Case No: A2/2013/0874

Neutral Citation Number: [2014] EWCA Civ 185
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
Mr Recorder Luba QC and 2 lay members
UKEAT011212DM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2014

Before :

LORD JUSTICE MAURICE KAY
(Vice President of the Court of Appeal, Civil Division)
LORD JUSTICE RYDER
and
LORD JUSTICE UNDERHILL

- -

Between :

JESSEMEY	**Appellant**
- and -	
ROWSTOCK LTD & ANR	**Respondents**

- -
- -

Ms Karon Monaghan QC and Mr Christopher Milsom (instructed by **The Equality and Human Rights Commission**) for the **Appellant**
Mr John Crosfill and **Mr Jason Braier** (instructed by **Lawdata Ltd**) for the **Respondents**

Hearing dates : 5-6 November 2013

- -

Judgment

Lord Justice Underhill :

INTRODUCTION

1. The issue raised by this appeal is whether the Equality Act 2010 prohibits acts of victimisation committed against a former employee. On 5 March 2013 the Employment Appeal Tribunal in this case, sitting in a constitution chaired by Mr Recorder Luba QC, held that it does not; but in a case decided two months later, *Onu v Akwiwu*, a constitution chaired by the President, Langstaff J, held that it does. The decisions are reported at [2013] ICR 807 and [2013] ICR 1039. The issue is of practical importance because claims by former employees that their employer has acted to their prejudice following the termination of the employment – typically, though by no means only, by giving a bad (or no) reference – are not at all uncommon.

2. Appeals in both cases were listed before us on the same occasion, but it was agreed that the present case should be treated as the lead – though there will still be a separate substantive judgment in *Onu* since that case raises other issues in addition. We have taken into account both the submissions addressed to us in the instant case by Ms Karon Monaghan QC and Mr Christopher Milsom for the Claimant (the Appellant before us) and by Mr John Crosfill and Mr Jason Braier for the Respondents and the submissions of Mr James Robottom and Mr Jake Dutton for the Claimant and the Respondents respectively in *Onu*. I should note that Ms Monaghan and Mr Milsom are instructed by the Equality and Human Rights Commission. In the EAT the Commission appeared in its own right as an intervener, instructing Mr Milsom: the Claimant was represented by a solicitor.

3. Since the issue is one of pure law I need only give the barest summary of the facts. The Claimant was employed by the First Respondent, Rowstock Ltd, which was a small car sales and repair business in Didcot in Oxfordshire; the Second Respondent, Mr Davis, was a director of Rowstock and appears in practice to have run the business. In January 2011 the Claimant was dismissed on the ground that he was aged over 65. He brought proceedings for unfair dismissal and age discrimination. He sought the help of an employment agency to find another job. When they approached Mr Davis he gave the Claimant a very poor reference. The Claimant believed that the reason for that reference was that he had brought proceedings, and he presented a further claim alleging victimisation contrary to the Equality Act 2010.

4. By a decision sent to the parties on 7 December 2011 an Employment Tribunal sitting at Reading, chaired by Employment Judge Hardwick, upheld the claims of unfair dismissal and age discrimination and awarded the Claimant compensation totalling (together with some smaller ancillary awards) £24,682.73. As regards the victimisation claim it found that the reason for the bad reference was that "the Claimant was pursuing Employment Tribunal proceedings". However, it held that "post-employment victimisation" was not unlawful under the 2010 Act. The EAT, as I have said, reached the same conclusion.

THE LAW

THE LAW PRIOR TO THE EQUALITY ACT 2010

5. Although the present claim is brought under the 2010 Act, it is necessary for an understanding of the issues on this appeal that I say something about the predecessor legislation and the case-law that it attracted.

6. In each of the "first-generation" discrimination statutes – the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995 – the proscription of discrimination in the employment field was expressed in very similar terms. Section 6 (2) of the 1975 Act and section 4 (2) of the 1976 Act are substantially identical, and I need only set out the former, which read:

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

(I have italicised the key words.) The equivalent provision in the 1995 Act (as originally enacted), which is section 4 (2), was slightly differently worded, the key words being "it is unlawful to discriminate against a disabled person *whom he employs* …". All three statutes contained provisions defining victimisation as a sub-species of discrimination, described as "discrimination by way of victimisation" (see section 4 of the 1975 Act, section 2 of the 1976 Act and section 55 of the 1995 Act); and thus the proscription of discrimination in the sections to which I have referred applied equally to victimisation.

7. In *Post Office v Adekeye* [1997] ICR 110 this Court decided that the 1976 Act did not prohibit discrimination against a former employee. It held that the natural meaning of the phrase "employed by him" in section 4 (2) was confined to persons employed at the time of the act complained of; and there was no other provision covering cases where the employment had terminated.

8. Shortly afterwards, in *Coote v Granada Hospitality Ltd*. (C-185/97) [1998] ECR I-5199, [1999] ICR 100, the ECJ decided a reference from the EAT in a case of the alleged victimisation of a former employee who had brought a claim of sex discrimination. Discrimination on grounds of sex was proscribed under the Equal Treatment Directive (76/307/EEC); but the Directive did not refer expressly to victimisation (save in the form of dismissal). The Court held that the "principle of effectiveness" meant nevertheless that member states were required to ensure that employees making claims of sex discrimination were protected against being victimised on that account. More pertinently for present purposes, it held that that was the case whether the victimisation occurred during employment or subsequently. At para. 25 of the judgment (p. 113) it said:

> "… [I]t is not possible to accept the United Kingdom Government's argument that measures taken by an employer against an employee as a reaction to legal proceedings brought to enforce compliance with the principle of equal treatment do not fall within the scope of the Directive if they are taken after the employment relationship has ended."

