HOUSE OF LORDS SESSION 2006–07
[2007] UKHL 16

on appeal from: [2005] EWCA Civ 977

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

St Helens Borough Council (Respondents)
v.
Derbyshire and others (Appellants)

Appellate Committee

Lord Bingham of Cornhill
Lord Hope of Craighead
Baroness Hale of Richmond
Lord Carswell
Lord Neuberger of Abbotsbury

Counsel

Appellants:
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Respondents:
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Simon Gorton
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Interveners
Ms Tess Gill
Miss Nadia Motraghi
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LORD BINGHAM OF CORNHILL

My Lords,

1. The Universal Declaration of Human Rights 1948 provided in article 2 that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Since 1948 steps have been taken, in this country and the European Community, to give legal effect, in part, to this general objective of non-discriminatory treatment. As explained by my noble and learned friend Lord Neuberger of Abbotsbury, whose account of the facts, the proceedings and the legislative background I gratefully adopt, Mrs Derbyshire and 38 other women, the appellants, brought proceedings against their employer, the St Helens Borough Council, complaining under section 2 of the Equal Pay Act 1970 that they were less well paid than men doing comparable work. Their claims succeeded, but it is not those proceedings which give rise to this appeal. For the appellants also complained, in separate proceedings, that while pursuing their claim for equal pay they were subjected to adverse treatment by the Council because they had persisted in pursuing that claim. It is that complaint, upheld by the Employment Tribunal, the Employment Appeal Tribunal and a minority of the Court of Appeal but remitted to the Employment Tribunal for fresh determination by a majority of the Court of Appeal, which now comes before the House.

2. A number of statutes have been passed in this country, and a number of orders made, to proscribe various kinds of discriminatory treatment. Immediately relevant in this case is section 6(2)(b) of the Sex Discrimination Act 1975, which makes it unlawful for an employer to

discriminate against a woman employed by him at an establishment in Great Britain by dismissing her or subjecting her to any other detriment. Section 6 appears in Part II of the Act, which is directed to discrimination in the employment field, and applies not only to employers but also trade unions, qualifying bodies, vocational training bodies, employment agencies and others. Part III covers sexual discrimination in education and the provision of certain goods, facilities, services and premises. A similar proscription of discriminatory conduct on grounds of race is found in section 4(2)(c) of the Race Relations Act 1976, on grounds of disability in section 4(2)(d) of the Disability Discrimination Act 1995, on grounds of religious belief in regulation 6(2)(d) of the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660), on grounds of sexual orientation in regulation 6(2)(d) of the Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661) and on grounds of age in regulation 7(2)(d) of the Employment Equality (Age) Regulations 2006 (SI 2006/1031). Part of this ground has been covered in legislation of the European Community, although the legislative technique employed has been somewhat different. Instead of proscribing specified forms of discriminatory conduct as unlawful, European directives have imposed an obligation on member states to secure non-discriminatory treatment in the specified field. Examples are found in articles 1, 3 and 4 of the Equal Pay Directive (Council Directive 75/117/EEC), articles 1-5 of the Equal Treatment Directive (Council Directive 76/207/EEC) and Chapter 1 of the Race Directive (Council Directive 2000/43/EC).

3. The right not to be discriminated against on one of the grounds proscribed by domestic law would be of little value if a victim of proscribed conduct, or a person claiming to be the victim of proscribed conduct, could not have recourse to a judicial body competent to rule on the merits of the claim and, if it is held to be made out, give redress. Such a right is found in section 63 of the Sex Discrimination Act 1975, section 54 of the Race Relations Act 1976, section 17A of the Disability Discrimination Act 1995, regulation 28 of the Religion or Belief Regulations, regulation 28 of the Sexual Orientation Regulations and regulation 36 of the Age Regulations. The Community instruments mentioned above have direct effect, and oblige member states to give victims of proscribed discrimination a domestic remedy: see article 6 of the Equal Pay Directive, article 6 of the Equal Treatment Directive and article 7 of the Race Directive.

4. The right to seek effective legal redress conferred on a person who is or claims to be the victim of proscribed discriminatory conduct would itself be of limited value and perhaps no value if the alleged

discriminator were free, otherwise than by defeating the claim on its merits, to frustrate or interfere with the conduct of the proceedings in a way that undermined the integrity of the judicial process to which the claim had given rise. This has been recognised in domestic and also Community legislation. Thus by section 4(1)(a) of the Sex Discrimination Act 1975 it is unlawful discrimination for A to treat B less favourably (in any circumstances relevant for the purposes of any provision of the Act, including but not limited to employment) than he treats or would treat other persons in those circumstances if he does so because ("by reason that") B has brought proceedings against A or any other person under the Act or the Equal Pay Act 1970. The object of section 4 is not in doubt. If the Act was to be effective, there had to be protection for those who sought to rely on it (*Cornelius v University College of Swansea* [1987] IRLR 141, para 31). As Lord Nicholls of Birkenhead put it in *Chief Constable of the West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065, para 16, "The primary object of the victimisation provisions in section 2 [of the Race Relations Act 1976] is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory rights or are intending to do so".

5. Provisions analogous to section 4 of the 1975 Act are found in section 2 of the Race Relations Act 1976, section 55 of the Disability Discrimination Act 1995 and regulation 4 of each of the Religion or Belief, the Sexual Orientation and the Age Regulations. They are matched by article 5 of the Equal Pay Directive, article 7 (as amended) of the Equal Treatment Directive and article 9 of the Race Directive.

6. Addressing the House on behalf of the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission, who had been given leave to intervene, Ms Gill submitted that our domestic provisions relating to discrimination should be interpreted and applied in a broadly similar manner, and in a manner consistent with European Community legislation in areas to which such legislation applies. I would accept that submission. It may well be that there are differences (other than as to their subject matter) between one domestic provision and another, but none is said to be significant in this case and the provisions have a very similar purpose. It was not suggested in argument that there is, in a respect relevant to this case, any disharmony between the European directives referred to and our domestic legislation. The object is to protect those seeking to assert what they claim to be their rights.

