Neutral Citation Number: [2024] EAT 94

Case No: EA-2021-001403-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 May 2024

Before:

HIS HONOUR JUDGE AUERBACH

- -

Between:

MR COLIN SMITH	**Appellant**
- and -	
NOTTINGHAM CITY TRANSPORT	**Respondent**

- -
- -

Mr Saul Margo (instructed through **Advocate**) for the **Appellant**
Mr Kevin McNerney (instructed for **Sills & Betteridge**) for the **Respondent**

Hearing date: 21 May 2024

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JUDGMENT

SUMMARY

The claimant in the employment tribunal brought multiple complaints raising a number of factual allegations, said to involve more than one type of discrimination.

During the course of the litigation, following the making of deposit orders in respect of certain of the complaints, a law centre representative wrote on behalf of the claimant withdrawing some complaints, whilst confirming for the avoidance of doubt that others were maintained.

In a decision arising from a full merits hearing, one of the complaints, only, succeeded, and the tribunal made an award of compensation for injury to feelings in respect of it.

The tribunal erred in considering that, following the claimant's non-compliance with deposit orders, one particular complaint of harassment was no longer live. It was not covered by those orders and it had not been unambiguously withdrawn. The matter was remitted to the tribunal to adjudicate that complaint.

The tribunal did not err in its adjudication of any of the other complaints, nor were its reasons in respect of the injury to feelings award not *Meek*-compliant. Nor did it err in failing to award interest on its award for injury to feelings. The tribunal considered that the true value of the injury to feelings was £750, but, wrongly, that it was obliged to award £900. Given its view of the true value of the loss, it did not err by not also awarding interest.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. The claimant in the employment tribunal seeks to appeal from the decision of the tribunal sitting at Nottingham (Employment Judge P Britton, Mr R Jones and Mr J D Hill), arising from a full merits hearing in August and September 2021. The tribunal determined a number of complaints under the **Equality Act 2010** by reference to the protected characteristic of disability and complaining of conduct said to amount to direct discrimination (section 13), discrimination arising from disability (section 15), harassment (section 26) and/or victimisation (section 27), all against his, by then, former employer, the respondent.

2. All of the claimant's complaints were dismissed, save for one complaint of discrimination contrary to section 15 relating to remarks made by the claimant's line manager, Ricky Wright, on 18 October 2018. The Tribunal made an award of injury to feelings of £900 in that respect and decided not to award interest.

3. At the employment tribunal hearing, as he was for much of the course of the litigation leading up to the hearing, the claimant was a litigant in person. However, there were periods in the course of the proceedings prior to the hearing when he was represented by Mr Benson, from the Nottingham Law Centre, then by someone from the Free Representation Unit (FRU) and subsequently again for a short period by Mr Benson.

4. In the EAT the claimant has been a litigant in person. But at a Rule 3(10) hearing he had the benefit of representation under the ELAAS scheme by Mr Margo of counsel; and five amended grounds tabled by him were permitted to proceed to this full appeal hearing. Today Mr Margo has again appeared for the claimant under the auspices of Advocate. Mr McNerney of counsel, who appeared for the respondent in the employment tribunal, has

again appeared for it today.

The Facts

5. The relevant factual background, which I take from the tribunal's decision and documents that are before me, is as follows.

6. The claimant started with the respondent in 2013 as a maintenance plant fitter. By the time of relevant events in 2018, he had had some absence because of carpel tunnel syndrome. He had also by then initiated through solicitors a personal injury claim in respect of hand-arm vibration syndrome (HAVS). By the time of the full merits hearing in the tribunal the respondent had conceded that the claimant was disabled in respect of both conditions.

7. On 12 October 2018 the respondent advertised the post of engineering maintenance team leader. The claimant considered that the job description effectively covered tasks that he had been expected to do, or could do, and he had issues about other aspects of the job description. He raised a grievance. On 18 October he then had a discussion about the matter with his line manager, Ricky Wright. Mr Wright spoke to the engineering director, Gary Mason, and then spoke to the claimant again later that day. In that conversation Mr Wright conveyed to the claimant that if he applied for the job he would not get it for a number of reasons, including because of his absence record, which arose from his carpel tunnel syndrome, and because of his personal injury claim relating to HAVS.