When the case returned to the EAT (see [1999] ICR 942) it was held that *Adekeye* should not be followed and that it was possible to construe the phrase "in the case of a woman employed by him" as covering the case of a former employee.

9. The issue of whether post-employment discrimination (including victimisation) fell within the terms of the provisions to which I have referred was authoritatively determined by the House of Lords in a number of appeals heard together and reported as *Rhys-Harper v Relaxion Group plc* [2003] ICR 867. The cases in question covered claims under all three statutes. It was held (reversing the decisions of the Court of Appeal) that the statutory language was indeed capable of applying in certain circumstances to discrimination against (or victimisation of) former employees: *Adekeye* was over-ruled and the decision of the EAT in *Coote* was approved. I need not set out the reasoning in detail, and there are in fact some differences between the speeches. The essential point is that it was regarded as extremely unlikely that Parliament had intended to exclude all claims for post-employment discrimination; and that, that being so, the phrases "employed by him" and "whom he employs" (despite, in the latter case, the use of the present tense) could and should be read as applying to former employees. Most of the members of the House found it unnecessary to rely on the decision of the ECJ in *Coote*: they reached their conclusions applying ordinary domestic principles of construction.[1]

10. In 2003 regulations were made addressing discrimination, victimisation and harassment on the grounds of sexual orientation and religion or belief: equivalent regulations in relation to age were made in 2006[2]. The provisions proscribing discrimination followed the same broad pattern as the statutes referred to above, and again victimisation was treated as a sub-species of discrimination. However each of the sets of regulations contained an express provision entitled "relationships which have come to an end". Since the Claimant's original complaint was of age discrimination, I will take reg. 24 of the Employment Equality (Age) Regulations 2006 as standing for all. It read (so far as material):

> "(1) In this regulation a "relevant relationship" is a relationship during the course of which an act of discrimination against, or harassment of, one party to the relationship ("B") by the other

---

1 *Coote* would in any event only have been directly relevant in the case brought under the 1975 Act. There was at the time of the acts complained of no EC legislation proscribing discrimination on the grounds of race or disability.

2 These were to give effect to the requirements of the EU "Framework Directive" referred to at para. 22 below. These required implementation by 2003, but there was an option to extend, of which the UK took advantage, as regards age discrimination.

party to it ("A") is unlawful by virtue of any preceding provision of this Part.

(2) Where a relevant relationship has come to an end, it is unlawful for A–

(a) to discriminate against B by subjecting him to a detriment; or

(b) to subject B to harassment,

where the discrimination or harassment arises out of and is closely connected to that relationship.

(3) …"

At the same time equivalent provisions were inserted by regulation into the 1975, 1976 and 1995 Acts: see sections 20A, 27A[3] and 16A respectively. I will refer to these regulations and amendments as "the 2003 legislation" (notwithstanding that the regulations relating to age were only made in 2006). The various regulations were formally made only a few days after the judgment in *Rhys-Harper*, and they were clearly drafted before it and at a time when there was, following *Adekeye* and *Coote*, considerable doubt whether the existing statutes applied to post-termination conduct. Broadly, however, the new provisions corresponded to the approach taken by the House of Lords.

11. The upshot of all that is that at the time that the 2010 Act was drafted it was well-established that post-employment discrimination – which included victimisation – was unlawful.

THE EQUALITY ACT 2010

12. Although ultimately we are concerned with the construction only of two specific provisions of the 2010 Act they need to be understood in the context of the structure of the Act as a whole. This can be summarised for our purposes as follows.

13. Part 2 of the Act (Part 1 is irrelevant) is headed "Equality: Key Concepts". It consists of two chapters. Chapter 1 sets out the familiar "protected characteristics". Chapter 2 is headed "Prohibited Conduct". The first group of sections, comprising sections 13-19, is headed "Discrimination" and contains the basic definitions of direct and indirect discrimination. It is followed by two groups of sections dealing with ancillary matters. The final group is headed "Other Prohibited Conduct" and consists of two sections, 26 and 27, defining harassment and victimisation respectively. Nothing

---

[3] Mr Robottom pointed out that the wording of section 27A appeared to be inapt to cover victimisation because it applied only to discrimination "on the grounds of race or ethnic or national origins", rather than simply to "discrimination", which would have embraced victimisation. (A similar point arose in relation to section 54A of the Act in *Oyarce v Cheshire County Council* [2008] ICR 1179.) This is a real footnote point. It is very debatable whether the exclusion of victimisation was deliberate or whether it would have affected the application of *Rhys-Harper* in race cases. There is no sign that it had any impact on the thinking of the draftsman of the 2010 Act.

turns on the precise terms of section 27 and I need not reproduce it here. There are thus three kinds of prohibited conduct identified by the Act – discrimination[4], harassment and victimisation. I should point out that in this respect it is structurally different from the predecessor legislation, which (as already noted) treated victimisation as a sub-species of discrimination.

14. It is important to appreciate that Part 2 is purely concerned with defining concepts: despite the use of the phrase "prohibited conduct", nothing in it provides that any of that conduct is unlawful. The provisions having that effect are to be found in the following Parts 3-7, which outlaw prohibited conduct in a number of specific fields – namely Services and Public Functions (Part 3); Premises (Part 4); Work (Part 5); Education (Part 6); Associations (Part 7) – and in Part 8, which is headed "Prohibited Conduct: Ancillary". The Parts which are directly relevant in this case are Part 5 and Part 8. I take them in turn.