The present case

7. If sections 4(1)(a) and 6(2)(b) of the 1975 Act are read together, the question in the present case becomes: did the Council, in circumstances relevant for any provision of the Act, discriminate against the appellants by treating them less favourably than in such circumstances it treats or would treat other persons because ("by reason that") the appellants had brought proceedings against the Council under the Equal Pay Act 1970, such less favourable treatment subjecting the appellants to a detriment?

8. Certain elements of this omnibus question are uncontentious. Thus the Employment Tribunal held (para 4(b) of their Reasons) the relevant circumstances to be the employment relationship between the parties, and that ruling has not been challenged. The Employment Tribunal held (Reasons, para 4(c)) that the treatment of the appellants was to be compared with the treatment of employees who had not brought and continued equal pay proceedings. This conclusion was not disputed in the Employment Appeal Tribunal (judgment, para 29) and was accepted by all members of the Court of Appeal (judgments, paras 22, 44-45, 68). The Employment Tribunal found (para 4(d)) that the sending of the letters of which the appellants complained, in particular the more widely disseminated letter, treated the appellants less favourably than those employees who had not brought and continued equal pay proceedings, and that each of them as a result suffered a detriment. The Employment Appeal Tribunal (para 26) accepted the finding of less favourable treatment. In the Court of Appeal, a majority upheld the finding of less favourable treatment and detriment: [2005] EWCA Civ 977, [2006] ICR 90, per Mummery LJ, paras 25-29, per Jonathan Parker LJ, para 46. It was on the Council's reason for treating the appellants less favourably than other employees ("by reason that the person victimised has – (a) … brought proceedings against the discriminator … under this Act or the Equal Pay Act 1970") that opinion in the Court of Appeal was divided.

9. In *Khan*, above, para 29, Lord Nicholls propounded a simple, common sense approach to this question. It is to ask why the alleged discriminator acted as he did. What matters is the discriminator's subjective intention: what was he seeking to achieve by treating the alleged victim as he did? The decisions in *Cornelius* and *Khan*, above, are, I think, consistent with this approach. In *Cornelius*, the appellant complained that the College had not transferred her or given her access to the College's internal grievance procedure pending tribunal decisions

on her complaints of sexual discrimination. There was no finding that she had been the victim of less favourable treatment or detriment or that, if she had, it had had anything to do with her pending proceedings. It appeared (para 33) that the College authorities wished to defer internal steps until the proceedings were over, to avoid acting in a way which might embarrass the handling or be inconsistent with the outcome of the tribunal proceedings. Similarly, in *Khan* the Chief Constable declined to give the applicant a reference for appointment to another force pending the determination of a racial discrimination complaint not because he wished to obstruct the conduct of those proceedings but because he believed, on advice, that any reference he gave would weaken his defence in those proceedings or aggravate the damages recoverable against him. The contrast with the present case is striking and obvious, for the object of sending the letters was to put pressure on the appellants to drop their claims. The Council may very well have had compelling reasons for wanting the claims to be dropped. It cannot possibly be criticised for advancing a bona fide defence to the claims. It was fully entitled to seek to settle them. But the letters which it sent were found by the tribunal to treat the appellants less favourably than employees who had not brought and continued Equal Pay claims. The letters caused the appellants a detriment. The letters were sent because the appellants had persisted in their claims and the Council wished to put pressure on them to settle. On the findings made, the tribunal were fully entitled to uphold the appellants' victimisation claims. For the detailed reasons given by my noble and learned friends, I cannot accept that the tribunal misdirected itself as held by the Court of Appeal majority and would fully endorse the succinct and accurate reasoning of Mummery LJ.

10. For these reasons I would allow the appeal, restore the decision of the Employment Tribunal and award the appellants their costs in the Court of Appeal and this House.

LORD HOPE OF CRAIGHEAD

My Lords,

11. Litigation between employers and employees about a matter which affects large sections of the work force such as an equal pay claim arouses strong feelings on either side. Increases in pay, especially where there is back pay to be made up too, must be matched by

increases in income or a reduction in costs if the business is not to suffer financially. For local government employers who have not yet been able to meet them, conceding these claims will mean hard choices – redundancies, cuts in wages, cuts in public services or increases in rates and in council tax. The problem is made worse by a deadline to meet all claims for equal pay by 1 April 2007 which was negotiated between local government employers and recognised trade unions under the single status agreement for establishing pay equality which they entered into ten years ago. Moreover, claims for back pay (in this case the unions started asked for an equivalent bonus scheme in 1998) can now go back six years before the proceedings were instituted instead of two: Equal Pay Act 1970, section 2ZB, inserted by the Equal Pay Act 1970 (Amendment) Regulations 2003 (SI 2003/1656). Employers who have reached the stage of litigating will only have done so because negotiations have failed to achieve what, from their point of view, is the only possible outcome. Employees who insist on their claims will be conscious of the risk that success for them may prejudice others due to the consequential cost-saving measures that their employers say will be unavoidable.

12. It is only to be expected that in this situation employers will try to convince their employees that the claims ought not to be pressed. It is only to be expected that the employees who are at the receiving end of such overtures will feel that they are being pressurised into a settlement. This is the highly charged field of competing emotions in which the statutory provisions which protect employees against victimisation must operate. For employers who must meet a successful equal pay claim, to be subjected to a claim for victimisation as well is an additional penalty. It is like being penalised a second time for being rude to the referee. As in sport, over-reaction – for what to the employer may seem the best of reasons – can have very unwelcome consequences.

The proceedings

13. The protection which the appellants invoke in this case is to be found in section 4(1) and section 6(2)(b) of the Sex Discrimination Act 1975 ("SDA 1975"). Provisions virtually identical to those of section 4 of SDA 1975, which defines discrimination by way of victimisation in the area of sex discrimination, are contained in the legislation which prohibits discrimination in other fields which my noble and learned friend Lord Bingham of Cornhill has mentioned. Among the acts which are protected by section 4 of SDA 1975 is the bringing of proceedings against the discriminator or any other person under the Equal Pay Act

1970. It is unlawful for an employer to discriminate against a woman by reason that she has brought such proceedings by, among other things, subjecting her "to any other detriment": section 6(2)(b). That is discrimination by way of victimisation within the meaning of section 4(1). It is an unlawful act for which Part VII of the Act provides a remedy.

