United Kingdom Employment Appeal Tribunal

BAILII case number: [2010] UKEAT 0150_10_2311
Appeal No. UKEAT/0150/10

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 20 August 2010
Judgment delivered on 23 November 2010

Before

HIS HONOUR JUDGE SEROTA QC

PROFESSOR S R CORBY

MR I EZEKIEL

(1) MS J FECITT
(2) MS A WOODCOCK
(3) MS F HUGHES — APPELLANT

NHS MANCHESTER — RESPONDENT

Transcript of Proceedings

JUDGMENT

REVISED

APPEARANCES

For the Appellants	MR DANIEL BARNETT (of Counsel) Instructed by: Messrs Gorvins Solicitors 2-14 Millgate Stockport Cheshire SK1 2NN
For the Respondent	MR JAMES BOYD (of Counsel) Instructed by: Messrs Hill Dickinson LLP 50 Fountain Street Manchester Lancashire M2 2AS

SUMMARY

VICTIMISATION DISCRIMINATION – Protected disclosure

S.47B of the **Employment Rights Act 1996** provides that "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

In cases where a Claimant has proved that he or she has made a protected disclosure under s.43A and s.47B **Employment Rights Act 1996** and that he or she has subsequently suffered unwanted treatment amounting to a detriment, the Respondent under s.48.2 has the burden of proving on the balance of probabilities, that the relevant act or deliberate failure, was not done on the ground that the worker had made a protected disclosure. In order to satisfy that burden the Respondent must prove that such act or deliberate failure was "in no sense whatsoever" on the grounds that the Claimant had done the protected act; meaning that the protected act played no more than a trivial part in the application of the detriment.

Igen v Wong [2005] IRLR 258 followed; **Aspinall v MSI Mech Forge Limited** [2002] EAT/891/01 and **London Borough of Harrow v Knight** [2003] IRLR 140 not followed.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is an appeal by the Claimants from a decision of the Employment Tribunal at Manchester heard over 12 days. The case was heard before Employment Judge Coles and lay members and the decision was sent to the parties on 4 January 2010. The Employment Tribunal dismissed the Claimants' claims of having suffered a detriment as a result of doing protected acts; see s.43A and s.47B **Employment Rights Act 1996**. There were in fact five separate claims heard together.

2. On 10 March 2010 HHJ Peter Clark referred the matter to a full hearing.

Factual Background

3. We take the factual background largely from the Decision of the Employment Tribunal. In the main, the factual background is not controversial.

4. The Claimants were all employed by the Respondent and were registered nurses. The first Claimant, Ms Fecitt, was a Clinical Co-ordinator for walk-in centres and responsible in particular for the Wythenshawe Walk-In Centre. At the time of the hearing before the Employment Tribunal she remained in the Respondent's employment.

5. Ms Woodcock was a Primary Care Nurse and her principal place of employment was the Wythenshawe Walk-In Centre. At the time of the hearing before the Employment Tribunal, as was the case with Ms Fecitt, she remained in the Respondent's employment.

6. Ms Hughes was a Bank Nurse, principally employed at the Wythenshawe Walk-In Centre. She also had a part-time job at a GP practice. Although she was a Bank Nurse she claimed that she was employed by the Respondent and unfairly dismissed because the Respondent refused to offer her work as a Bank Nurse.

7. In early 2008 Ms Woodcock had concerns about one Daniel Swift, a general nurse who worked at the Wythenshawe Walk-In Centre. Apparently he boasted about his clinical experience and qualifications. Mrs Woodcock believed that he did not have that clinical experience nor did he have the qualifications about which he boasted. On 3 March 2008 she expressed her concerns to Ms Fecitt. Ms Fecitt held a public appointment as the Nurse Registrant panellist on the NMC Fitness to Practice Conduct and Competence Committee. Ms Fecitt looked into the matter and discovered that Mr Swift was only qualified as a children's nurse and did not have a dual qualification as he claimed, as both a registered children's nurse and registered adult nurse.

8. On 20 March 2008 Ms Fecitt registered her concerns with her line manager, Mrs Coates. She was supported by Ms Woodcock and Ms Hughes. It is accepted by the Respondent, that when passing on her concerns, protected disclosures had been made because the Claimants believed they tended to show that the health and safety of individuals was being endangered. Mrs Coates discussed the matter with Mr Swift who acknowledged that he had exaggerated his qualifications and experience to colleagues, although he had not done so to the Respondent; he apologised. Mrs Coates decided to take no further action but this did not satisfy the Claimants who continued to pursue the matter to the extent that some of their colleagues considered they were now engaging in a form of witch hunt against Mr Swift. The Employment Tribunal did however conclude that Ms Fecitt had acted appropriately.

9. Mr Swift took umbrage at the way the matter was pursued and became extremely distraught to the extent that concerns were expressed about his mental health. He threatened suicide. The staff at the Wythenshawe Walk-In Centre became divided between those who supported Mr Swift, those who supported the Claimants and those who did not wish to become involved in the dispute.

