once decisions are taken, by declining to take, or abstaining from, actions which flow from those decisions; and negligence causing financial loss, damage or injury to people."

24. The letter then went on to identify seven specific allegations of alleged misconduct which were to be investigated by an Investigating Officer, Mr Thompson. Only two of those (numbered 2 and 4 in the letter) are of potential relevance to this appeal.

25. Allegation number 2 was expressed in the following terms:

> "On 19 June 2018 you and Mr Dunn met with Audit Scotland and despite previous full internal investigations into your concerns you again reported the same beliefs that errors were being made in relation to public service pensions. Although SPPA remain unaware of the specific conversation you and Mr Dunn had with Audit Scotland, it did provide details of complaints about final salary links and retained firefighters benefits we provided under scheme regulations that were the subject of your previous complaints. SPPA provided a full response to Audit Scotland on 8 August 2018."

26. Allegation 4 was expressed in the following terms:

> "You have falsely accused SPPA of the misuse of public funds and of corruption on a number of occasions and have written to the First Minister and other Scottish ministers under the heading 'Public Pensions Scandal' with complaints that were similar to those fully investigated by SPPA. You have also falsely stated that staff were being required to give false information to members or 'revolt and be disciplined'."

27. Mr Thompson carried out an investigation into all seven of the matters identified in Ms Heatlie's letter of 27 February 2018. The tribunal characterised his investigation as "thorough". Mr Thompson interviewed 14 witnesses, including the appellant and Mr Dunn. He prepared a report which was submitted to Ms Heatlie on 17 April 2019.

28. Before the tribunal, the appellant submitted that the disciplinary investigation into the second and fourth allegations were acts of detriment to which he was subjected on the ground of his having made his fourth and fifth protected disclosures (respectively to Audit Scotland on 30 March 2018 and in his e-mail of 13 June 2018).

29. The tribunal addressed that argument at para. 151 of its reasons, stating:

> "The reason for [the disciplinary] allegations was, in our view, explained in the paragraph from Ms Heatlie's letter to the claimant of 27 February 2019 which we have quoted at paragraph 87 above. It related not to the claimant having made whistleblowing disclosures but to his conduct. In those circumstances we did not regard the initiation of the disciplinary allegations as a detriment on the ground that the claimant had made a protected disclosure."

The disciplinary proceedings and dismissal of the appellant

30. Having received Mr Thompson's report, Ms Heatlie wrote to the appellant on 7 May 2019 setting out a reduced list of four disciplinary charges against him. In contrast to the allegations in the letter of 27 February 2019, none of the charges referred to the appellant's contacts with Audit Scotland.

31. Charge 1 related to the sharing of official information with Mr Dunn and the use of Mr Dunn's identity in e-mail correspondence about the SPPA. Charge 2 related to alleged failures to comply with management instructions and to specific allegations of misinformation about entitlements being provided to pension scheme members to their disadvantage. Neither charge 1 or charge 2 is relevant to this appeal.

32. Charge 3 alleged that the appellant had given false information to colleagues about being punished for not obeying orders and for reporting erroneous and fraudulent payments. Charge 4 related to the terms of an e-mail sent by the appellant to the First Minister and others on 20 September 2018 in which he stated that he had 'no option other than to revolt and be disciplined', and to an e-mail sent by him to the Minister for Public Finance and Digital Economy on 13 December 2018 in which he stated, 'you allow us to be tortured and punished'.

33. A disciplinary hearing took place on 23 May 2019. The disciplinary panel consisted of two people with no previous involvement in the case. The first was Mr Caldwell, the Deputy Head of Area Offices, SG Agricultural Policy Delivery. The other was Ms McFarlane, People Advice and Wellbeing Manager.

34. The conclusion reached by the disciplinary panel was that the allegations of misconduct had been established and that the appropriate disposal was that of summary dismissal.

35. The tribunal noted that the dismissal would only be automatically unfair under section 103A **ERA** if the reason or, if more than one, the principal reason for the dismissal was that the claimant had made a protected disclosure. It found that the appellant was dismissed because of his conduct rather than because he had made protected disclosures.

36. The tribunal was satisfied that the respondent did indeed believe that the appellant had committed the acts of misconduct of which he was accused, that the respondent had reasonable grounds upon which to sustain that belief, that the investigation of the allegations was reasonable, and that dismissal was within the band of reasonable responses.

The grounds of appeal and submissions for the appellant

37. Counsel for the appellant submitted, on ground 1, that the tribunal had conflated the different issues of detriment and causation. In consequence, it had failed properly to address either issue. In relation to the alleged detriment of the March 2017 secondment, there was no explanation as to why the tribunal did not see that act as a detriment. The bare conclusion in the final sentence of paragraph 142 was difficult to understand. Had the tribunal properly applied **Shamoon v. Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285, its reasons would have contained some explanation as to why a reasonable worker would not have taken the view that the secondment was a detriment. As was noted in **The Edinburgh Mela Ltd v. Purnell** UKEAT/0041/19, an unrequested re-assignment is capable of amounting to just that.