14. The letters which gave rise to the complaint of victimisation by the employees in this case were said by the employment tribunal to have been carefully written. The tribunal thought that their tone was rational and that they contained much that was sensible. Nevertheless the employees' reaction was of distress in at least some cases and the letter which their colleagues received, in which the impact the claims could have was spelt out, incurred for the employees some odium. Some people feared that, if the equality claim succeeded, they would not be able to afford school meals for their children. Others feared for the loss of their bonus. The tribunal found that in these circumstances the employees did suffer a detriment. In the Court of Appeal Parker LJ agreed with Mummery LJ that its findings as to detriment were findings that it was entitled to make and were unchallengeable in that court: [2006] ICR 90, para 46.

15. But there was a difference of opinion in the Court of Appeal on the question whether the employees suffered that detriment "by reason of" their having brought proceedings against the respondents under the Equal Pay Act 1970. The majority (Jonathan Parker and Lloyd LJJ) said that the tribunal erred in law because the reasoning in paragraph 4(e) of its extended reasons failed to follow the guidance in *Cornelius v University College of Swansea* [1987] IRLR 141 and *Chief Constable of the West Yorkshire Police v Khan* [2001] 1 CR 1065. Mummery LJ, on the other hand, said that the tribunal's reasons had to be read as a whole, that its findings under the various aspects of victimisation were interconnected and that, on a fair reading of the reasons as a whole, they contained no error of law. On one level, therefore, the issue in this appeal is simply whether the majority in the Court of Appeal misconstrued paragraph 4(e) of the tribunal's reasons when they held that the tribunal misdirected itself. But there is a more important point, which is one of general public importance. It is whether the majority were themselves in error as to the effect of the dicta in *Cornelius* and *Khan* on which they based their criticisms of the tribunal's reasoning. This in turn makes in necessary to consider what was said in those cases, and especially the reasoning in *Khan*.

The tribunal's reasoning

16. As to the first point, I agree with Mummery LJ and with my noble and learned friend Lord Neuberger, whose speech I have had the opportunity of reading in draft, that the majority in the Court of Appeal did indeed misconstrue paragraph 4(e) of the tribunal's reasons. It has been said many times that a generous interpretation ought to be given to an employment tribunal's reasoning, and that it should not be subjected to an unduly critical analysis. No such latitude is needed in this case, however. Paragraph 4(e) has to be read in the light of the admirably clear findings that preceded it. The point to which the tribunal was addressing itself was whether it had been shown that the detrimental treatment suffered by the appellants was "by reason that" they were insisting on their equal pay claims. It was necessary for it to cross the bridge between finding that there was a detriment within the meaning of section 6(2)(b) of SDA 1975 and the requirement in section 4(1) that the detriment was by reason of the employees having committed one of the protected acts.

17. In the crucially important fifth sentence of paragraph 4(e), which both Jonathan Parker and Lloyd LJJ omitted to include in their quotations from this paragraph, the tribunal informs the reader that it had observed the distinction between the respondents' right to protect themselves in litigation on the one hand and detrimental treatment as a response to the commencement of proceedings on the other. The reference to the distinction that was made in *Chief Constable of the West Yorkshire Police v Khan* indicates that it had in mind the test mentioned by Lord Hoffmann in para 60, although it did not use precisely the same language. The tribunal does not say, in so many words, that it addressed itself to the further question whether the steps which the respondents took were steps which, as Lord Nicholls of Birkenhead put it in *Khan*, para 31, employers "acting honestly and reasonably" ought to be able to take to preserve their position without laying themselves open to a charge of victimisation. But that, in essence, is the point which the tribunal was making when it referred in the fifth sentence to the respondents' right to protect themselves in litigation. When the reasons are read as a whole, it is plain that the tribunal was of the opinion that the respondents' conduct, while no doubt honest, could not be said to have been reasonable. As Mummery LJ said in para 39 of the Court of Appeal's judgment, the effect of the tribunal's findings was that the respondents went further than was reasonable as a means of protecting their interests in the existing litigation.

"By reason that": the guidance in Khan

18. The more troublesome aspect of this case is to be found in the way the guidance which was given in *Cornelius* and *Khan* was analysed in the Court of Appeal by the majority. I think that there are two points that need to be addressed.

19. First, Jonathan Parker LJ said that the tribunal made an error of law when it said in para 4(e) that the respondents were reacting "if not to the commencement of proceedings, certainly to their continuance". He said that the tribunal overlooked the distinction drawn in *Cornelius* and *Khan* between the commencement of proceedings and the continuance of proceedings, once commenced: para 53. Lloyd LJ acknowledged that this distinction was not easy to apply in a case such as this, where the act in question related directly to the conduct of proceedings: para 72. It seemed to him that the fact that the "by reason that" test focuses attention on the question whether the employee has been treated as she has by reason that she has brought proceedings under the Equal Pay Act did not fit well with the last sentence of para 60 of Lord Hoffmann's speech in *Khan*. Nevertheless Jonathan Parker LJ held that the distinction which the tribunal drew between "merely seeking to avoid prejudicing their position in the litigation" and "wanting the applicants to abandon their claims" was not a relevant distinction: para 51.

20. Second, Jonathan Parker LJ said that he agreed with Lloyd LJ that the question at issue was whether the conduct complained of fell within the description of an "honest and reasonable" attempt to compromise the proceedings: para 54. Lloyd LJ said that he had some difficulty in seeing how, applying the "honest and reasonable" test mentioned by Lord Nicholls in *Khan*, a finding that an employer could act in that way with impunity in resisting equal pay claims could be reconciled with the terms of the legislation. But he thought that it would be absurd if employers were not able to act in that way, and that this was the test by which the respondents' conduct should be judged: para 74. So the tribunal was wrong in law to hold in para 4(e) that it was not open to an employee to try to persuade one or more employees who had brought equal pay proceedings against it to settle those proceedings, so as to avoid an adjudication altogether: para 75. The fact that this was the employer's objective could not, by itself, take the conduct outside the scope of the freedom permitted to the employer to conduct its defence to the proceedings in an honest and reasonable manner.