10. As a result of this dispute, and unsurprisingly, relations between the staff at the Wythenshawe Walk-In Centre deteriorated.

11. The associate director of the Respondent, Mrs Kerwin, carried out an investigation and she concluded that, as Mr Swift had acknowledged his wrongdoing and given assurances he would not repeat it, no further action need be taken.

12. On 3 April 2008 Mr Swift lodged a complaint against Ms Fecitt asserting that he had been bullied and harassed. Although he sought to withdraw the complaint it went to a hearing. There were no findings against Ms Fecitt in relation to the allegations of bullying and harassment but concerns were expressed about her management style.

13. The situation at the Wythenshawe Walk-In Centre continued to deteriorate and Mr Swift was suspended. Ms Fecitt then made a formal complaint under the Respondent's whistle blowing policy. The Respondent sought to persuade all the staff at the centre to behave in a professional manner towards one another but the Respondent did not make any real attempt to find out what behaviour the Claimants had been subjected to, by whom and whether the threat of disciplinary process was necessary to control an escalating situation.

14. On 5 June 2008 Professor Madhok, the Respondent's Medical Director, completed an interim report. He apparently concluded that Ms Fecitt was justified in her concerns but agreed with Mrs Kerwin as to

the decision to take no action against Mr Swift. His suspension was then lifted.

15. Professor Madhok produced a final report dated 30 July 2008 in which he concluded that Ms Fecitt had acted properly in raising the issue of Mr Swift's conduct and also in pursuing the matter when senior management had decided it was not necessary to take the matter further. He expressed concern about a lack of robust management to deal with the situation.

16. At this time the Claimants had other causes of concern. On 31 March 2008 an anonymous call had been made to Ms Fecitt in which an unknown male threatened to burn down her home if she did not drop her complaint against Mr Swift. Ms Fecitt's picture was displayed on a Facebook page causing her distress. The Employment Tribunal (paragraph 29) was satisfied that as a direct result of the disclosures, the Claimants had been subjected to unpleasant behaviour by other staff at the Wythenshawe Walk-In Centre. The behaviour to which they were subjected led all three Claimants to raise grievances which were investigated by an outside consultant. The Claimants believed that the investigation did not fully address the issues. Of the three complaints, only Ms Hughes' went to a hearing. The consultant, Mrs Nixon, partially upheld her complaint that she had suffered unpleasant treatment that left her feeling isolated and thereby prejudiced and that the Respondent's management could have done more. The Employment Tribunal (paragraph 26) was satisfied that Mrs Nixon would have come to the same conclusions in relation to the grievances of Ms Fecitt and Ms Woodcock.

17. The Respondent then removed Ms Fecitt from her managerial responsibilities and later she and Ms Woodcock were redeployed away from Wythenshawe Walk-In Centre. Ms Hughes was simply not given any more work. The Employment Tribunal at paragraph 27, quote from an email dated 9 June 2008 addressed to Bev Harper in the Respondent's Human Resources Department sent by Mrs Lake, the former District Nursing Clinical Lead. The email was in these terms:

> **"Bev, we have a Bank Nurse at the WIC. She works at weekends and has worked at the WIC for six years but has always declined permanent hours. I would like to reduce her Bank to virtually nothing (trouble-causer) but she has already complained that we have reduced her hours and she has employment rights! Where do I stand? ..."**

At paragraph 29(c) the Employment Tribunal found that as a result of the dysfunctional situation following the protected disclosures the Claimants were subjected to significant detriments, including the removal of Ms Fecitt and Ms Woodcock against their will from the Wythenshawe Walk-In Centre and the decision to give no work to Ms Hughes. At paragraph 29(e) the Respondent's management, it was found, could have done more to prevent the Claimants from being subjected to unpleasant and unwarranted behaviour on the part of Mr Swift and his supporters.

18. The Claimants all asserted that they had suffered as a result of their protected disclosures within the meaning of section 47B of the **Employment Rights Act 1996** and that Ms Hughes had been unfairly and wrongfully dismissed. The Respondent admitted that Ms Hughes was a "worker" for the purposes of section 47B but denied that she was an employee within the meaning of section 230 of the Act. This matter was never investigated before the Employment Tribunal.

19. My colleagues, who have considerable industrial experience, considered it most unusual that the victims of alleged victimisation who clearly suffered detriment by reason of their colleagues' conduct, were removed from the workplace rather than those said to have been responsible for the conduct complained of.

The Decision of the Employment Tribunal

20. The Employment Tribunal set out the facts which we have briefly recounted above. At paragraph 13 it identified the principal issue as to what could have been done to prevent the matter escalating in the alarming and unfortunate way that it did and whether in those circumstances there was a breach of the Claimants' rights not be subjected to detriment for having made a protected disclosure. The Employment Tribunal recorded a submission on behalf of the Claimants that it should apply a "but for" test in determining whether the Claimants had suffered detriment "on the ground that" they had made the protected disclosures. The Claimants relied upon **James v Eastleigh Borough Council** [1990] IRLR 288, a case involving sex discrimination where Lord Goff had suggested that in cases of direct discrimination the Employment Tribunal should ask whether the complainant would have received the same treatment from the Respondent "but for his or her sex". Alternatively the Claimants submitted that if the appropriate test for causation in determining whether detriment was suffered "on the ground that"

a protected disclosure had been made, was somewhat higher than the "but for" test it was sufficient to show that the fact that the protected disclosure had been made "caused or influenced the employer to act (or not to act) in the way complained of". The Claimants relied upon **London Borough of Harrow v Knight** [2003] IRLR 140.