8. On the morning of 19 October 2018 the claimant spoke to Mr Wright again and covertly recorded the conversation. The tribunal set out in its decision an extract from the transcript of the recording that was before it, showing that the claimant asked Mr Wright to go over what he had told him the evening before. When Mr Wright asked the claimant whether this was off the record, he said "yes". Mr Wright went on to confirm that the issue

relating to the claimant's sickness record had come from his superior, Mr Mason. The claimant asked Mr Wright if he was willing to confirm this at his grievance hearing, which was due to take place that afternoon. But Mr Wright in so many words said he did not mind telling the claimant this off the record, but was not prepared to go on the record, because of the consequences that he himself would face if he did so.

9. That same day, 19 October 2018, a grievance meeting took place in the afternoon with Sheila Swift of the respondent's HR team and Mr Wright. The claimant had his trade union representative with him. The claimant complained about what he said he had been told by Mr Wright that Mr Mason had said. When Mr Wright disputed his account, the claimant revealed that he had made a recording of his conversation with Mr Wright that morning. Ms Swift indicated that, given the factual dispute between them, in order to consider the matter further, the claimant would need to provide a transcript of the recording for the next grievance hearing. It was understood at that point that he would do so.

10. Subsequently, the claimant initiated a further grievance, complaining that he had been the victim of discrimination by virtue of the stance taken by Mr Mason, as reported by Mr Wright. After he had put in that further grievance, Ms Swift wrote indicating again that he needed to produce the recording, or a transcript of it.

11. The claimant applied for the job in question on 13 November 2018. He had a first interview with his immediate line manager, Graham Smith, and Ms Swift, on 14 November.

12. The claimant decided at a certain point that he would not, after all, provide a transcript of his recording for the purposes of his grievance at that stage, but would wait and see what the outcome of his job application was, as he took the view that if that application was successful then he would have no need to pursue the matter further. However, the claimant

did not at that point share his change of stance. So Ms Swift wrote to him on 20 November, as the further grievance hearing was coming up on 22 November, asking him again to provide the recording or transcript, and stating that, if he did not, he would not be able to rely upon it at the forthcoming hearing or any further stage of the grievance procedure.

13. The further grievance meeting took place on 22 November 2018 with Ms Swift and Graham Smith. The claimant again had his union representative present. During the course of the meeting the claimant explained that he was not prepared to provide the transcript at that stage pending finding out whether he was successful in his job application. Graham Smith said at some point that the claimant had put a loaded gun to the respondent's head, or words to that effect, and Ms Swift said that the claimant's stance amounted to blackmail.

14. The claimant was successful in his first interview and received a second interview, conducted by Liam O'Brien, a recently appointed chief engineer, and Lynne Aldred from HR. However, another candidate got the job.

15. Having been unsuccessful in his initial grievance, the claimant appealed under the second stage of the grievance procedure. That appeal was heard by Mr Mason in December and rejected by him at the beginning of January 2019. The claimant then appealed further at stage three of the respondent's grievance appeal procedure and that was heard by the Head of HR, Mr Potgieter, and Mark Fowler, the managing director. Later in January the claimant was told that that further appeal had been unsuccessful.

16. Subsequent to that, the claimant provided a copy of the transcript. He also began a period of sickness absence. The provision of the transcript led to a disciplinary investigation in relation to Mr Wright, who received a written warning.

17. The claimant subsequently began his tribunal claim. He also subsequently resigned,

but there was no claim before the tribunal of constructive dismissal of any sort.

The Tribunal Litigation

18. Prior to the full merits hearing, there was a series of preliminary hearings (PHs) in the employment tribunal. As I have described, for some of this time the claimant was unrepresented but there were periods when he had some representation and assistance. I do not need to set out the whole history of all of these hearings and every stage of the litigation in the employment tribunal, but relevant developments were as follows.