"Bringing proceedings"

21. As to the first point, in *Cornelius v University College of Swansea*, para 33, Bingham LJ contrasted a decision by an employer that was influenced merely by "the existence of proceedings" with a decision that was influenced by "the appellant's conduct in bringing proceedings under the Act". It would only be if the second alternative was made out on the facts that it could be held that the appellant had succeeded in showing that the College did what it did because the appellant had brought proceedings against the College under the Act. Building on this distinction in *Chief Constable of the West Yorkshire Police v Khan*, para 60, Lord Hoffmann said:

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

22. The Tribunal does not appear to have had any difficulty in applying the distinction which was identified in these passages to the facts of this case. Its finding, as expressed in the last sentence of para 4(e), was that the appellants' Equal Pay Act case "was not simply the setting for the detriment: its continuance was the efficient cause." The problem lies in what was said about this in the Court of Appeal. Jonathan Parker LJ said in para 49 that he could see no reason in principle why the latitude extended to an employer in the context of the adversarial relationship between employer and employee resulting from pending proceedings should not include an honest and reasonable attempt on the employer's part to compromise the proceedings. This led him to criticise the tribunal for, as he thought, holding that the "by reason that" test was satisfied was because the respondents wanted their employees to abandon their claims. Lloyd LJ pointed out in para 71 that the test proposed by Lord Hoffmann in *Khan* in para 60 could not be

applied in a case such as this where the act in question was directly to do with the proceedings themselves.

23. In my opinion the majority in the Court of Appeal read too much into what was said on this point in *Cornelius* and *Khan*, and this led them to embark on a criticism of the tribunal's decision that was not merited and unnecessary. As Lloyd LJ observed in para 63, the conduct at issue in those cases did not relate directly to the course of the proceedings. In this case, of course, it did. The respondents were, as the tribunal put it in para 4(e), not merely seeking to avoid prejudicing their position in the litigation. They acted as they did because they wanted to dissuade the appellants from pressing their claims to an adjudication. So it is clear that the test which was referred to in *Cornelius* and *Khan* was met in this case. But the matter does not end there. In neither of those cases was consideration given to the way the issue of victimisation ought to be approached in a case of this kind. In my opinion the test was being taken out of context. In a case of this kind, where the conduct was due directly to the fact that the employees had brought proceedings against the employer under the Equal Pay Act, some latitude must be given to the right of the employer to argue his point of view and, if he can, to achieve a compromise. The fact that he wanted to dissuade the employees from pressing their claims to an adjudication does not, of itself, mean that the employees were being victimised.

Honest and reasonable

24. What is to be said then about the test of "honest and reasonable" conduct? This is not a test which is set out in the statute, and there is a risk that it too may be taken out of context. It has a comfortable ring about it. But it should not be used as a substitute for the statutory test, which is whether the employer's conduct was "by reason that" the employee was insisting on her equal pay claim. Properly understood, it is a convenient way of determining whether the statutory test is satisfied. But it may not fit every case, and in cases where it is used it must be used in the right way.

25. The context is provided by the judgment of the European Court of Justice in *Coote v Granada Hospitality Ltd* [1999] ICR 100 (Case C-185/97) which, as Lord Neuberger points out, was not cited in *Khan*. That was another case where the conduct did not relate directly to the proceedings. The case arose out of the employer's refusal to supply the

employee with a reference after the employment had ended by mutual consent. The questions which were referred to the European Court were directed to the question whether, having regard to Council Directive (76/207/EEC), retaliatory measures after the employment relationship had ended were to be regarded as prohibited. But the Court took the opportunity to draw attention to the fact that article 6 of the Directive requires member states to introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves the victims of discrimination "to pursue their claims by judicial process." In para 24 the European Court said:

> "The principle of effective judicial control laid down in article 6 of the Directive would be deprived of an essential part of its effectiveness if the protection which it provides did not cover measures which, as in the main proceedings in this case, an employer might take as a reaction to legal proceedings brought by an employee with the aim of enforcing compliance with the principle of equal treatment. Fear of such measures, where no legal remedy is available against them, might deter workers who considered themselves the victims of discrimination from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the Directive."

26. The European Court's reference to measures "liable seriously to jeopardise implementation of the aim pursued by the Directive" provides the key to how the matter should be approached. It looks at the employer's conduct from the standpoint of the employee's interest, not that of the employer. What is "honest and reasonable" is an objective test. It is designed to guide the tribunal after the event, not the employer who is trying to work out first what he can and cannot do. It carries with it the implication, which I would regard as sound, that the employer is entitled to take steps to protect his own interests. But he must not seriously jeopardise the employee's right to pursue her claim. It is the employee's interest in pursing the claim that provides test of what is and what is not "reasonable".

27. But the employer who is looking for guidance needs a bit more than that. One can do no more than resort to generalities on such a fact-sensitive issue. However, I think that this much can be said. The employer should reflect on how the way he wishes to conduct himself will be seen through the eyes of the employee – how would she be likely

to react if she were to be treated in that way? He is entitled to bear in mind that an unjustified sense of grievance cannot amount to "detriment": *Barclays Bank plc v Kapur and others (No 2)* [1995] IRLR 87; *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, paras 35 and 105. But he must also bear in mind that the right of the employee to enforce compliance with the principle of equal treatment is protected by the Directive. So he must avoid doing anything that might make a reasonable employee feel that she is being unduly pressurised to concede her claim. Indirect pressure of the kind that the tribunal found established in this case – fear of public odium, or the reproaches of colleagues – is just as likely to deter an employee from enforcing her claim as a direct threat. Sensitivity to the wider effects of what he plans to do will be crucial to the exercise of an informed judgment as to what is reasonable.