15. Chapter 1 of Part 5 is concerned with "Employment etc". Different sections deal with different kinds of relationship in, broadly, the employment field. Section 39 deals with discrimination and victimisation and section 40 with harassment: the distinction presumably reflects the fact that the structure of the provisions relating to discrimination and victimisation is very similar whereas harassment requires rather different treatment.

16. I start with section 39. Sub-sections (1) and (2) deal with discrimination. Although we are not directly concerned with them, it is necessary to set them out. They read:

> "(1) An employer (A) must not discriminate against a person (B) —
>
> (a) in the arrangements A makes for deciding to whom to offer employment;
>
> (b) as to the terms on which A offers B employment;
>
> (c) by not offering B employment.
>
> (2) An employer (A) must not discriminate against an employee of A's (B) —
>
> (a) as to B's terms of employment;
>
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
>
> (c) by dismissing B;
>
> (d) by subjecting B to any other detriment.

Sub-sections (3) and (4) deal with victimisation, as follows:

---

[4] Breach of the duty to make adjustments in the case of a disabled person is treated as a form of discrimination: see section 21.

"(3) An employer (A) must not victimise a person (B) —

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B) —

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment."

Although I have included sub-section (3) for completeness, none of the kinds of victimisation proscribed by it could occur after the termination of the employment. We are thus for present purposes concerned only with sub-section (4), and indeed only with head (d) under that sub-section.

17. As I have said, harassment is rendered unlawful by section 40. Section 40 (1) reads:

"An employer (A) must not, in relation to employment by A, harass a person (B)—

(a) who is an employee of A's;

(b) who has applied to A for employment."

18. The definition of "employee" for the purpose of Part 5 appears in section 83. The material parts read as follows:

"(2) "Employment" means —

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

(b)-(d) ...

(3) ...

(4) A reference to an employer or an employee, or to employing or being employed, is ... to be read with subsections (2) and (3); ... ."

19. Part 8 is, as I have said, headed "Prohibited Conduct: Ancillary". We are only concerned with section 108, which is headed "Relationships which have Ended" and reads (so far as material):

> "(1) A person (A) must not discriminate against another (B) if —
>
> (a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and
>
> (b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.
>
> (2) A person (A) must not harass another (B) if —
>
> (a) the harassment arises out of and is closely connected to a relationship which used to exist between them, and
>
> (b) conduct of a description constituting the harassment would, if it occurred during the relationship, contravene this Act.
>
> (3) It does not matter whether the relationship ends before or after the commencement of this section.
>
> (4)-(5) …
>
> (6) For the purposes of Part 9 (enforcement), a contravention of this section relates to the Part of this Act that would have been contravened if the relationship had not ended.
>
> (7) But conduct is not a contravention of this section in so far as it also amounts to victimisation of B by A."

This is broadly similar, but not identical in its drafting, to the 2003 legislation: see para. 10 above.

20. Part 9 provides for enforcement. Claims under Part 5 are to be brought in the employment tribunal, as are claims under section 108 which relate to an employment relationship. Other claims are to be brought in the ordinary courts.

21. Section 108, set out at para. 19 above, is central to the issue on this appeal. To anticipate, the problem about it is that, while by sub-sections (1) and (2) it explicitly proscribes discrimination and harassment arising out of a previous relationship, it contains no equivalent provision as regards victimisation. Victimisation is only referred to in sub-section (7), whose intended effect is far from clear. I will return to these points in due course.

EU LAW

22. The 2010 Act is intended to give effect in UK law to the requirements of a number of EU Directives. I need to refer to three, namely: (a) Council Directive 2000/43/EC ("the Race Directive"), which is the first EU directive addressing race discrimination; (b) Council Directive 2000/78/EC ("the Framework Directive"), which is likewise the first directive addressing discrimination on the grounds of religion or belief, disability, age or sexual orientation; and (c) Directive 2006/54/EC of the European Parliament and the Council ("the Recast Directive" – so called because it consolidates and updates previous directives), which deals with discrimination on grounds of sex. These represent what Ms Monaghan referred to as a new generation of directives, which are not only more extensive in their scope but differently structured from the Equal Treatment Directive which was in force at the time of the claims considered in *Coote* and *Rhys-Harper*.

23. The provisions prohibiting victimisation are not identically worded in the three Directives, but they are broadly similar and it is not suggested that any difference between them is material for present purposes. Since the underlying claim in this case was one of age discrimination, I will take article 11 of the Framework Directive as standing for all. It reads:

> "*Victimisation*. Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment."

It is clear from the decision of the ECJ in *Coote* that that provision must apply equally to acts done after as well as during the currency of the employment relationship: see para. 8 above.

THE REASONING OF THE ET AND THE EAT

24. As I have said, the ET found that Mr Davis gave the bad reference which he did because of the discrimination claim which the Claimant had brought. Its reasons for nevertheless rejecting the claim of victimisation were shortly expressed at para. 5.6 of the Reasons as follows:

> "However, because of the drafting of the Equality Act 2010 the Tribunal cannot consider any remedy for this victimisation. Section 108 provides that it is unlawful to discriminate against or harass anyone in a relationship that has ended. By virtue of Section 108 (7) conduct is not a contravention of this section (i.e. relationships that have ended) insofar as it also amounts to victimisation. Accordingly the claim for post employment victimisation fails as it is not rendered unlawful by Section 108."