21. The Respondent, however, suggested that on the authority of **Aspinall v MSI Mech Forge Limited** [2002] EAT 891/01 the protected disclosure had to be causative in the sense of being the real reason or core reason, the motive, for the treatment complained of. The Respondent also drew support from the decision of Mr Recorder Underhill QC, as he then was, in **London Borough of Harrow v Knight** 2003 IRLR 140. The Employment Tribunal also considered the Claimants' submission, following **Cumbria County Council v Carlisle-Morgan** [2007] IRLR 314 that an employer might be vicariously liable for the acts of an employee done in the course of his or her employment, whether or not what the employee had done would be actionable against him or her. The Employment Tribunal concluded at paragraph 37:

> **"The Tribunal has found that these claimants were subjected to detriment by the actions of members of staff at the Wythenshawe Walk-In Centre who were supportive of Mr Swift following protected disclosures having been made by the claimants to the respondent."**

22. Unfortunately, we do not know what detriment the Employment Tribunal found to have occurred save that we know the following occurred:

> (a) There had been the anonymous call to Ms Fecitt in which a male had threatened to burn down her home if she did not drop her complaint against Mr Swift. There was no finding as to who may have been responsible;
>
> (b) The display of Ms Fecitt's picture on a Facebook page which caused her distress; again we do not know who was responsible;
>
> (c) The Employment Tribunal was satisfied (see paragraph 29) that as a direct result of the disclosures the Claimants were subjected to unpleasant behaviour by other staff at Wythenshawe Walk-In Centre; we do not know what this behaviour was;
>
> (d) Mr Swift made a complaint against Ms Fecitt.

There was also no finding by the Employment Tribunal that the acts complained of were such as to make the Respondent vicariously liable. The Employment Tribunal at paragraph 38 did hold that if the Respondent had deliberately failed to take appropriate steps it would then have been liable under section 47B both on the principles of vicarious liability and by reason of its failure to act. The Employment Tribunal, at paragraph 38, concluded that senior management could have done more than it did and acted more quickly:

> **"The Tribunal also agrees with the findings of the investigations that senior management could have done more sooner to prevent such detriment occurring. However, having considered the totality of the evidence, the Tribunal finds that management did in fact seek to take steps to resolve the tensions between the various parties at the Centre and to encourage all members of staff to act professionally towards each other. It is not sufficient, in the Tribunal's judgment, to establish liability on the respondent simply because management either did not do as much as it perhaps could have done or was simply unsuccessful in its attempts to resolve matters. However, hard management might try, there are sometimes situations that arise in the workforce following a protected disclosure having been made which are extremely difficult to control and prevent. Whilst a reasonable level of proactive engagement with a view to prevent such situations continuing can be expected, any failings by management in this case to secure the desired result were not sufficient, in the Tribunal's judgment, to amount to a deliberate failure to act."**

23. We should approach this last finding with some considerable respect. My colleagues, the lay members,

have considerable industrial experience and may be taken to know what can reasonably be expected of management in situations such as this.

24. In relation to the appropriate test of causation the Employment Tribunal had this to say at paragraphs 39 and 40:

> **"It is, of course, correct that, had the claimants not made the protected disclosures in question, they would not have been subjected to the detriment of which they complain. Having considered the submissions of Counsel and the relevant authorities, however, the unanimous judgment of the Tribunal is that the "but for" test is not the correct test to apply in order to establish liability under section 47B of the Employment Rights Act 1996. There must be a causal connection between the protected act and the respondent's acts or omission to act.**
>
> **In the Tribunal's judgment, any failure on the part of the respondent to take sufficient steps to protect the claimants from being subjected to a detriment was not "because" they had made protected disclosures and was not, therefore, "on the ground that" they had made the protected disclosures."**

25. The Employment Tribunal went on to hold at paragraph 41 that the decision to redeploy Ms Fecitt and Ms Woodcock because of the dysfunctional state of the Wythenshawe Walk-In Centre was because their removal was the only feasible way of resolving the problem and was not "on the ground that" they had made protected disclosures.

26. At paragraph 42 the Tribunal held that the decision to remove Ms Hughes from the Bank was not because she had made protected disclosures but because Mrs Lake had already formed a negative view of her and partly to redress the dysfunctional state of the Walk-In Centre.

The Notice of Appeal and Submissions in Support

27. Mr Barnett, who appeared on behalf of the Claimants, advanced three principal grounds. He did not seek to advance other grounds set out in the Notice of Appeal. The three grounds relied upon by Mr Barnett were in relation to (a) causation, (b) vicarious liability, (c) the burden of proof.