28. The question whether the borderline has been crossed is, in the end, a question of fact for the tribunal. It will exercise its judgment, in the way I have suggested, on a consideration of all the evidence. It is not to be criticised if it does not ask itself, in so many words, whether the employer's conduct was "honest and reasonable". On the facts of this case, a finding that the detriment was "by reason that" the employees were insisting on their claims because the respondents went further than was reasonable in protecting their own interests was inescapable.

Conclusion

29. For the reasons which Lord Neuberger has given, and for these further reasons of my own, I would allow the appeal and make the order which he proposes.

BARONESS HALE OF RICHMOND

My Lords,

30. This is a classic case of "blaming the victims". The victims of long-standing and deep-seated injustice should not be made to feel guilty if they pursue their claims for justice. But it is all too tempting to try to do so, especially if their success may have far-reaching

consequences. Women workers have suffered injustice in the labour market for centuries. This is not only because they tend to have more interrupted working lives than men. They have been paid less than men for doing the same work. They have been segregated into "women's work" which is paid less than men's simply because it is women's work. There is still a gender pay gap which is far larger than it should be. In November 2006, the gender pay gap stood at 12.6% (using the median) and 17.2% (using the mean) between the hourly earnings of men and women in full time work.

31. But this is a great improvement upon 1975, when the Equal Pay Act 1970 came into force. Then the gap between the hourly average earnings of men and women in full time employment was 30%. The 1970 Act began in a small way by insisting that men and women be paid the same for "like work" or "work rated as equivalent". The machinery chosen was to incorporate an equality clause into their contracts of employment. This gave them a contractual right to equal pay irrespective of what their contracts actually provided. This necessarily entailed "levelling up" and back-dating, rather than a prospective averaging out. That is why success for the women can have such far reaching consequences for everyone. But the 1970 Act did not initially have too dramatic an effect, because it did not tackle the problem of segregation into "women's work".

32. In 1983, the Act was amended to cover "work which . . . is . . . in terms of the demands made on her (for instance under such headings as effort, skill and decision) of equal value to that of a man in the same employment" (Equal Pay Act 1970, s 1(2)(c), inserted by the Equal Pay (Amendment) Regulations 1983, SI 1983/1793, reg 2). Equal value claims are enormously complex, often involve a great many employees and go on for a very long time, as this one has done. During this time, people still have to work together. The whole idea is that they should be able to go on doing so, not only while the case is going on, but also in the future. This makes the protection from "victimisation" given by section 4 of the Sex Discrimination Act 1975 all the more important.

33. The principle that men and women should receive equal pay has always been "an integral part of the establishment and functioning of the common market" (Council Directive 75/117/EEC, The Equal Pay Directive). Although passed before the United Kingdom joined the common market, the 1970 Act (together with its sister, the 1975 Act) is our way of implementing our developing obligations under European Union law to further the cause of gender equality. These have always

contained an obligation to "take the necessary measures to protect employees against dismissal 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 pay" (*ibid,* article 5). This protection is necessary to make effective the obligation to introduce measures "to enable all employees who consider themselves wronged by failure to apply the principle of equal pay to pursue their claims by judicial process . . ." (*ibid*, article 2). Provision to the same effect as article 5 was made in article 7 of the wider ranging Equal Treatment Directive of the following year (Council Directive 76/207/EEC).

34. Then came the decision of the European Court of Justice in *Coote v Granada Hospitality Ltd* [1999] ICR 100. There, an employee who had complained of sex discrimination left the company's employment by consent, but later complained that the company had refused to supply her with a reference as a reprisal for her previous claim. The Court held that the Directive required that people be enabled to pursue their claims after leaving their employment. More importantly for our purposes, it also held that the measures against which people were protected by article 7 were not limited to dismissal:

> ". . . . having regard to the objective of Directive (76/207/EEC), which is to arrive at real equality of opportunity for men and women (*Marshall v Southampton and South West Hampshire Health Authority (Teaching) (No 2)* [1993] ICR 893, 931, para 24), and to the fundamental nature of the right to effective judicial protection, it is not, in the absence of a clear indication to the contrary, to be inferred from article 7 of the Directive that the legislature's intention was to limit the protection of workers against retaliatory measures decided on by the employer solely to cases of dismissal, which, although an exceptionally serious measure, is not the only measure which may effectively deter a worker from making use of the right to judicial protection. Such deterrent measures include, inter alia, those which, as in the present case, are taken as a reaction to proceedings brought against an employer and are intended to obstruct the dismissed employee's attempts to find new employment."

In 2002, a Directive of the European Parliament and Council (2002/73/EC) amended article 7 of the Equal Treatment Directive, among other things, to give protection against "dismissal or other adverse treatment" as a reaction to complaints or legal proceedings. Article 5 of the Equal Pay Directive has not been amended, but it is common ground that the *Coote* decision produces the same effect.

35. European law therefore requires that people who bring equal pay and sex discrimination claims are given effective protection against dismissal or other adverse treatment from their employers as a reaction to their complaints. The purpose is to secure that they are not deterred from pursuing their claims or punished if they have done so. The same now applies to claims of discrimination on other prohibited grounds by virtue of the Race Directive (2000/43/EC, article 9) and the Employment Directive (2000/78/EC, article 11). It is important to recognise that the latter two directives were not in force when this House decided the race discrimination case of *Chief Constable of the West Yorkshire Police v Khan* [2000] ICR 1169. Accordingly, the House was under no obligation to construe the victimisation provisions in section 2 of the Race Relations Act 1976 (which are *mutatis mutandis* identical to those in section 4 of the Sex Discrimination Act 1975) in accordance with the Directives or with the *Coote* decision. They were not therefore cited to the House. The reasoning, if not the result, in *Khan* must now be revisited in the light of the European law. That reasoning should certainly not be transferred automatically to the sex discrimination context to which the European law has always applied.

36. Neither the Sex Discrimination Act itself nor the European Directives contain any "honest and reasonable employer defence". Nor, indeed, did their Lordships in *Khan* invent one: they merely pointed to the sort of conduct which would not fall foul of the victimisation provisions. It would be better if the "defence" were laid to rest and the language of the legislation, construed in the light of the requirements of the Directives, applied. There are three relevant questions under the 1975 Act. First, did the employer discriminate against the woman in any of the ways prohibited by the Act? In this particular case, the alleged discrimination was by "subjecting her to any other detriment" (contrary to section 6(2)(b) of the 1975 Act). Secondly, in doing so, did the employer treat her "less favourably than . . . he treats or would treat other persons"? Thirdly, did he do so "by reason that" she had asserted or intended to assert her equal pay or discrimination claims or done any of the other protected acts set out in section 4(1) of the Act?