19. There was a PH on 9 September 2020 before EJ Heap at which the claimant was represented by Mr Benson. At that hearing the claimant was permitted to amend his claim on the basis that the claims going forward were those set out in a Scott schedule that had been prepared and tabled by Mr Benson. At a subsequent hearing on 9 June 2021 before EJ Read, at which point the claimant was represented by the FRU representative, Mr Stuart, the judge made deposit orders in respect of certain of the numbered allegations in that Scott schedule.

20. Thereafter, FRU ceased to act for the claimant, but Mr Benson reappeared for a time and wrote an email on 1 July 2021, in which he indicated that certain claims were being withdrawn but also included a table confirming, as he put it, "for the avoidance of doubt", which claims were maintained. Later in July 2021 EJ Butler dismissed one allegation on the basis that it had been withdrawn and two other allegations on the basis that a deposit had not been paid in relation to them. As I have said, at the hearing that then began at the end of August 2021 the claimant appeared in person.

Grounds of Appeal, Discussion, Conclusions

21. The grounds of appeal before me relate in part to the award that the tribunal made in respect of the one complaint that succeeded and in part to how the tribunal dealt, or it is said,

failed to deal, with certain, though not all, of the other complaints that were dismissed.

22. Ground 1 relates to allegation 6 in the Scott schedule prepared by Mr Benson, and which had formed the basis at the earlier PH before EJ Heap of the complaints that the claimant was permitted to proceed with by amendment. Under the heading "harassment related to the protected characteristic of disability" the factual allegation in allegation 6 was that Ms Swift was aggressive towards the claimant and accused him at the meeting on 19 October 2018 of blackmail and gross misconduct "for complaining about my line manager making a discriminatory remark and making a recording of the conversation to prove it".

23. At [16] of its reasons, the tribunal reached the conclusion that there was no claim remaining relating to the conduct of Ms Swift on 19 October 2018. Ground 1 contends that this was an error. As it set out at paragraphs [15] and [16], the tribunal reached that conclusion on the footing that that complaint had gone by the wayside, because the claimant had failed to comply with the deposit order in relation to it and it had then been dismissed by EJ Butler. The ground contends that this was an error, as that complaint had *not* been the subject of a deposit order, hence nor had it been dismissed for non-payment of a deposit. Nor, in any event, had it clearly and unambiguously been withdrawn by Mr Benson.

24. The Scott schedule grouped the complaints that it set out by dealing first with all the complaints of direct discrimination, setting out the factual conduct alleged to amount to direct discrimination, then all of the complaints of discrimination arising from disability, again setting out each matter of alleged conduct said to amount to that particular wrong, and then doing the same in turn in relation to harassment, and then finally victimisation. This approach meant that, where the claimant alleged that something factually had occurred, which in law amounted to more than one kind of wrong, the factual allegation was repeated in each of the

sections relating to the particular types of wrong alleged in relation to that factual matter.

25. Allegation 4 was contained in the section setting out complaints of discrimination arising from disability (section 15) and included a complaint that the conduct of Ms Swift by accusing the claimant of blackmail and gross misconduct for complaining about Mr Wright's remark and using a recording to prove it, amounted to conduct contravening section 15. Allegation 6, which appeared in the section dealing with complaints of harassment contrary to section 26, related to the same alleged conduct on the part of Ms Swift and the additional allegation that she was aggressive towards the claimant during that meeting.

26. The deposit order was set out as being in relation to: allegation 4, under which a brief description of the factual allegations was given; allegation 8, again with a factual description; and allegation 11, again with a factual description.

27. On what appears to have been the last day for paying the deposit if the claimant was going to do so, Mr Benson wrote his email of 1 July 2021. He began:

> **"Following the deposit orders the claimant now wishes to withdraw the following claims:**
>
> - **the claims arising from the alleged comment of Ben Potgeiter that Mr Potgeiter had accused the claimant of blackmail;**
>
> - **the claims arising from the alleged accusation by Sheila Swift at the meeting on 19 October 2018 that the claimant was blackmailing the respondent."**

28. Further on, Mr Benson wrote:

> **"For the avoidance of doubt, therefore, the claimant is still proceeding with the following claims."**

29. The email then set out a table with columns for "Event", "Type of claim" and "Cross-reference to the respondent's 'schedule of allegations'" by allegation numbers.