25. The EAT's reasoning was rather more fully expressed but equally straightforward. Mr Recorder Luba started his consideration of the issue by acknowledging that it was

highly unlikely that Parliament had "intended to legislate away (or fail to make provision for) any redress for post-employment victimisation", given both the UK's obligations under EU law and the prior legislative history and the decision in *Rhys-Harper*: see para. 29 (p. 814). He also acknowledged the "flexible interpretative approach" required when construing legislation intended to implement EU law: he referred in particular to my own decision, sitting in the EAT, in *EBR Attridge LLP v Coleman* [2010] ICR 242 and to the decision of the House of Lords in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 – see paras. 32 and 33 (p. 815). But he pointed out that there are limits to what is permissible even on that approach, and his conclusion was that to read a prohibition on post-termination victimisation into the 2010 Act was simply not possible. In particular, he read section 108 (7) as providing in terms that post-termination victimisation was not unlawful. That being so, the Claimant's case fell on the wrong side of the "*Ghaidan* line": it would "fly directly in the face of what Parliament has actually enacted" and would represent (borrowing a phrase from Lord Steyn's speech in *Ghaidan*) a crossing of the Rubicon: see paras. 36-38 (p. 816). The case was fundamentally different from *Rhys-Harper* because, unlike in the legislation in force at that time, Parliament had made express provision for the case of post-termination conduct: see para. 39 (p. 816).

THE JUDGMENT OF THE EAT IN *ONU*

26. The consideration of this issue by Langstaff J at paras. 58-111 of his judgment in *Onu* (pp. 1056-67) is fully and carefully reasoned, but I need only give a fairly short summary. He started by considering, at paras. 62-96, the effect of the relevant statutory provisions from a purely domestic perspective, i.e. without reference to the Directives or *Coote*. He acknowledged the problem that section 108, which on the face of it might be expected to deal comprehensively with the case of prohibited conduct in the context of a relationship which has ended, contains no proscription of post-termination victimisation equivalent to that of post-termination discrimination and harassment. But he reasoned that the implications of that are undermined by the terms of sub-section (7). He read the sub-section as being designed to prevent "double recovery" in a case where a person could (otherwise) claim both for discrimination/harassment under section 108 and for victimisation. On that basis it had, in his view, to follow that the draftsman believed that post-termination victimisation was, at least in some circumstances, unlawful: thus he must have understood that it was proscribed by some other provision of the Act. The only possible candidate for that provision was section 39 (4). Langstaff J believed that it was perfectly possible to read the phrase "an employee of A's" in section 39 (4) as applying not only to those employed as at the date of the conduct complained of but also to former employees. That was, after all, very closely analogous to the route taken by the House of Lords in *Rhys-Harper* in relation to the provisions in the original predecessor legislation: indeed, as he pointed out, if anything the language of section 39 (4) lends itself more easily to a construction which covers former employment than do the phrases used in the earlier Acts. The policy considerations which influenced the House of Lords in adopting that construction were equally applicable in the context of the 2010 Act and were indeed reinforced by the consideration that it was unlikely in the extreme that Parliament had intended to reduce the scope of the protection as recently and authoritatively declared in *Rhys-Harper* itself.

27. Although Langstaff J reached that conclusion applying purely domestic principles of construction he said that the EAT's view was reinforced by the fact that if post-employment victimisation were not unlawful the UK would be in breach of EU law and that, if necessary, it would reach the same result applying an approach based on *Ghaidan*: see paras. 100-105 (pp. 1064-5). Victimisation was expressly proscribed by the Race Directive (being the relevant Directive in *Onu*), and it was clear from *Coote* that that was the case whether the victimisation occurred during or after the claimant's employment.

THE APPEAL

THE ISSUE

28. It seems to me clear that on a natural reading of the relevant provisions of the 2010 Act, taken on their own and without reference to any contextual material, post-termination victimisation is not proscribed. Even though the phrase "an employee of A's" in section 39 (4) can no doubt in isolation be read as extending to a former employee, the apparent scheme of the Act is that prohibited conduct arising out of a past relationship will be proscribed, if at all, by the "ancillary" provisions of Part 8, and specifically by section 108; and section 108 contains an explicit proscription of the other two forms of prohibited conduct – discrimination and harassment – but not of victimisation. It is true that victimisation is mentioned in sub-section (7). I deal elsewhere with what can be inferred from that, but, whatever its meaning, it is on a natural reading plainly inadequate to repair the omission of any provision equivalent to sub-sections (1) and (2).

29. However, once the proper contextual materials are considered it seems to me equally clear that that is not the result which the draftsman intended. That was the view not only of Langstaff J in *Onu* but also of Mr Recorder Luba in this case (see para. 25 above), and indeed the contrary was not argued before us. Although the conclusion is common ground, it is important that I set out the contextual considerations on which it is based. These are as follows.

30. First, as explained above, at the time that the 2010 Act was drafted the existing state of the law was that post-termination victimisation was unlawful. That had been initially established by the House of Lords in *Rhys-Harper* as regards post-employment victimisation; and it had been re-stated, and confirmed to apply to all protected relationships, in the 2003 legislation. Furthermore, it was a central part of the reasoning in *Rhys-Harper* that there was no rational basis for withdrawing the statutory protection against discrimination, including victimisation, arising out of the employment relationship as at the moment at which the employment terminates. Lord Nicholls, at paras. 37-40 of his speech (pp. 880-1), said that such a state of affairs would be arbitrary and capricious and cannot have been intended by Parliament – a view with which I respectfully agree. The draftsman will of course have been, and Parliament must be taken to have been, well aware of that history.