37. The first question concentrates upon the effect of what the employer has done upon the alleged victim. Is it a "detriment" or, in the terms of the Directive, "adverse treatment"? But this has to be treatment which a reasonable employee would or might consider detrimental. As my noble and learned friend, Lord Hope of Craighead, observed in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, 349, para 35, "An unjustified sense of grievance cannot amount to 'detriment'". There are some things that an employer might do during a discrimination claim which cannot sensibly be construed as a detriment or adverse treatment. Ordinary steps in defending the claim and ordinary attempts to settle or compromise the claim do no-one any harm and may even do some good.

38. But these were no ordinary attempts to settle the claim. It is worthwhile emphasising how the Employment Tribunal put it in para 4(d) of their Reasons:

> "The letter of 19 January 2001 contained what was effectively a threat. It spelt out a danger that the applicants might deprive children of school dinners, and that they might cause redundancies among their colleagues. It amounted to an attempt to induce the acquiescence of individuals despite the view of their union. It was more than a matter-of-fact reminder of what might happen if they went on with a complaint. . . . It is directed against people who were in no position to debate the accuracy of the respondents' pessimistic prognostications. The reaction to such a letter may be, even where there is a well-justified belief in the justice of one's case, surrender induced by fear, fear of public odium or the reproaches of colleagues. Such a reaction, although prompted by emotion, is reasonable in the sense that it is a normal, sane human response to the prospect of an unpleasant consequence realistically perceived. Thus the letter was intimidating."

The Tribunal had already pointed out that the warnings of dire consequences had been sent, not only to the women who were pursuing their claims, but also to all their colleagues in the catering department, and incurred for them "some odium" from colleagues, as well as causing some of them distress.

39. The Employment Appeal Tribunal drew attention in para 26 of their judgment to

> "the particular sensitivities which can arise in public sector equal pay claims, often involving historical and allegedly discriminatory pay practices in the context of gender job segregation; the far reaching effects such claims may have, if successful, on pay structures or grading systems; and the potential vulnerability in the workplace of women pursuing such claims, particularly as regards their relationships with workplace colleagues …"

This was ample reason to regard these particular letters as subjecting these particular women to a "detriment" or "adverse treatment". Equal pay claimants are peculiarly vulnerable to reproach, and worse, from colleagues who fear the effects of their claims upon their own positions. However anxious the employers may be to settle, they should not exploit that vulnerability in their attempts to do so.

40. The second question focuses upon how the employer treats other people. There is no equivalent comparison question in the Directives and so we must beware of introducing too many niceties into this aspect of our domestic legislation. But it may be that, without a difference in treatment, it would be difficult to assert that the employer's behaviour was a reaction to the discrimination claim. In any event, it is now common ground that the "other persons" for the purpose of the comparison required by s 4(1) of the 1975 Act are those employees who are not doing the various acts protected under section 4(1)(a) to (d), in this case those who had not brought and continued equal pay claims. They had not been subjected to the particular detriment complained of and so these women have indeed been treated less favourably than others.

41. The third question focuses upon the employers' reasons for their behaviour. Why did they do it? Was it, in the terms of the Directives, a "reaction to" the women's claims? As Lord Nicholls of Birkenhead explained in *Khan's* case [2001] ICR 1065, 1072, para 29, this

> "does not raise a question of causation as that expression is usually understood. . . . The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did

> the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."

If one asks the simple question – "why did these employers send the letters?" - there can only be one answer: because these women were pursuing their claims for equal pay even though the others had settled. The employers wanted them to settle too. There is, of course, nothing wrong with that. But it was undoubtedly the reason why the letters were sent. That was, in my view, all that the Tribunal were pointing out in paragraph 4(e) of their Reasons. They were also right to point out that the reason for the adverse treatment could be the continuation as well as the commencement of proceedings. It would make no sense to prevent an employer from treating an employee badly because she had brought proceedings but not to prevent him from treating her badly if she continued them. The more difficult question for the Tribunal was whether these employers had gone too far in their attempts to induce the women to settle and the Tribunal had already addressed that question in the passage quoted from paragraph 4(d).

42. For these reasons, in addition to those given by my noble and learned friend, Lord Neuberger of Abbotsbury, I would allow this appeal.

LORD CARSWELL

My Lords,

43. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Neuberger of Abbotsbury. For the reasons which he has given I too would allow the appeal and make the order proposed.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

44. The appellants, Mrs Derbyshire and 38 other women, appeal against the decision of the Court of Appeal, reversing the Employment Appeal Tribunal ("EAT"), remitting a decision of the Employment Tribunal ("the Tribunal") for reconsideration. The decision of the Tribunal was that the appellants had been discriminated against pursuant to section 4 of the Sex Discrimination Act 1975 ("the 1975 Act") by their employer, the respondent St Helens Borough Council ("the Council").

The facts

45. The appellants, together with some 470 other women employed by the Council as catering staff in its school meal service, brought equal pay claims against the Council pursuant to section 2 of the Equal Pay Act 1970, during the autumn of 1998. The Council settled the claim of the 470 other claimants by paying an agreed lump sum which was shared between them. However, the 39 appellants did not join in the settlement, and proceeded with their claims before the Tribunal (where in due course they were all ultimately successful, and there was no appeal by the Council).

46. On 19th January 2001, some two months before the equal pay claim was due to be heard by the Tribunal, the Council's acting Director of Environmental Protection, Mr Sanderson, sent out two letters ("the two letters"). The first letter was addressed and sent to all members of the catering staff; the second letter was addressed and sent only to the 39 appellants, i.e. those female members of the catering staff who had not settled their equal pay claims. I do not propose to quote the contents of those letters: they are helpfully appended in a schedule to the judgment of the Court of Appeal, [2005] EWCA Civ 977, [2006] ICR 90, [2005] IRLR 801.