38. On the issue of the reason for the secondment, whilst the tribunal had referred in passing (at para. 125) to **Fecitt v. NHS Manchester** [2012] ICR 372, it appeared not to have realised that a "material influence" need only be one that was "more than trivial" (**Fecitt** at para. 45). The tribunal appeared instead to have looked for the principal or "main" reason for the secondment or to have concluded that if other reasons also existed, the materiality test would not be met.

39. In relation to ground 2, similar problems could be seen with the tribunal's approach to the detriment of the disciplinary investigation. On the issue of causation, the tribunal had taken a selective approach to the letter of 27 February 2019, and had failed to notice that two of the seven specific allegations of misconduct appeared to correlate with the fourth and fifth disclosures without raising any apparently separate issues of conduct. Had the tribunal properly applied **Fecitt**, it would have been bound to conclude that that the appellant's fourth and fifth disclosures materially influenced the

decision to commence a disciplinary investigation against him.

40. On ground 3, it was not clear from the tribunal's reasons that it had correctly applied **Kong v. Gulf International Bank (UK) Limited** [2022] EWCA Civ 941 to the issue of severability of conduct from the making of the disclosures themselves. The tribunal's findings contained little analysis of the thought processes of the respondent and no direct consideration of whether or not the alleged conduct issues were truly severable from the first, fourth and fifth disclosures. By analogy with the reasoning in **Smith v. City of Glasgow District Council** 1987 SC (HL) 175, if any part of the respondent's composite reason for dismissal was connected to the making of a protected disclosure, that would make the dismissal automatically unfair.

41. Had the tribunal addressed its mind to that issue, it would have concluded that charge 3 of what ultimately became the disciplinary allegations was, in substance, the same as the appellant's first protected disclosure. The appellant's claim to colleagues that he had been subjected to detriment by being moved out of the injury benefit team was not severable from his first protected disclosure. The tribunal also failed to recognise that charge 4 was predicated upon the appellant's fourth and fifth disclosures. Again, the tribunal had not properly considered severability.

42. On ground 4, even if the making of protected disclosures was not the principal reason for the dismissal and was merely context, any connection between the alleged misconduct and the protected disclosures was a factor which had a bearing upon section 98 fairness. It was conceded, however, that if issues of conduct were truly severable, and if the protected disclosures were correctly assessed as having formed no part of the composite reason for the dismissal, this ground could not succeed.

Respondent's submissions

43. For the respondent, it was submitted on ground 1 that the final sentence of para. 142 of the tribunal's reasons required to be read in context. The context was a finding by the tribunal that was the appellant had told Ms Heatlie that he was feeling stressed and anxious. He was then referred to Occupational Health. In these circumstances, a proper inference as to the tribunal's conclusions was

that it had found that a reasonable worker would not have considered the secondment to be a detriment. The tribunal had not therefore required to consider causation. If, contrary to that primary submission, it had done so, it was wrong to construe its finding that there was "a link" between the appellant raising the police issue and the secondment as meaning that the former had influenced the latter. On the basis of **Aspinall v. MSI Forge Limited** EAT 891/01, the protected disclosure had to be causative in the sense of being "the real reason, the core reason, the *causa causans*, the motive for the treatment complained of".

44. On ground 2, the tribunal had been aware of the whole of the letter of 27 February 2018 and had correctly self-directed on the law. Having done so, it had concluded that the paragraph of Ms Guthrie's letter quoted by it at para. 87 was the core reason for the disciplinary investigation.

45. On ground 3, the conduct referred to in charge 3 of the letter of 7 May 2019 was not the same allegation that was made to Ms Guthrie (disclosure 1). It was connected to that disclosure only in the limited sense that, but for the disclosure, the appellant would not have made the subsequent allegation of detriment. That, however, was a separate issue. Charge 4 in the letter of 7 May 2019 was plainly an issue related only to conduct and not to the making of any protected disclosure recognised by the tribunal.

46. In relation to ground 4, the tribunal had made findings in fact that were open to it and had correctly applied the law to those findings.

Decision and reasons

Ground 1

47. The appellant's criticisms of para. 142 of the tribunal's reasons (ground 1) are well founded. The tribunal concluded that the first disclosure made by the appellant (to Ms Guthrie) was a protected disclosure. On the issue of detriment, however, its reasoning is sparse and difficult to follow. Within a single sentence at the end of para. 142, the tribunal stated that it did not consider that moving the appellant to another team was a detriment. No explanation was given for that conclusion. Being

required to move teams was plainly something with which the appellant was unhappy. Subjectively, he clearly regarded it as a detriment. If the tribunal considered that a reasonable worker would not have so regarded it, it was incumbent upon the tribunal both to say so and to explain why.

48. The remainder of paragraph 142 relates to causation. On the issue of whether the secondment was "on the ground of" the appellant having made the disclosure in question, the tribunal again erred. It found, on the evidence, that one reason for the secondment was the breakdown of the appellant's relationship with Ms Scott. It also stated, however that there was "a link between" the making of the protected disclosure and the decision to move the appellant, and that "it was credible that Ms Guthrie would want to move the claimant away from the casework with which he had concerns". In combination, those passages suggest that even if the protected disclosures were not the only reason (or the principal reason) for the secondment, they influenced the respondent's decision in a way that was material, in the sense of being more than trivial.