30. Later in July 2021 EJ Butler issued judgments dismissing allegation 4 on withdrawal by the claimant and striking out allegations 8 and 11 because of non-payment of the deposit.

31. Mr McNerney submitted that, standing back from this sequence of events, what had happened in substance was that the claimant had withdrawn the factual allegation which underpinned allegation 6, and that therefore this was a withdrawal of that factual allegation for the purposes of all legal complaints. In any event, the dismissal of allegation 4 referring to the factual basis, which was in substance the same as that of allegation 6, meant that allegation 6 had fallen by the wayside as well. Even if its particular reasoning was faulty, the full-hearing tribunal did not err in concluding that allegation 6 was no longer live.

32. I do not agree with those submissions. It is not unusual that a claimant alleges that something factually occurred, and claims that that factual conduct amounted to more than one type of legal wrong. Correspondingly, there is a difference between withdrawing a factual allegation entirely, and hence all of the legal complaints relating to it, and withdrawing a particular legal complaint about a factual allegation, but not the factual allegation itself, in relation to which other legal complaints are maintained.

33. In the present case there were two different legal complaints relating to the overlapping factual allegations regarding the conduct of Ms Swift on 19 October 2018: allegation 4 – a complaint under section 15, and allegation 6 – a complaint under section 26. The deposit order related to allegations 4, 8 and 11. The fact that it summarised the factual basis of allegation 4 does not mean that it related also to allegation 6. The numbered allegations to which it did relate were clearly and expressly set out.

34. As to the email from Mr Benson, the reference in the second bullet point of the introduction, read in complete isolation, could be construed as relating to all complaints or

claims arising from the alleged conduct of Ms Swift on 19 October 2018, because it used the word "claims" in the plural. However, the introductory words were: "Following the deposit orders" and the bullet points both referred to matters to which allegations that were the subject of the deposit orders related. This conveys the impression that the claimant had reviewed his position, following the deposit orders, and decided not to proceed with certain of the complaints that were the subject of those orders.

35. Further, in the table which followed, among the claims which it was said "for the avoidance of doubt" were maintained, was the claim relating to being accused of blackmail and gross misconduct by Ms Swift, as well as Graham Smith, and to Ms Swift being aggressive on 19 October 2018. The types of complaint listed there included "harassment" and the cross reference to the allegation numbers included allegation 6.

36. I should note that Mr Margo fairly pointed out that Mr Benson was referring in that table to a list of the complaints that had been prepared *by the respondent*. However, certainly in relation to allegation 6, that list corresponded to the claimant's Scott schedule.

37. Mr Margo referred me to the line of authorities relating to the importance of any withdrawal being clear and unambiguous. Those authorities particularly relate to cases in which it was said that the tribunal should have made enquiries or sought clarification of the position of a litigant in person who it was being said might have withdrawn a complaint. On this occasion the email was written by someone who was professionally qualified, albeit acting as a law centre representative. However, the fact remains that this email was, at worst for the claimant, ambiguous and contradictory, and it might be said, in case of doubt, should have been construed in favour of the claimant.

38. It might also be said that, as the table was described as providing "for the avoidance

of doubt", that the claimant was *proceeding* with the claims there set out, and given that the bullet points appeared to be intended to address complaints that had been the subject of the deposit order, these are further reasons why any ambiguity should have been resolved in favour of concluding that the net effect of this email was that ground 6 still remained live.

39. Overall, I consider that this email could not provide a safe foundation for concluding that allegation 6 was no longer maintained, without, at the very least, the tribunal at the full merits hearing, at which the claimant was again appearing in person, checking with him what his position at that point was in relation to that allegation and whether he did still maintain it.