28. In relation to the question of causation, i.e. what was meant by the phrase "on the ground that" in s.47B, Mr Barnett suggested there were four possibilities:

> (a) The "but for" test; neither counsel has suggested that is the appropriate test so I need say no more about it;
>
> (b) The Claimants need to prove that the protected act was a material or significant factor in the detriment they suffered;
>
> (c) The Claimants need to prove that the prohibited act was the direct or proximate cause or principal cause of the detriment they suffered;
>
> (d) The Respondent must show where Claimants have suffered a detriment that it is "in no sense whatever" associated with the protected disclosures.

29. Mr Barnett submitted the Employment Tribunal fell into error on the question of causation and that it appeared to have applied the test of requiring the protected act to be the direct and proximate cause of the detriment. It thus applied a less favourable test for Claimants than appropriate. Mr Barnett submitted that it was necessary for the Respondent to prove that its decision to move Ms Fecitt and Ms Woodcock and remove Ms Hughes from Bank work "in no sense whatever" was associated with the protected disclosures.

30. He submitted that whistle-blowing was regarded as a form of discrimination; accordingly victimisation in so far as in cases of whistle blowing were concerned, should be assimilated as far as possible to the

law relating to discrimination and victimisation in other areas of where the law has legislated against discrimination, such as discrimination on the grounds of race or sex. In particular, and insofar as this case was concerned the burden of proof should be regarded as the same as in other cases of discrimination and victimisation. He relied upon authorities such as **Woodward v Abbey National** [2006] IRLR 677 and **Virgo Fidelis Junior School v Boyle** [2004] IRLR 268.

31. Accordingly, it was appropriate to rely upon the guidelines set out in **Barton v Investec** [2003] ICR 1205 and **Igen v Wong** [2005] IRLR 258 that it was for the Respondent to prove that the detriment was "in no sense whatever" associated with the protected disclosures. **Igen v Wong**, a decision of the Court of Appeal was the last word on the subject and considered the *dicta* of the House of Lords in **Nagarajan v London Regional Transport** [1999] IRLR 572 (HL). The Employment Tribunal should follow the guidance of **Igen v Wong**. Further, there were also sound policy reasons why this test (which was the most favourable to whistle-blowers) should be adopted because of the need to protect whistle-blowers. The other tests were less favourable to employees and consequently more favourable for employers and reduced protection for whistle-blowing employees.

32. In relation to the question of vicarious liability there was no dispute that the Respondent could be liable for victimisation in two respects: (a) in relation to acts it carried out itself, such as the removal of Ms Fecitt and Ms Woodcock from the Wythenshawe Walk-In Centre and the decision not to offer further Bank work to Ms Hughes; (b) the second way in which the Respondent could be liable for victimisation would be if it were vicariously liable for acts of employees which were so closely connected with their employment as to make the first Respondent vicariously liable for those acts.

33. Mr Barnett submitted that in this case the second possibility had not been examined by the Employment Tribunal at all. On the facts found it appears as though the Employment Tribunal would have found that there was some vicarious liability but its findings were deficient. It did not identify or make findings as to the acts amounting to detriment meted out to the Claimants by their colleagues. It also did not consider whether the first Respondent might have been vicariously liable for such acts.

34. The third point raised by Mr Barnett was that the Employment Tribunal at paragraph 38 of its decision appeared to have put the burden of proof on the employee.

35. We have in mind the *dicta* of Mummery LJ in **Kuzel v Roche Products Limited** [2008] EWCA Civ 380 when he said at paragraph 46:

> **"The summary of the submissions shows how worked up lawyers can get about something like the burden of proof. In some situations, such as being charged with a criminal offence, there is plenty to get worked up about. It is very important indeed. In many areas of civil law, however, the burden of proof is not a big thing. Discrimination law is an exception, because discrimination is so difficult to prove. In the case of unfair dismissal, however, there has never been any real problem for the tribunals in practice. The danger is that in cases like this something so complicated will emerge that the sound exercise of common sense by tribunals will be inhibited."**

36. Mr Barnett pointed out that section 48 of the Employment Rights Act entitles a claimant to apply to the Employment Tribunal in cases where a protected act has been done and detriment suffered in consequence. Section 48(2) provides:

> **"On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done."**

37. It is clear, therefore, that the burden of proof is on the employer to prove, in effect, where there has been a detriment that the claimant was not victimised. We deal with the point right away. The paragraph (38) relied upon by Mr Barnett simply does not bear the weight placed upon it especially as the Employment Tribunal at paragraph 36 had made particular reference to section 48(2), the burden being on the Respondent to show the ground on which the act or deliberate failure to act had been done. This particular point has no substance and we do not need to consider it further.

The Respondent's Submissions

38. In relation to the issue of victimisation, it was submitted the Employment Tribunal had found that the detriments (the removal of Ms Fecitt and Ms Woodcock and the refusal to supply further work to Ms Hughes) had not been suffered "on the ground that" the Claimants had done the protected acts. In relation to causation the Employment Tribunal had correctly relied upon **London Borough of Harrow v Knight**.