31. Secondly, and following from that, we have been referred to no indication that the Government in promoting the 2010 Act intended to change the law by withdrawing, even if only as regards victimisation, the protection previously enjoyed by former employees; and it is vanishingly unlikely that that was the case. Although the Act is not formally a consolidating statute, its purpose was to re-state, with some

clarifications and enhancements where necessary, existing protections against discrimination (including victimisation and harassment).

32. Thirdly, para. 353 of the Explanatory Notes to the 2010 Act, which is part of the commentary on section 108, reads:

> "A breach of this section triggers the same enforcement procedure as if the treatment had occurred during the relationship. However, if the treatment which is being challenged constitutes victimisation, it will be dealt with under the victimisation provisions and not under this section."

I will have to say more about this paragraph when considering section 108 (7) (see para. 45 below); but at this stage its relevance is simply as a statement that post-termination victimisation is intended to be proscribed, albeit by (unidentified) "victimisation provisions" other than section 108. Explanatory Notes are in principle admissible as an aid to construction: see *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956, *per* Lord Steyn at paras. 2-6 (pp. 2958-9).[5]

33. Fourthly, if post-termination victimisation were not proscribed, the UK would be in breach of its obligations as a matter of EU law: see paras. 22 and 23 above.

34. Fifthly, no rational basis was suggested to us for treating post-termination victimisation differently from post-termination discrimination and harassment.

35. I also incline to think, like Langstaff J, that the drafting of section 108 (7) points in the same direction (though this is not strictly a contextual point). But the intended effect of that sub-section, which I consider at para. 45 below, is seriously problematic, and I need not rely on it in view of the weight of the points set out above.

36. It follows that the apparent failure of the statute to proscribe post-termination victimisation is a drafting error. How that error arose is not possible to ascertain. One explanation which at first sight seems plausible is that the draftsman took as his model when drafting section 108 the earlier provisions relating to "relationships which have come to an end" – see para. 10 above – but overlooked the fact that, whereas in the predecessor legislation victimisation was a sub-species of discrimination, its new status as a distinct head of prohibited conduct meant that it needed to be proscribed in its own right. However, this explanation cannot be reconciled with para. 353 of the Explanatory Notes (at least if these were produced by the draftsman of the section, rather than by someone else trying to reconstruct his thinking), since these proceed on the basis that post-termination victimisation is caught by separate "victimisation provisions". In the end it is unnecessary to be able to show how the error arose as long as it is clear that it was indeed an error.

---

[5] Ms Monaghan also relied on similar words in the Code of Practice issued by the Commission covering the employment provisions of the 2010 Act. But even if, which I doubt, this is admissible as an aid to construction on a point of this kind, it is of less weight than the Explanatory Notes.

37. Accordingly the issue raised by this appeal is how far it is right to go to correct what is an undoubted drafting error: would that, as the EAT put it, involve crossing the Rubicon ? Ms Monaghan and Mr Robottom submitted that there were ample powers to give effect to what must have been the legislative intention. Mr Crosfill and Mr Dutton submitted that, in Mr Crosfill's phrase, the interpretative tools available were simply not strong enough to give a remedy in the present case.

THE APPROACH TO THE INTERPRETATION OF THE ACT

38. Since the relevant provisions of the 2010 Act are intended to give effect to the UK's obligations as a matter of EU law the Court must in construing those provisions apply the special approach required in such a case (and where section 3 of the Human Rights Act 1998 is in play) which is most authoritatively expounded by the House of Lords in *Ghaidan* (see para. 25 above): I will refer to this as "the *Ghaidan* approach". It is generally said that the power of the Court to depart from the natural reading of the language of the statute, including by the implication of words which alter its effect as drafted, is wider on the *Ghaidan* approach than is permissible on the conventional domestic approach to the construction of statutes. That is no doubt right as a generalisation, though I have to say that it is not possible usefully to calibrate the extent of the difference, especially now that the need to take a purposive approach is well-recognised in construing purely domestic legislation; and it may be that at least in cases of drafting error the difference is insubstantial – see para. 53 below.

39. Langstaff J in *Onu* did not find it necessary to go beyond the conventional domestic approach. For my part, I think it right in principle to start with the *Ghaidan* approach, since this is unquestionably a case where it applies. But I will also go on to consider whether the position would be different if we were to apply a purely domestic approach. We were encouraged by Ms Monaghan to take the latter course because, although EU law prohibits post-termination victimisation in the employment field with which we are concerned in the present case, that is not so as regards all the fields covered by the 2010 Act.[6] The Commission, by whom she is instructed, is anxious if possible that the Appellant should succeed in this appeal on a basis which applies to the Act as a whole and thus to preclude any future argument (whatever its prospects might be) that post-termination victimisation remains lawful in the case of those provisions which do not have a "Euro-underpinning". Ms Monaghan also had a separate, though similar, concern that we should not find for the Claimant on the basis exclusively of the EAT's reasoning in *Onu*, since that depended on being able to construe section 39 (4) as the House of Lords had construed its predecessors in *Rhys-Harper*. She pointed out that, while many of the primary provisions proscribing victimisation elsewhere in Part 5 and in the other Parts of the Act were framed similarly to section 39 (4), that was not the case in relation to all: she cited section 29, which is the primary provision of Part 2, by way of example. She urged us to, in

---

6 All the provisions of the Act relating to employment are underpinned by one of the three Directives identified above. But as regards the other Parts of the Act the position is more patchy. Art. 3 of the Race Directive extends its scope into a number of fields beyond employment, but the same is not true of the Framework Directive or the Recast Directive. So far as sex discrimination is concerned, that gap is to some extent filled by Council Directive 2004/113/EC, which applies the principle of equal treatment to discrimination between men and women as regards access to certain goods and services; but its scope (as defined in art. 3) is not as extensive as that of the 2010 Act.

effect, supply a new "section 108A" which would apply to all post-termination victimisation across the board.