40. The judgments by way of the deposit order, and then two complaints being struck out and allegation 4 being dismissed on withdrawal, take matters no further, because it is clear on their face that those judgments did not relate to allegation 6.

41. For all of these reasons, the tribunal erred in treating allegation 6 as no longer live and in failing to determine that specific complaint of harassment, and so ground 1 succeeds.

42. I turn to ground 2. This falls into two parts. The first is advanced on the footing that it might be contended that, despite saying that there were no live complaints in relation to Ms Swift's conduct on 19 October 2018, the tribunal had later in its decision purported to determine a complaint of harassment related to that conduct. However, in their skeletons and arguments before me, both Mr Margo and Mr McNerney agreed that that would not be a correct interpretation of anything that the tribunal said later on. I also agree that it did not purport to determine, as such, a harassment complaint in relation to the factual allegations made in ground 6. I pause to observe that that is not, however, the same as saying that the tribunal did not make any findings of fact that might be considered to be relevant to the determination of such a complaint. But it did not make such a determination.

43. The other part of ground 2 contends that the tribunal erred in relation to allegation 9. That was a complaint of harassment by Ms Swift, at the meeting on 22 November, refusing to take account of the claimant having recorded the conversation with Mr Wright, and indicating that, because the claimant had not produced the recording for that meeting, he would not be able to produce and rely upon it at any later stage in the grievance process. Allegation 9 asserted that the *consequence* of Ms Swift taking this stance was that the claimant's grievance was rejected at those later stages. However, I note that the legal complaint, as such, was about the conduct of Ms Swift in saying that the claimant would not be able to rely upon it at any future stage because he had not produced it for that stage-one grievance meeting.

44. Ground 2 complains that the tribunal failed properly to determine that complaint of harassment because it failed to consider, and take into account, the claimant's perception of that conduct on the part of Ms Swift pursuant to section 26(4)(a) **Equality Act 2010**.

45. As to this, the tribunal made findings of fact about what occurred at that meeting starting at [50], drawing on the minute of the meeting, including Ms Swift saying:

> **"You can't use this evidence now because you've had a couple of weeks to submit the recording you have and to give us an opportunity to investigate your claim. You chose not to supply this recording and therefore we can't investigate your claims we therefore have to deal with the evidence we have in front of us."**

46. The claimant went on to explain his stance of awaiting the outcome of his job application. Thereafter Graham Smith made his "loaded gun" remark. Although not referred to in the minute, Ms Swift admitted to the tribunal that she had spoken of blackmail.

47. The tribunal went on to set out the relevant provisions of section 26, including subsection (4), which provides that in deciding whether conduct has the effect referred to in section 26(1)(b) the tribunal must take into account: (a) the perception of B; (b) the other

circumstances of the case; (c) whether it is reasonable for the conduct to have that effect.

48. At [52] the tribunal cited **Richmond Pharmacology v Dhaliwal** [2009] ICR 724 and noted that, having volunteered that he would provide the transcript, the claimant had had at least 33 days to do so prior to that meeting. The tribunal went on to find that it was in that context that Graham Smith had made his "loaded gun to the head" remark. It continued:

> **"He wasn't saying it because it related to the claimant's disability. He was saying it because of the way in which the claimant was playing cat and mouse with the transcript. As to SS the Tribunal concludes that although a better choice of words might have been appropriate, 'sounds like blackmail' does not constitute harassment given the context. Blunt it may have been but in the context given his implied threat it was objectively justified and thus it would be unreasonable to conclude that it had the effect of being harassment."**

49. At [55], where the tribunal turned to deal with complaints of victimisation relating to the same meeting, it referred again to harassment at the end, noting that, once the transcript had been produced after the grievance process was over, Mr Wright had admitted the conduct or, as the tribunal put it, fell on his sword and was given a stage 3 warning. The tribunal said:

> **"It follows that these allegations against GS and SS, do not constitute harassment or victimisation."**

50. At the beginning of [56] it continued:

> **"And as to the remarks on the 22nd of SS and GS they flow from exactly the same reasons we have found apply to the alleged harassment. Just as they do not constitute harassment, they do not constitute victimisation."**

51. Mr Margo submitted that what the tribunal failed to do at any point was specifically address the conduct of Ms Swift said to amount to harassment on this occasion, as a discrete complaint of harassment, and, specifically, the subjective impact that it had on the claimant.