39. Mr Boyd, who appeared on behalf of the Respondent, pointed out that the whistle-blowing provisions of the Employment Rights Act made no specific provisions for vicarious liability, unlike in other cases of cases; see section 41 of the **Sex Discrimination Act 1976**, section 33 of the **Race Relations Act 1976** and section 58 of the **Disability Discrimination Act 1995**. If an employer was to be made vicariously liable for whistle blowing victimisation it would not have the statutory defence available in other discrimination cases that it took reasonable steps to prevent its employees doing the act in question in the course of their employment. He submitted that until an employer knows or should know the detriments the employer could not be liable; that is what was envisaged by section 47(b).

40. There was no need for an employer to be vicariously liable in cases of whistle-blowing victimisation because other remedies were available, such as those available under the Protection from Harassment legislation. Accordingly, the Respondent could not be vicariously liable for the acts of its employees were it to be found that they had victimised the Claimants as a result of their protected acts.

The Law

41. The statutory tort set out in section 47B(1) of the Act is as follows:

> **"A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done *on the ground that* the worker has made a protected *disclosure*." [our italics].**

42. "Protected Disclosures" are defined in s.43A and s.44B(1)(d) of the Act and include the making of a qualifying disclosure, including a disclosure that "the health or safety of any individual has been, is being or is likely to be endangered"; see s.43B. [That was the nature of the protected acts in this case.]

43. Section 47(2) places the burden on the employer to show the ground on which any act or deliberate failure to act was done:

> **"(2) Except where an employee is dismissed in circumstances in which, by virtue of section 197, Part X does not apply to the dismissal, this section does not apply where the detriment in question amounts to a dismissal (within the meaning of that Part)."**

44. Section 48(1A) provides:

> **"48.- (1A) An employee may present a complaint to an industrial tribunal that he has been subjected to a detriment in contravention of section 47B."**

45. We now turn to the question of vicarious liability. We need not say a great deal about this because the issue is essentially factual. We draw attention to the speech of Lord Nicholls in **Majrowski v Guy's and St Thomas' NHS Trust** [2006] UKHL 34 at paragraph 10:

> **"A precondition of vicarious liability is that the wrong must be committed by an employee in the course of his employment....a wrong is committed in the course of employment only if the conduct is so closely connected with acts the employee is authorised to do that for the purposes of the liability of the employer to third parties the wrongful conduct may fairly and properly be regarded as done by the employee while acting in the course of his employment. [He added] The rationale underlying the principle holds good for a wrong comprising a breach of statutory duty or prohibition which gives rise to civil liability provided always that the statute does not expressly or impliedly indicate otherwise."**

46. There is further authority for the proposition that a respondent employer may be vicariously liable for acts of victimisation by employees under the legislation we are considering; see **Cumbria County Council v Carlisle-Morgan** [2007] IRLR 314 (HHJ Reid QC). This was a case where a claimant asserted he had been victimised by fellow employees after making a protected disclosure and the question for decision was whether the respondent as an employer could be vicariously liable; see paragraphs 39-40:

> **"39. An employer may be liable for the acts of his employee done in the course of his employment whether or not what the employee has done would be actionable against him. The principle of vicarious liability exists not because the employee is liable but because of what he has done: see per Lord Nicholls in Majrowski at paragraph 14 when considering the Australian case of Darling Island Stevedoring & Lighterage v Long (1957) 97 CLR 36.**
>
> **40. The liability imposed by section 47B is imposed on the employer not on the employee. It is analogous to an implied contractual term in that the person on whom the liability is imposed is the employer, but it does not seem to us to matter whether the section is regarded as creating a statutory tort or some form of implied contractual term. The Claimant might or might not have had a claim against Mrs Horsman under the Harassment Act 1977 but she had no claim against her under section 47B. The question is whether what Mrs Horsman did can properly be classified as an act of the employer for the purpose of section 47B."**

47. We now turn to consider the issue of causation. We approach the issue of causation on the basis that it will be the same as in other areas of the law relating to victimisation and other discrimination in the context of other areas of discrimination. It has to be said that the cases are not easily reconcilable and attempts to reconcile the authorities are not always wholly convincing.

48. We start by noting that in claims for discrimination, such as sex, race, or disability there is a statutory reversal of the burden of proof where the claimant has proved facts from which it could be found that an act of discrimination or harassment had been committed. In those circumstances, the Employment Tribunal will look to the Respondent for an explanation and in the absence of an adequate explanation the Employment Tribunal "must" uphold the complaint. In **Oyarce v Cheshire County Council** (CA) it was made clear that in victimisation claims based on discrimination, the *statutory* reversal of the burden of proof did not apply. However, this made relatively little difference because the principle enshrined in cases such as **King v Great Britain-China Enterprises** [1992] ICR 516 achieves the same result save that the Employment Tribunal "may" rather than "must" draw inferences against the respondent. Moreover, in whistle-blowing cases the claimant does not have to prove facts from which it can be found that an act of discrimination or harassment has be committed because by virtue of section 48(2) the burden will always be on the employer, once a detriment has been established, to show the ground on which any act, or deliberate failure to act, was done.