47. The longer of the two letters, sent to all the catering staff, ("the first letter") ran to over two full pages, and said that "the continuance of the current claims and a ruling against the Council will have a severe impact on <u>all</u> staff", and explained in some detail why this would be so.

This letter included the statement that "the Council fully acknowledges and respects the right of individuals to pursue employment matters via the courts or tribunals, and others should respect this also". However, the first letter immediately went on to say that it was "important to ensure that all affected staff are fully aware of the longer term employment consequences" of the appellants' equal pay claims succeeding, and that separate letters were being written to the appellants (although they were not identified).

48. In the letter written only to the appellants ("the second letter"), references were made to an earlier proposal to settle the equal pay claim, and to the more recent settlement offer (which had been accepted by the other 470 claimants), which was renewed. In the second letter, Mr Sanderson described himself as "greatly concerned about the likely outcome of this matter as stated in the letter to catering staff".

49. Each of the appellants then brought a claim in the Tribunal on the basis that she had been "victimised" as a result of the two letters contrary to section 4 of the 1975 Act.

The legislation

50. Section 4 is in Part I of the 1975 Act which is entitled "Discrimination to which Act applies", and it provides as follows, so as far as relevant:

> "(1) A person ('the discriminator') discriminates against another person ('the person victimised') in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has –
>
> (a) brought proceedings against the discriminator or any other person under this Act or the Equal Pay Act 1970…
>
> (2) Subsection (1) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith.

> (3) For the purposes of subsection (1), a provision of Part II or III framed with reference to discrimination against women shall be treated as applying equally to the treatment of men and for that purpose shall have effect with such modifications as are requisite."

The allusive words "in any circumstances relevant for the purposes of any provision of this Act" refer to the subsequent Parts of the 1975 Act, and in particular, to Parts II, III, IV which are respectively entitled "Discrimination in the employment field" "Discrimination in other fields", and "Other unlawful acts". This case, of course, is concerned with Part II. It is necessary to refer to the first section of that Part, namely Section 6, of which only subsection (2)(b) is relevant for present purposes; it is in these terms:

> "(2) It is unlawful for a person, in the case of a woman employed by him at a establishment in Great Britain, to discriminate against her –
>
> (a) …
>
> (b) by dismissing her, or subjecting her to any other detriment."

51. Section 4 of the 1975 Act is one of a number of statutory so called "victimisation provisions", which include Section 2 of the Race Relations Act 1976, Section 55 of the Disability Discrimination Act 1995, Regulation 4 of the Employment Equality (Religion or Belief) Regulations 2003, Regulation 4 of the Employment Equality (Sexual Orientation) Regulations 2003 and Regulation 4 of the Employment Equality (Age) Regulations 2006. All these other provisions are expressed in very similar or nearly identical language, and have precisely the same purpose in their respective areas as Section 4 of the 1975 Act has in relation to the employment area.

52. The purpose of such victimisation provisions was admirably and succinctly summarised by Lord Nicholls of Birkenhead in *Chief Constable of the West Yorkshire Police v Khan* [2001] ICR 1065 at paragraph 16, where he said that the "primary object of the victimisation provisions…is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory rights or are intending to do so".

The decision of the Tribunal

53. The instant applications were initially dismissed by the Tribunal but that dismissal was overturned by a decision of the EAT. The applications then were reheard on 11 July 2003 following which the Tribunal (Mr Lloyd Parry, Chairman, and Mrs Pegg and Mr Partington) gave its decision on 25 September 2003. In that decision, the Tribunal unanimously decided that each of the appellants had made out her case. In paragraph 2 of its decision ("the Decision") the Tribunal summarised the respective cases. Each of the appellants contended that the two letters were "trying to intimidate her into abandoning, or at least modifying, her contention" in the equal pay proceedings. The Council contended that the letters merely "contained a clear statement of their viewpoint, and a needful warning of the harmful consequences of pursuing the claims for bonus" and that it was "more responsible…than not" for the Council to tell their employees the truth.

54. Paragraph 3 of the Decision, which ran to eight subparagraphs, contained the Tribunal's findings of fact. In paragraph 3 (c) the Tribunal said that the two letters had a "tone [that] is rational and [that] they contain[ed] much (at least) that is sensible". Paragraph 3 (g) was in these terms:

> "The letters caused distress to at least some of the applicants, and incurred for them some odium. People spoke of the danger that they could not, if the bid for equality succeeded, afford school meals for their children. The families of road sweepers feared the loss of their bonus. Such was the reaction to the letters. Doubtless they conveyed it to the applicants in terms of reproach".

55. In paragraph 4 of the Decision, the Tribunal set out its conclusions. It is necessary to set them out in full:

> "4. (a) Here was a complaint of victimisation pursuant to section 4 of the Sex Discrimination Act 1975. The complaint was that the respondents discriminated against each applicant in circumstances relevant for the purposes of this Act by treating her less favourably than in those circumstances they treated other persons, and that they did

so by reason that she had brought proceedings against them under the Equal Pay Act 1970.

(b) There was no issue whether the circumstances were relevant for the purposes of the Act. What happened was in the circumstances of an employment relationship between the parties.

(c) Who is the proper comparator? Happily, EAT (in their judgement on the appeal from the earlier decision of our colleagues) have provided us with the answer. The question is whether the 2 letters amounted to treating the applicants less favourably than a person who had not brought and continued equal pay proceedings.