DISCUSSION AND CONCLUSION ON THE *GHAIDAN* APPROACH

40. The existence of a special approach to the construction of statutes which are designed to implement obligations under EU law was first identified by the House of Lords in *Pickstone v Freemans plc* [1989] AC 66 and was re-affirmed in *Litster v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546. In *Ghaidan* the House assimilated that approach to that required in cases in which section 3 of the 1998 Act is engaged – see *per* Lord Steyn at para. 48 (p. 576) and Lord Rodger at para. 118 (pp. 599-600).[7]

41. The speeches in *Pickstone*, *Litster* and *Ghaidan* are very well-known, and nothing would be gained by my citing from them extensively here. For working purposes, it is sufficient to adopt the summary (which refers also to two more recent cases in this Court) in the judgment of Sir Andrew Morritt C in *Vodafone 2 v Her Majesty's Commissioners of Revenue and Customs* [2009] EWCA Civ 446, [2010] Ch. 77, at para. 37 (p. 90):

> "In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular:
>
> (a) It is not constrained by conventional rules of construction (per Lord Oliver in *Pickstone* at 126B)
>
> (b) It does not require ambiguity in the legislative language (per Lord Oliver in *Pickstone* at 126B; Lord Nicholls in *Ghaidan* at 32)
>
> (c) It is not an exercise in semantics or linguistics (see *Ghaidan* per Lord Nicholls at 31 and 35; Lord Steyn at 48-49; Lord Rodger at 110-115)
>
> (d) It permits departure from the strict and literal application of the words which the legislature has elected to use (per Lord Oliver in *Litster* at 577A; Lord Nicholls in *Ghadian* at 31)
>
> (e) It permits the implication of words necessary to comply with Community law obligations (per Lord Templeman in *Pickstone* at 120H-121A; Lord Oliver in *Litster* at 577A);

---

[7] Both *Pickstone* and *Litster* preceded the well-known decision of the ECJ in *Marleasing SA v La Comercial Internacional de Alimentacion SA* (C-108/89) [1990] ECR I-4135. But the approach which they take is entirely consistent with it, as was noted in *Ghaidan*: see *per* Lord Steyn at para. 45 (pp. 574-5) and Lord Rodger at para. 118 (p. 599). I should say for completeness that we were referred in the skeleton arguments to the decision of the CJEU in *Kücükdevici v Swedex GmbH* (C-555/07) [2010] IRLR 546, but in the oral submissions no distinct reliance was placed on it.

(f) The precise form of the words to be implied does not matter (per Lord Keith in *Pickstone* at 112D; Lord Rodger in *Ghaidan* at para 122; Arden LJ in [*R (IDT Card Services Ireland Ltd) v Customs and Excise Commissioners* [2006] STC 1252] at 114)"

He added, at para. 38 (pp. 90-91):

"The only constraints on the broad and far-reaching nature of the interpretative obligation are that:

(a) The meaning should "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed." (per Lord Nicholls in *Ghaidan* at 33; Dyson LJ in [*Her Majesty's Commissioners of Revenue and Customs v EB Central Services Ltd* [2008] EWCA Civ 486] at 81). An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment; (see *Ghaidan* per Lord Nicholls at 33; Lord Rodger at 110-113; Arden LJ in *IDT Card Services* at 82 and 113) and

(b) The exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate. (See *Ghaidan* per Lord Nicholls at 33; Lord Rodger at 115; Arden LJ in *IDT Card Services* at 113.)"

42. Given the existence of the EU obligation to proscribe post-employment victimisation, the only question is whether it is "possible", in the sense elucidated in *Ghaidan*, to imply words into the 2010 Act which achieve that result. In my view it plainly is. In the light of my conclusion at paras. 29-36 above the implication of such a prohibition would not only be consistent with the fundamental principles of the Act and "go with its grain": it in fact represents what the draftsman intended.

43. The EAT based its conclusion that it was not possible to correct the draftsman's error on its view that the terms of section 108 were simply too explicit. It relied both (a) – though this point is perhaps more implied than expressed in its judgment – on the simple fact that the section which has the role of providing for cases of prohibited conduct arising out of a "relationship that has ended" proscribes such conduct when it constitutes discrimination and harassment but not when it constitutes victimisation; and (b) on what it took to be the explicit effect of sub-section (7).

44. So far as (a) is concerned, with respect I think that the EAT failed to appreciate the extent of the flexible interpretative obligation explained in *Ghaidan*. I entirely accept that its approach to section 108 would be the "natural" reading if no regard were had to the wider context. But the question is whether that reading is, having regard to that

context, a reliable indication of a positive legislative intent to permit post-termination victimisation. For the reasons already given, in my view it is not.