49. So far as the "but for" test is concerned neither side has contended for the applicability of such a test, although it is right to say it derives some support from the decision of the House of Lords in **Rhys-Harper v Relaxion Group Plc** [2003] IRLR 484. This case does not appear to have been followed and we say no more about it. In **Nagarajan v London Regional Transport** [1999] IRLR 572 Lord Nicholls had this to say:

> **"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."**

50. In **Barton v Investec Henderson Crosthwaite Securities Limited** [2003] ICR 1205 certain rather mechanistic guidelines were given as to the approach to be adopted to the burden of proof in discrimination claims. HHJ Ansell referred to the circumstances where the burden of proof (to show that the alleged discrimination was not on the grounds of sex or race), had shifted to the respondent by virtue of provisions such as section 63A of the **Sex Discrimination Act 1975**. Guideline (10) was as follows:

> **"(10) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment *was in no sense whatsoever* on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive." [our italics]**

51. The **Barton** guidelines were considered by the Court of Appeal in **Igen v Wong** [2005] IRLR 258. Peter Gibson LJ said at paragraph 35:

> **"Finally, we should refer to a dispute on whether paragraph (10) of the Barton guidance requires modification. In Emokpae His Honour Judge McMullen Q.C., giving the judgment of the EAT, held that the reference in paragraph (10) to the words "no discrimination whatsoever", which are taken from the Burden of Proof Directive, was inappropriate because they concerned not the definition of or the ingredients in discrimination but merely the forms of discrimination. Instead Judge McMullen suggested that paragraph (10) be rewritten to read:**
>
> **"To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was not significantly influenced, as defined in Nagarajan v London Regional Transport [2000] 1 AC 501, by grounds of sex.""**

52. He then referred to Lord Nicholls' speech in **Nagarajan** which we have set out above and continued:

> **"36. Miss Slade supported the correctness of that amendment to paragraph (10). Mr. Allen cogently criticised it as based on a misreading of the relevant Directives and he drew particular attention to the French version of them. We think it sufficient to say that we see no reason to change the original paragraph (10). In Nagarajan, a race discrimination case, unsurprisingly there does not appear to have been any consideration of the Burden of Proof Directive relating to sex discrimination. That Directive is emphatic in its definition in Art. 2(1) of the principle of equal treatment as meaning that there shall be no discrimination whatsoever based on sex, either directly or indirectly, and in requiring by Art. 4(1) that once the burden shifts for the second stage it is for the respondent to prove that there has been no breach of that principle. In Art. 2(1) of the Framework Employment Equality Directive there is a definition of the principle of equal treatment to similar effect (viz. "there shall be no direct or indirect discrimination whatsoever on any of the [proscribed] grounds"). Only in the definition of the principle of equal treatment in Art. 2(1) of the Race Directive is the word "whatsoever" omitted, but it would be idle to suggest that that omission entails a meaning different from that of the other Directives. The language of the definitions in the French texts of the three Directives is in effect the same.**
>
> **37. In any event we doubt if Lord Nicholls' wording is in substance different from the "no discrimination whatsoever" formula. A "significant" influence is an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial. We would therefore support the original paragraph. (10) of the Barton guidance and, consistently therewith, a minor change suggested by Mr. Allen to paragraph (11) so that the latter part reads "it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the**

treatment in question."

53. However, The Court of Appeal did not accept HH Judge McMullen's view, and reiterated the **Barton** guideline 10 as guideline 11 in the annex to the judgment in the following terms:

> **"To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive."**

54. We now turn to an earlier decision, another decision of the House of Lords, **Chief Constable of West Yorkshire Police v Khan** [2001] ICR 1065 in which there are relevant passages in the speeches of their Lordships. The Claimant in that case had done a protected act and commenced proceedings in the Employment Tribunal against the Respondent. He subsequently asked the Respondent for a reference but the Respondent declined to give him a reference by reason of the litigation. The Claimant in subsequent proceedings asserted that he had been victimised by the refusal of the reference by reason of his having done a protected act. Lord Nicholls (with whom Lords Hoffman and Hutton agreed) had this to say at paragraph 30:

> **'by reason that'**
>
> **Contrary to views sometimes stated, the third ingredient ('by reason that') does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the 'operative' cause, or the 'effective' cause. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in Nagarajan v London Regional Transport [1999] IRLR 572, 575–576, a causation exercise of this type is not required either by s.1(1)(a) or s.2. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."**

55. Lord Hoffman (with whom Lord Hutton agreed) put the matter a little differently at paragraph 60:

> **"A test which is likely in most cases to give the right answer is to ask whether the employer would have refused the request if the litigation had been concluded, whatever the outcome. If the answer is no, it will usually follow that the reason for refusal was the existence of the proceedings and not the fact that the employee had commenced them. On the other hand, if the fact that the employee had commenced proceedings under the Act was a real reason why he received less favourable treatment, it is no answer that the employer would have behaved in the same way to an employee who had done some non-protected act, such as commencing proceedings otherwise than under the Act."**