52. I do not allow this part of ground 2. That is for the following reasons. Firstly, the tribunal reminded itself of the statutory definition of harassment, including section 26(1),

relating to purpose or effect, and section 26(4) expanding on the concept of effect; and it must be taken to have had that in mind and correctly applied the law in the paragraphs that follow unless it is clear that it took an erroneous approach.

53. Secondly, at [52] there is a clear finding in relation to Graham Smith, that his reaction to the claimant's stance in relation to the transcript, by using the loaded gun expression, was not related to the claimant's disability. That conclusion, as such, is not challenged by this appeal and was one that the tribunal was entitled to reach on the basis that, at best, the claimant's disabilities formed part of the background or context.

54. Later in that paragraph the tribunal considered Ms Swift's remark, which it also found did not constitute harassment. The tribunal stated that it would be unreasonable to conclude that the conduct had the effect of being harassment. That was a clear reference to, and an application of, section 26(4)(c). It was not necessary for the tribunal to make a finding as to whether the claimant perceived it to be proscribed conduct, because the finding that it was not reasonable to conclude that it had that effect was fatal to this complaint.

55. In addition, it seems to me, reading all these passages, including what the tribunal said at [55] and [56] together, that the tribunal was of the view that Ms Swift, like Graham Smith, was reacting to the claimant's stance; and that her conduct too was, in any event, not related to disability in the requisite sense.

56. Ground 2 therefore fails.

57. I turn to ground 3. As I have described, the tribunal found that what Mr Wright said to the claimant on the evening of 18 October 2018 amounted to a contravention of section 15. But it did not so find in relation to what he said in their further exchange the following morning. The relevant passage in the tribunal's reasons is as follows:

> **"60. Section 15 of the EqA states:**
>
> ***(1) A person (A) discriminates against a disabled person (B) if—***
>
> ***(a) A treats B unfavourably because of something arising in consequence of B's disability, and***
>
> ***(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim***
>
> **61. The Tribunal has concluded as follows and in doing so it has referenced in the disciplinary investigation undertaken in relation to RW and the fact that he received a finding of misconduct and a stage 3 written warning (Bp 369) following a disciplinary investigation culminating in a hearing before David Astill, the commercial and operations director, on 21 March 2019. By now the Respondent had the transcript and faced with it RW did not deny what he had said. It was found that what he said was inappropriate and should not have been said in his capacity as the team leader.**
>
> **62. As to our findings, the Claimant did not entrap RW into what he said on the evening of the 18th. Thus, it means that in that sense the damage so to speak might be said to have been done because then it was in the mind of the Claimant that his fears were confirmed that GM did not want him in the new role and inter alia because of his sickness absences, which relates at least in part to time off for the CTS operations and the PI claim in relation to HAVS. Yes RW was lulled into a false sense of security the following morning. The Claimant duped him by confirming the discussion was off the record and of course covertly recorded the conversation.**
>
> **63. What the Tribunal concludes is that this was unfavourable treatment because it was to the Claimant's detriment to tell him what RW believed to be the situation rather than pass the Claimant's concern to say HR for them to discuss with the Claimant. This is particularly so as RW confirmed in the investigation that he had been concerned as to the Claimant's mental state and that the latter became tearful in the conversation. So this was unfavourable treatment and in part it related to something arising in consequence of the Claimant's disability ie the CTS absences and the HAVS**
>
> **64. So, the Tribunal has concluded after a lot of thought that the claim of Section 15 unfavourable treatment is made out but in a very limited way confined in effect to the conversation on the 18th October given how the second confirmation was elucidated by the Claimant by the covert tape recording whilst misleading RW that it was off the record. No justification argument is advanced by the Respondent and it accepts vicarious liability. So on this one allegation only the Claimant succeeds to a very limited extent."**

58. Ground 3 contends that the tribunal failed properly to explain why, having found that the conduct on the evening of the 18th contravened section 15, it concluded that the conduct on the morning of the 19th, when Mr Wright effectively confirmed what he had told the

claimant on the previous occasion, did *not* contravene section 15.