45. As for (b), the effect of section 108 (7) is decidedly opaque. For ease of reference I repeat it here:

> "But conduct is not a contravention of this section in so far as it also amounts to victimisation of B by A."

Para. 353 of the Explanatory Notes, set out at para. 32 above, must also be borne in mind. I attempt to analyse the sub-section as follows:

(1) It starts with a "but". That means that it constitutes a qualification to all or part of the preceding section. At first sight it might appear to be a qualification only to the immediately preceding sub-section (6), particularly because both use the phrase "a contravention of this section" (which does not appear elsewhere in the section). That impression is reinforced by para. 353 of the Explanatory Notes: the first sentence clearly refers to sub-section (6) and the second, introduced by a "however", to sub-section (7). That reads as if the two sub-sections form a pair. But when one tries to apply sub-section (7) on that basis it makes no sense: whether or not conduct is a "contravention of this section" is not an issue under the enforcement provisions. So it seems that sub-section (7) is intended as a qualification to the principal operative parts of the section, namely sub-sections (1) and (2).

(2) Approached in that way, the effect of the sub-section is that conduct which would otherwise be unlawful under sub-section (1) or (2) is not unlawful "in so far as"[8] it also constitutes victimisation. Cases of acts which fall under more than one head of prohibited conduct – "overlap cases" – are of course common, including where the relevant relationship has come to an end. To take a concrete example, a former employer may refuse a reference both because the ex-employee is black and because he has previously complained of racial discrimination. The effect of sub-section (7) is that he cannot bring his claim as one of discrimination.

(3) So far so good, but the question is why the draftsman wanted to achieve that result. The only possibilities seem to me to be (i) that he did not intend post-termination victimisation to be unlawful and believed that, that being so, if the same conduct also constituted discrimination it should not be unlawful under that head either; or (ii) that he did regard post-termination victimisation as unlawful, being proscribed somewhere else in the Act, but that he had some reason for requiring any overlap cases to be complained of only under those other provisions. I take the two possibilities in turn.

(4) As to (i), this works from a purely verbal point of view: it should be recalled that the sub-section refers only to "victimisation", which is not as such unlawful (see para. 13 above). But I can see no rational reason for a provision

---

[8] There was some discussion before us about why the draftsman used "in so far as" rather than simply "if". But I cannot see that the distinction matters for present purposes.

having that effect, and it would have perverse results. The fact that particular conduct does not constitute unlawful victimisation is not a reason why it should not constitute unlawful discrimination. To take my example, why should an employer who refuses to give a reference to a former employee because he is black be let off the hook if he was also motivated by the fact that the employee had made a previous complaint of discrimination ?

(5) As to (ii), this is of course the explanation suggested by the Explanatory Notes, which say that overlap cases have to be complained of under "the victimisation provisions" (whatever they are). That would confirm that the draftsman intended post-termination victimisation to be unlawful: he just thought (albeit wrongly on any natural reading) that he had provided for it elsewhere. I do think it is legitimate to attach some weight to that. But the weight is diminished by the fact that, though the explanation works in theory, it is very hard to see why the draftsman believed that an "anti-overlap" provision of this kind – allocating the unlawfulness to one head rather than another – was necessary. Langstaff J, though he agreed that the intention of the draftsman was difficult to discern, thought that he must have been concerned about double recovery; but I am bound to say that I find that unconvincing. Overlap cases are common in claims arising out of conduct during the course of a relationship but they have never given rise to any problem of the claimant being over-compensated by recovering separately under each head. I cannot see why the draftsman might have thought there was some overlap problem peculiar to post-termination cases, and none of the counsel before us was able to come up with an explanation. I am tempted to echo Lord Russell in *O'Brien v Sim-Chem Ltd* [1980] 1 WLR 1011 (see p 1017 F-G) (who was in turn echoing Lord Bramwell in *Bank of England v Vagliano Brothers* [1891] AC 107) and say "this beats me" and jettison section 108 (7) "as making no contribution to the manifest intention of Parliament".

I have felt obliged to enter into this lengthy and I fear tedious discussion because section 108 (7) was at the centre of the reasoning of the EAT both in this case and in *Onu*. But the essential point is that, even if it is indeed impossible to see the point of sub-section (7), it contains in my view no clear indication of an intention that post-termination victimisation should be lawful.

46. Ms Monaghan made one other point which is worth noting. She pointed out that in Schedule 28 to the Act, which contains an "Index of Defined Expressions", "discrimination" is said to be defined in "sections 13 to 19, 21 *and 108* [my emphasis]". The reference to section 108 must be an error. That section does not define discrimination, as the other sections referred to do: rather, its effect is to proscribe it (in the circumstances specified). By contrast, the entry for "harassment" does not refer to section 108. (Nor does the entry for "victimisation", but that is perhaps neutral.) This error is not directly material to the problem before us, but it reinforces the impression that the draftsman may rather have lost his way in his treatment of section 108.

47. I accordingly see no obstacle in the provisions of section 108 to an implication which would give effect to the EU obligation to proscribe post-employment victimisation.