56. Lord Scott at paragraph 77 also put the matter differently:

> **"Was the reference withheld 'by reason that' Sergeant Khan had brought the race discrimination proceedings? In a strict causative sense it was. If the proceedings had not been brought the reference would have been given. The proceedings were a *causa sine qua non*. But the language used in section 2(1) is not the language of strict causation. The words 'by reason that' suggest, to my mind, that it is the real reason, the core reason, the *causa causans*, the motive, for the treatment complained of that must be identified."**

57. The question of causation was also referred to in two decisions of the Employment Appeal Tribunal, **Aspinall v MSI Mech Forge Limited** [2002] EAT/891/01 (HHJ Reid QC). This was a case of alleged victimisation for having made a protected disclosure. HHJ Reid approached the matter at paragraph 14 in this way:

> **"It follows from this legitimate finding of the Tribunal that there was no constructive dismissal. In the light of the way in which the matter was finally put in argument before us, this finding disposes of any question of there being victimisation because of a protected disclosure. However, as the point was raised before us, we should express our views briefly. We have reservations about the concession by MSI that the mere making of the video was a protected disclosure. That there was a protected disclosure at the point when the video was produced to Mr Aspinall's solicitors is clear, and the introduction of an outsider who could witness the confidential process and to make the video could be a protected disclosure, but we remain unconvinced that the making of the video by itself (if it was made by a fellow worker to whom nothing new was disclosed) amounted to a protected disclosure. For there to be detriment under section 47B 'on the ground that the worker has made a protected disclosure' the protected disclosure has to be causative in the sense of being 'the real reason, the core reason, the *causa causans*, the motive for the treatment complained of', to borrow the words of Lord Scott in the Race Relations case of Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 at 1082. Similarly if the detriment is (as was suggested in this case) dismissal, the making of the protected disclosure has to be the reason or principal reason for the dismissal. In this case not only was there no dismissal but the steps which the employer took were not because of any protected disclosure that tended to show 'that the health or safety of any individual has been, is being or is likely to be damaged' (see section 43B(1)(d) of the 1996 Act). It was solely because of the perceived breach of the confidentiality of MSI's manufacturing process."**

58. HHJ Reid declined to follow the "but for" test and followed the decision of Underhill J in **London Borough of Harrow v Knight** [2003] IRLR 140. Underhill J, after considering the cases of **Nagarajan** and **Chief Constable of the West Yorkshire Police v Khan** [2001] ICR 1065 dealt with the matter in this way at paragraph 16:

> **"It is thus necessary in a claim under s. 47B to show that the fact that the protected disclosure had been made caused or influenced the employer to act (or not act) in the way complained of: merely to show that 'but for' the disclosure the act or omission would not have occurred is not enough (see Khan). In our view, the phrase 'related to' imports a different and much looser test than that required by the statute: it merely connotes some connection (not even necessarily causative) between the act done and the disclosure. On any view the failure of Mr Redmond to answer Mr Knight's letters was *related to* the protected disclosure: after all, the disclosure was the fundamental subject matter of the letters and they would never have been written but for the fact that the disclosure had been made. Likewise any failure on the part of the Council to look after Mr Knight *related to* the disclosure: the awkward situation created by the disclosure was the very reason why he needed help. But that does not answer the question whether that formed part of the motivation (conscious or unconscious) of Mr Redmond or Mr Esom. Mr Redmond, for example, might have failed to answer the letters because he was annoyed by the original report and regarded whistle-blowers as disloyal and a nuisance: that would indeed be a deliberate omission 'on the ground that' he had made the protected disclosure. But he might in principle equally have failed to do so for one of a number of other reasons."**

59. For the sake of completeness we would refer to the decision in **Villalba v Merrill Lynch** [2006] IRLR 437 although the case was not cited to us. The decision largely follows **Igen v Wong** by which, as we

shall shortly explain we are bound and which was the subject of submissions. Elias J, having referred to passages from **Nagarajan** and **Igen v Wong**, considered that **Igen v Wong** attempted to reconcile various approaches to causation in the cases to which we have referred. We refer to his judgment at paragraph 80:

> **"80. Ms Rose submits that there is no reason to suppose that the Tribunal applied that limited notion of "significant", particularly since their decision was prior to the *Igen* ruling. She says that normally "significant" means "important" or some such concept, and it is reasonable to assume that in this case the Tribunal had applied that test in determining whether victimisation had an impact on the decision to remove Mrs Villalba from her post.**
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> **81. In this connection she pointed out that in paragraph 237 of the decision the Tribunal had expressly referred to the difference in view expressed in two decisions of this Tribunal, Barton v Investec Henderson Crosthwaite Securities Limited [2003] ICR 1205 and Chamberlin Solicitors and Emezie v Emokpae [2004] IRLR 592. In the former the EAT held that once the burden moves to the employer (as in this case) then the employer must show that there is no the prohibited ground played no part whatsoever in the decision. Chamberlin entered the caveat that the discrimination must be a significant influence. The Tribunal said that it preferred the Chamberlin approach but that since Mrs Rose had expressly reserved the right to argue that the Barton approach was to be preferred, they said that they had "also considered the evidence on the more stringent test in Barton." Igen in fact preferred the approach in Barton but with the modification that there would be no discrimination if any discriminatory influence was trivial. Mrs Rose says that whilst they adopted that approach with respect to sex discrimination they did not apply that more stringent test to victimisation discrimination.**
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> **82. We accept that the Tribunal could not have been applying the "no influence whatsoever" approach in the context of victimisation because they found that victimisation was "a very small factor, not a significant influence" in the decision to remove Mrs Villalba. Mr Linden submits that there was no error by the Tribunal. It had reproduced the approach of Lord Nicholls which was not criticised by the Court of Appeal in Igen. There is no reason to suppose that the Tribunal had any different understanding to the concept of a "significant reason" to Lord Nicholls. We agree with his submission. We recognise that the concept of "significant" can have different shades of meaning, but we do not think that it could be said here that the Tribunal thought that any relevant influence had to be important; as Mr Linden pointed out, the juxtaposition of "a very small factor" with "not a significant influence" strongly supports the view that they did not think that such victimisation as there was amounted to anything more than trivial in relation to the decision taken by Mr Yu. It was not material to the decision to remove Mrs Villalba from office, or the subsequent decision to dismiss. If in relation to any particular decision a discriminatory influence is not a material influence or factor, then in our view it is trivial."**

Conclusions

Vicarious Liability

60. We can deal with this point quite briefly. We accept Mr Barnett's submissions and we follow the authority of **Cumbria County Council v Carlisle-Morgan** [2007] IRLR 314 which is in point.

61. The fallacy in the Appellants' argument is that the Employment Tribunal found that the *specific acts of the Respondent* for which it might have been directly liable, namely the removal of Ms Fecitt and Ms Woodcock from the Wythenshawe Walk-In Centre and the decision to offer no further work to Ms

Hughes were not caused by any protected acts. That claim therefore appears to have failed on the facts.

62. The suggested remedy under the Protection from Harassment legislation is not appropriate as there are different and more stringent requirements for claimants to establish liability for harassment under the **Protection from Harassment Act 1997** than under discrimination legislation. Also harassment under the Act is a criminal offence and there needs to be more than one occasion of harassment.

63. In our opinion, the Employment Tribunal has simply not dealt at all with the vicarious liability of the Respondent for the acts of its employees and must make appropriate findings (a) were there acts of employees that were meted out to the Claimants or any of them by reason of their having done protected acts, (b) if so, what were those acts and who were the perpetrators, (c) did the unwanted treatment meted out to the Claimants amount to a detriment, (d) if so, were the acts complained of so closely connected with the employment of those responsible so as to make the Respondent vicariously liable?

Causation

64. We accept the submission that what amounts to causation in cases of victimisation in discrimination claims is the same as that that should apply to victimisation for whistle-blowing and to other forms of discrimination.

65. We also recognise that **Igen v Wong** was a case that concerned race discrimination (as in fact was **Nagarajan**) where the European Directive applied. Such cases therefore differ from whistle-blowing cases where the legislation is entirely home-grown. We were, however, impressed by the argument as to the assimilation of the law of victimisation in discrimination cases and victimisation in whistle-blowing cases. Peter Gibson LJ held that the appropriate test required the employer to prove that the treatment [discrimination] and was "in no sense whatever" on the grounds of the Claimant's race or sex as the case may be. The same would apply to detriment suffered *on the ground that* the Claimant had been (whistle-blowing) and thus done a protected act. As we have noted Peter Gibson LJ held that this test did not differ from Lord Nicholls' formula in **Nagarajan**; a "significant" influence was an influence which was more than trivial.

66. We bear in mind that, in the legislation relating to whistle-blowing, Parliament has sought to offer protection to whistle-blowers. We consider that we should take a broad view of provisions for their protection. Further, the decision of the Court of Appeal in **Igen v Wong** is binding upon us. The Court of Appeal considered the relevant earlier authorities and so far as we are concerned its decision is both definitive and binding upon us. Accordingly in our opinion, once a detriment has been shown to have been suffered following a protected act the employer's liability under section 48(2) is to show the ground on which any act or deliberate failure to act was done and that the protected act played no more than a trivial part in the application of the detriment. That is the meaning of the test in **Igen v Wong**. Put another way, the employer is required to prove on the balance of probabilities that the treatment was in no sense whatever on the ground of the protected act.

67. In those circumstances we must allow the appeal.

68. We would have considered (although we came to no final conclusion on the point) that it was appropriate for this matter to be remitted to a fresh Employment Tribunal. However, and quite understandably, for reasons of expense the Claimants wish the matter to be referred back to the same Employment Tribunal and the Respondent has agreed to this course.

69. We accordingly remit this matter to the Employment Tribunal to reconsider its decision in the light of this judgment, particularly in relation to vicarious liability of the Respondent's employees and in relation to the question of causation.

70. It only remains for us to thank the advocates for the great assistance they have given to us.