59. Mr Margo submits that the reference to the second confirmation being elicited by the claimant by the covert tape recording, whilst misleading Mr Wright that it was off the record, does not explain why the tribunal considered that this aspect made the difference. That would not, he argued, provide a proper basis for concluding that there was no unfavourable treatment on that occasion. If the tribunal's view of the causative link to the claimant's disabilities in relation to the second occasion was different, that was wrong as well.

60. I do not allow this ground. It would have been better had the tribunal spelled it out, but it is clear is that it considered that what made all the difference on the second occasion was that Mr Wright repeated his account because the claimant asked him to do so in order that the claimant could make a recording and then use it for the purposes of his grievance. The natural and common sense reading of the tribunal's conclusions is that it considered that, the claimant having elicited this conduct, in this way, for this purpose, it was not unfavourable or detrimental treatment. The tribunal was entitled to take that view.

61. I turn then to ground 4. That is a complaint about the tribunal's reasoning leading to the £900 injury to feelings award as being not *Meek*-compliant. In particular, it asserts that at [38] the tribunal had identified an issue as to whether what Mr Wright said to the claimant at the meeting at the end of the day on the 18th, caused the claimant to become depressed; but in its later conclusions it failed to resolve that issue, instead referring to other matters relating to the claimant's behaviour or experience of subsequent developments.

62. I will set out the relevant paragraphs of the tribunal's decision:

> **"38. So, the Claimant had this first discussion with RW at the end of work of 18th He initiated that conversation. To be told that he would not get the job even if he applied and because of GM may well have caused him to become depressed and possibly tearful. And it may be that the Claimant already**

> **suffered from anxiety and depression. There is a reference to this as a diagnosis in the sick notes from January 2019 when he went absent never to return prior to his resignation from the employment. The Claimant has inferred as such in his evidence and cross examination of the Respondent witnesses. However, we wish to stress that there is no claim for disability discrimination relying upon anxiety and depression before us. Furthermore there is no claim of constructive dismissal.**
>
> **39. In any event the following morning the Claimant having dwelt upon it all wanted to speak further to Ricky (RW). That takes us to the transcript at Bp336. The Claimant was seeking to get RW to confirm what he had said the evening before about GM and why he would not get the job. He did not believe that RW would tell him the truth if he thought it would then get back to GM and so he decided to record said conversation covertly having been on the ACAS website. Stopping there, the Judge to assist his colleagues, has looked at legal authorities on this subject. The admissibility of such a recording is not as clear cut as the Claimant thinks because albeit a tape recording can be deployed before a Tribunal and particularly where it relates to matters alleging discrimination, it may not be admissible depending on how it might have been obtained: see *Williamson v Chief Constable of Greater Manchester Police EAT034609.***
>
> **….**
>
> **65. We are with Mr McNerney that the Claimant's conduct of matters from the morning of the 19 October 2018 onwards is relevant in assessing injury to feelings. There is no loss of earnings. Post the evening of the 18th the evidence of how the Claimant conducted matters simply does not show any significant injury, illustrative being his entrapment of RW and his ambushing him at the afternoon meeting. During the internal proceedings thereafter, which we have rehearsed there is no evidence that he ever showed any distress. His absence with stress and anxiety later on in events on the evidence before us is linked to his not getting the job and alleged shortcomings viz the grievance process.**
>
> **66. However, we must of course follow the *Vento* Guidelines. Given our findings it follows that this case sits very much in the lowest band of the three bands of Vento. The latest Presidential Guidance which of course we must take account of is to the effect that from 6 April 2018 the bottom of the lowest band would be £900.00. But for that guidance we would have awarded £750.00."**

63. I do not uphold this ground. At [38] the tribunal identified that it was the claimant's case that what was said to him at the meeting on the 18th not merely upset him and distressed him at the time when it was said, but caused him to become depressed in some more deep-seated and longer lasting way. The tribunal identified an issue as to whether that was the case or whether the depression for which there was later some evidence had a pre-existing cause or was caused or exacerbated by subsequent events.