49. Although, at para. 125 of its reasons the tribunal made reference in general terms to the **Fecitt** materiality test, it is not clear that it appreciated that for the disclosure to be a material factor it had simply to be "more than trivial". Its reasons at para.142 are, in fact, more consistent with conclusions as to the principal reason for the detriment. Whilst that is the relevant test when considering the reason for a dismissal under section 103A, it is not the relevant test of causation when considering a detriment short of dismissal in terms of section 47B. To the extent that the earlier EAT decision in **Aspinall** might be read as suggesting otherwise, that has been overtaken by what was said in para. 43 of **Fecit**t (per Elias LJ) about the applicability of **Igen Limited v. Wong** [2005] ICR 931 CA to whistleblowing claims.

Ground 2

50. The appellant's second ground is also well founded. In focussing only upon the introductory paragraph of Ms Heatlie's letter of 27 February 2019, the tribunal does not seem to have considered whether either of the specific allegations of misconduct set out later in that letter numbered 2 and 4

respectively was simply a reference to the appellant having made a protected disclosure. If the tribunal did consider that issue in relation to either or both of those two specific allegations, it is not clear what conclusions it reached or why.

51. On the face of allegation number 2 in the letter of 27 February letter 2019, it appears to relate directly and solely to the protected act of the appellant's disclosures to Audit Scotland. Although the allegation refers only to the meeting with Audit Scotland on 19 June 2018, it is tolerably clear that what was being referred to by Ms Heatlie was the appellant's approach to Audit Scotland *per se*. The first part of allegation 4 in the 27 February letter would also seem to be wide enough to include the appellant's e-mail of 13 June 2019.

52. The tribunal does not explain why it considered those to be matters which related only to conduct, and appears not to have noticed the apparent correlation between protected disclosures 4 and 5 on the one hand and allegations 2 and 4 on the other. Again, it is not clear that the tribunal recognised that the **Fecitt** materiality test simply required the influence of the protected disclosure(s) on the relevant act to be "more than trivial".

Ground 3

53. A dismissal will be automatically unfair in terms of section 103A of the **ERA** if the reason (or, if more than one, the principal reason) for the dismissal was that the employee made a protected disclosure. The reason for the dismissal is an issue of fact.

54. Here, the tribunal found that the principal reason for his dismissal was the appellant's conduct rather the making by him of protected disclosures. In coming to that view, it clearly applied the distinction, recognised in **Kong**, between the making of protected disclosure on the one hand and conduct merely associated with or indirectly related to the disclosure on the other.

55. The appellant's submission that charge 3 of the disciplinary allegations in the letter of 7 May 2019 was, in substance, the same as the making of the first disclosure is incorrect. On the tribunal's findings in fact, the first protected disclosure was the information provided by the appellant to Ms

Guthrie. On no view was that the same thing as the appellant's allegations to colleagues that he had been punished for not obeying orders and for reporting erroneous and fraudulent payments by being isolated.

56. The submission that charge 4 was "predicated upon" the appellant's fourth and fifth disclosures is also incorrect. Neither of the e-mails of 20 September or 13 December 2018 was relied upon before the tribunal as a protected disclosure or found by the tribunal to be such. In any event, the tribunal was entitled to conclude that the respondent's issue with those e-mails was not that contained protected disclosures, but that they were expressed in such a way as to give rise to issues of conduct. That is in accordance with the guidance provided in **Kong**, and no error of law is apparent in the tribunal's reasons or in its conclusions.

Ground 4

57. Counsel for the appellant accepted that ground 4 depended upon the protected disclosures having formed some part of the composite reason for the dismissal. As I have concluded that there was no error in the tribunal's conclusion that they did not, ground 4 also fails.

Conclusion and disposal

58. The respondent submitted that if the appeal succeeded in relation to the detriments of the March 2017 secondment and the disciplinary investigation undertaken by Mr Thompson between February and May 2019, the issue of time bar would remain live as the tribunal had expressly not dealt with it (see para. 153). That is correct.

59. That being so, I will allow the appeal only on grounds 1 and 2. I will set aside, in part, the tribunal's Judgment of 25 May 2021 to the extent that it dismissed all of the claims made under section 47B **ERA**. I will thereafter remit to the same tribunal consideration of the following issues:

a) Was the secondment of the claimant in or around March 2017 an act of detriment on the ground that he had made the first protected disclosure?

b) Was the disciplinary investigation undertaken by Mr Thompson between February and May 2019 an act of detriment on the ground that the claimant had made the fourth and fifth protected disclosures?

c) Were the claimant's complaints about either or both of those matters timeously presented to the tribunal in terms of section 48 **ERA**?; and

d) If so, what is the appropriate remedy?

60. The appeal on grounds 3 and 4 is refused.