48. As noted in Sir Andrew Morritt's summary of the case-law in *Vodafone 2* quoted at para. 41 above (see point (f)), where words fall to be implied into a statute in order to give effect to an EU obligation it is not necessary to draft a formal quasi-amendment: what matters is the effect of the implication rather than its precise form. But, as he went on to say (see para. 39 (p. 91 C-D)), it may still be a useful exercise to see what form the implication could take. That presents no difficulty in the present case. The simplest course would be to insert at the end of section 108 (1) the sentence: "In this sub-section discrimination includes victimisation." But the same effect could be achieved more elaborately by a new sub-section (2A) which follows the form of sub-sections (1) or (2) but refers to victimisation rather than discrimination/harassment. This, I think, is in substance what Ms Monaghan meant by inviting us to adopt a "section 108A" approach. I see no reason to respect what may, judging from the Explanatory Notes, have been the draftsman's intention that the prohibition should be contained in separate "victimisation provisions" elsewhere in the Act (whether that means under section 39 (4) and its cognates or somewhere else): that view, if it was his view, is part of the problem and not the solution.

49. I am not sure that anything needs to be done about sub-section (7). In the unlikely event that anyone seeks to rely on it in future, some other court can cudgel its brains about what real effect, if any, it has: all that matters for present purposes is that it can have no meaning which is inconsistent with post-termination victimisation being unlawful.

THE DOMESTIC APPROACH

50. As I have set out above, Langstaff J based his decision that post-employment victimisation was proscribed by the 2010 Act on the construction that he felt able to give, applying a purely domestic approach to construction, to section 39 (4); and it was Ms Monaghan's fallback submission that we should adopt his reasoning. But both she and, in more fully developed submissions, Mr Robottom advanced a more straightforward domestic route to the same result, by way of a "rectifying construction" of the kind adopted by the House of Lords in *Inco Europe v First Choice Distribution* [2000] 1 WLR 586. *Inco* was not apparently relied on in the EAT in this case. In *Onu* it was not referred to in the original skeleton arguments or at the original hearing, but Mr Robottom did address it in subsequent written submissions and at a further hearing which the EAT directed.

51. In *Inco* the House was concerned with section 18 (1) (g) of the Supreme Court Act 1981, as amended by section 107 and Schedule 3 of the Arbitration Act 1996. As so amended that provision on its face clearly excluded a right of appeal (which had existed previously) to the Court of Appeal from a decision of the High Court under section 9 of the 1996 Act. The decision of the House was that this was a plain case of drafting error and that it was permissible to read words into the amended paragraph (g) to give effect to the evident intention of the legislature. Lord Nicholls, who delivered the only substantial speech, said this, at p. 592:

> "I am left in no doubt that, for once, the draftsman slipped up. The sole object of paragraph 37 (2) in Schedule 3 was to amend section 18 (1) (g) by substituting a new paragraph (g) that would serve the same purpose regarding the Act of 1996 as the original paragraph (g) had served regarding the [predecessor legislation]. The language used was

not apt to achieve this result. Given that the intended object of paragraph 37(2) is so plain, the paragraph should be read in a manner which gives effect to the parliamentary intention. Thus the new section 18 (1) (g), substituted by paragraph 37 (2), should be read as confined to decisions of the High Court under sections of Part I which make provision regarding an appeal from such decisions. In other words, "from any decision of the High Court under that Part" is to be read as meaning "from any decision of the High Court under a section in that Part which provides for an appeal from such decision".

I freely acknowledge that this interpretation of section 18 (1) (g) involves reading words into the paragraph. It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opuscule, *Statutory Interpretation*, 3rd ed. (1995), pp. 93–105. He comments, at p. 103:

> 'In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.'

This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation … . In the present case these three conditions are fulfilled."

Mr Robottom's skeleton argument also referred to *R (Zenovics) v Secretary of State for the Home Department* [2002] QB 204, *R (Kelly) v Secretary of State for Justice* [2009] QB 204, and *Forstad Supply AS v Enviroco Ltd* [2011] 1 WLR 921, and to Bennion on Statutory Construction, 5th ed, section 287. But they add nothing on the issue of principle.

52. Mr. Robottom submitted that the present case is a plain case of a drafting mistake and that the three conditions identified by Lord Nicholls are fulfilled. I agree. I have already explained why I believe that it is clear that the draftsman and Parliament intended to proscribe post-termination victimisation and that the failure explicitly to do so was inadvertent. As for Lord Nicholls' third condition, what I say at para. 48 above applies equally here.

53. If I am right in this conclusion it seems that in the particular case of a frank drafting error – that is, where the Court can be satisfied that the draftsman positively intended to include a provision which in fact he omitted – there is no real difference between the *Ghaidan* approach and the approach based on purely domestic principles. It would be different in a case where no such intention is established and the argument is simply that the implication sought is necessary in order to comply with EU law or the requirements of the Convention.

54. The adoption of the *Inco* route renders it unnecessary for me to express a view on the particular reasoning of Langstaff J in *Onu*. I should say, in deference to the submissions of Mr Crosfill and Mr Dutton, that I do see force in the point that the legislative changes since *Rhys-Harper* have made the solution of finding a proscription of post-termination victimisation in section 39 (4) more difficult: there is now a dedicated section dealing with post-termination conduct, and since victimisation is now a distinct head of prohibited conduct it is not easy to see why post-termination victimisation should be dealt with in the primary provisions when post-termination discrimination is not.

CONCLUSION

55. In my view post-termination victimisation is proscribed by the 2010 Act, and I would allow the appeal accordingly. In the light of the factual finding of the Employment Tribunal that Mr Davis gave the reference that he did because the Claimant was pursuing tribunal proceedings, that means, if my Lords agree, that the victimisation claim must succeed and the case be remitted to the Tribunal for the assessment of compensation.

Lord Justice Ryder:

56. I agree.

Lord Justice Maurice Kay:

57. I also agree.