64. The opening words of [39] are significant, because the tribunal noted there that in any event the claimant, having dwelt upon the matter, then decided to take the steps that he took on the following morning. When one turns to [65], it seems to me that the tribunal, on a fair reading, was there engaging with, and reaching a conclusion about, whether the distress that should sound in compensation for injury to feelings arising specifically from the exchange on 18 October was confined to the distress that the claimant exhibited during the course of that meeting or was more deep-seated or prolonged. The tribunal eliminated the second possibility, having regard to how the claimant conducted himself the following morning, which it said was relevant in assessing injury to feelings, and what it said was the lack of evidence of ongoing distress at subsequent meetings and what it considered was the independent causation of later stress and anxiety which led to the claimant going off sick.

65. The tribunal was there in substance reaching a conclusion, therefore, that the distress compensable in injury to feelings for the conduct on the 18th was confined to the distress that the claimant experienced and exhibited when he became tearful and upset during the course of that meeting. Reading these paragraphs as a whole, the parties therefore know why the tribunal concluded that this was very much in the lowest band of the *Vento* guidelines and, indeed, why the tribunal considered that this case fell below the lower threshold of that band.

66. For those reasons, ground 4 fails.

67. Ground 5 relates to the decision not to award interest. This is set out at [67]:

> **"67. Pursuant to the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996, we may consider whether to award interest at 8% from the date of the discrimination, namely 18 October 2018. But it is in our discretion. Hence the reference to 'may'. As we feel constrained to having to award £900, we decline to award interest and because given our findings it is not in the interest of fairness and thus justice to do so. Accordingly, we confine our award for injury to feelings to £900."**

68. This ground contends that, having made an award of compensation for injury to feelings of £900, and, while the tribunal had a discretion under the **1996 Regulations** whether to award interest or not, it needed to exercise that discretion judicially. In circumstances where it was making its award approaching three years after the event, the fact that it considered that it had been obliged to make an award of £900 was, it is contended, not a sound reason for not awarding interest, as the claimant was, in principle, entitled to compensation which reflected the passage of time since the incident had occurred.

69. As to this, Mr Margo and Mr McNerney agree that the tribunal was not legally correct in its assumption that it was not open to it to make an award of a figure lower than the lower threshold of the lowest band. I note, in this regard, that in the **Vento** case itself [2003] ICR 318, when the bands were first established, and the range of the lower band was set at that time at from £500 to £5,000, Mummery LJ merely said, at [65]:

> **"In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings."**

70. Mummery LJ's words do not indicate that it will necessarily always be an error or not possible for a tribunal to make an award lower than the lower end of the lowest band, though his words should be borne in mind and considered by any tribunal in a given case contemplating doing so.

71. By the time of the award in the present case, the figure for the lower end of the lowest band had risen to £900. But it is clear that the present tribunal considered that the true and fair value to attach to the underlying injury to feelings suffered by the claimant was £750, and that that was the reason why it considered that, as it had already awarded £900, justice did not require a further award of interest on top of that.

72. Had the tribunal used the actual value of the loss, of £750, as its baseline, an increase to £900, being of £150, would have equated to an additional award of 20%. The interest rate at the time was 8% and so an award of interest on £750 at that rate for a full three years at a flat rate would have entailed an extra 24% being added. That is not that far off from 20%, and I note also that the decision was given slightly short of the third anniversary.

73. Having regard to all of that, and notwithstanding that the tribunal was wrong to assume that it was bound to make an underlying award of more than what it considered was the true value of the loss, the tribunal was, standing back, entitled to take the view that the award of £900 sufficiently compensated the claimant for the true value of the loss, assessed at the date of that award, and that he was done no injustice by not awarding interest on top.

74. Ground 5 therefore fails.