(d) Did the respondents subject any applicant to a detriment? The answer was the same for all, since they all alleged the same detriment. We found that each applicant did suffer a detriment. Mr Gorton, for the respondents, asked pertinently: "How can it be victimization to merely point out what a reasonably held belief of a party is in connexion with the prosecution of a claim?" (he was considering particularly the question of detriment). Here is our answer. The letter of 19 January 2001 contained what was effectively a threat. It spelt out a danger that the applicants might deprive children of school dinners, and that they might cause redundancies among their colleagues. It amounted to an attempt to induce the acquiescence of individuals despite the view of their union. It was more than a matter-of-fact reminder of what might happen if they went on with a complaint. A professional representative can be expected to respond calmly to such a letter. But here was a direct approach to each individual. A letter pointing to the likelihood of dire, unpopular consequences is likely to frighten one not accustomed to legal controversy. It will provoke, not a dispassionate balancing of strengths and weaknesses, but fear and perhaps panic. It is directed against people who were in no position to debate the accuracy of the respondents' pessimistic prognostications. The reaction to such a letter may be, even where there is a well-justified belief in the justice of one's case, surrender induced by fear, fear of public odium or the reproaches of colleagues. Such a reaction, although prompted by emotion, is reasonable in the sense that it is a normal, sane human response to the prospect of an unpleasant consequence realistically perceived. Thus the letter was intimidating. The intimidation was such as to affect the applicants but not the others who had settled their complaints (not in the

same way at any rate): the respondents treated the applicants less favourably than they treated those others.

(e) Here was a claim by women to be treated equally with men. Were the Tribunal proceedings the occasion of the less favourable treatment? They were. Here is how we reasoned that conclusion. We observed the distinction between, on the one hand, the respondents' right to protect themselves in litigation, and, on the other, detrimental treatment as a response to the commencement of proceedings. That distinction is made in *Chief Constable of the West Yorkshire Police v Khan* [2001] ICR 1065. Here, the respondents did not, as they did in *Khan's* case, merely seek to avoid prejudicing their position in the litigation. They wanted the applicants to abandon their claims. They were reacting, if not to the commencement of proceedings, certainly to their continuance: they did not want to abide the event; they wanted to prevent adjudication. The Tribunal case was not simply the setting for the detriment: its continuance was the efficient cause."

The decisions of the EAT and of the Court of Appeal

56. On the Council's appeal from the Tribunal, the EAT (Cox J, Mr Lewis and Mrs Prosser) upheld the Decision. In paragraph 24 of its reasoned decision, the EAT observed that the case "turns on its own particular facts and the Employment Tribunal's decision upon them". In paragraph 26, the EAT said this:

> "The combined experience of all members of this Appeal Tribunal leads us to recognise, as the context for these victimisation complaints, the particular sensitivities which can arise in public sector equal pay claims…and the potential vulnerability in the workplace of women pursuing such claims, particularly as regards their relationships with workplace colleagues in both applicant and comparative groups."

The EAT then went on to reject the suggestion that the consequence of upholding the Decision would be that employers facing discrimination claims "will inevitably be unreasonably constrained and unable properly to defend themselves from victimisation complaints", on the basis, in

effect, that each case in this area inevitably turned on its own particular facts.

57. The Council appealed to the Court of Appeal who by a majority allowed the appeal and remitted the matter to the Tribunal for reconsideration. In very summary form, both Jonathan Parker LJ and Lloyd LJ considered that the Tribunal had misdirected itself in paragraph 4 (e) of the Decision. This was essentially on the basis that the Tribunal had wrongly concluded that the two letters represented victimisation under Section 4 of the 1975 Act because, in writing them, the Council had wanted the appellants to abandon their equal pay claims, whereas the correct test, which the Tribunal ought to have applied, was whether the two letters simply represented "an honest and reasonable attempt by the Council to compromise the proceedings". (In this connection, see paragraph 51-54 in the judgment of Jonathan Parker LJ and paragraphs 77-80 in the judgment of Lloyd LJ.)

58. Mummery LJ took a different view. At paragraph 32, he said that the reasons of the Tribunal should be "read as a whole", and "an appellate court should not be over-critical in its treatment of the reasons given by the Employment Tribunal". He then concluded that, on a "fair and reasonable reading of the reasons as a whole", the Decision contained "no error of law".

59. A number of other points raised by the Council were unanimously rejected by the Court of Appeal, and it is right briefly to mention them before turning to the issue upon which your Lordships have to rule. First, the Tribunal correctly determined that the appropriate comparators, namely the "other persons" for the purposes of section 4 (1), were the employees who had not brought or continued equal pay claims. Although Mr Jeans QC, who appeared for the Council, suggested that another comparator group might have been more appropriate, he did not push the point, at least in part, I think, because he accepted that it would not affect the outcome of this appeal. Nonetheless, it is right to record that I consider that the Tribunal proceeded on the right basis. Secondly, the Tribunal was entitled to find that the sending of the two letters constituted "less favourabl[e]" treatment of the appellants: as Mummery LJ pointed out in paragraph 27 of his judgment, the fact that the appellants were proceeding with their equal pay applications meant that the result of the receipt of the letters was that they were likely to be subject to pressures which the comparator employees would not undergo. Thirdly, as to "detriment", it is clear that the sense of upset or distress described in paragraphs 3 (g)

and 4 (d) of the Decision was capable of amounting to detriment for the purposes of section 6(2)(b) of the 1975 Act.

60. In these circumstances, the two questions which have to be considered are (a) whether the Tribunal was entitled to conclude that the sending of the two letters, coupled with the distress they caused to the appellants, was capable of amounting to an to victimisation falling within section 4 of the 1975 Act, and (b) whether in reaching the conclusion that it was, the Tribunal made an error of law which vitiated its decision. The first point is one of some general significance; the second point is rather more specific to this case.

The reasoning of the House in Khan

61. Mr Hendy QC who appeared for the appellants, and Ms Gill who appeared for the interveners (the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission), accepted that, where an employee was mounting an equal pay claim, section 4 of the 1975 Act would not prevent the employer sending a letter with a view to pointing out to the employee the possible consequences of the claim succeeding, or indeed, with a view to settling the claim. That must be right. The question that arises, however, is how one construes the provision of sections 4 and 6 of the 1975 Act in order to arrive at such a conclusion. In that connection, the Court of Appeal approached the matter on the basis suggested in the speeches in *Khan*: hence the reference to an "honest and reasonable" employer in the judgments.

62. The facts of *Khan* were as follows. Sergeant Khan had had brought proceedings based on an allegation of unlawful racial discrimination in the course of his employment, against his employer, the Chief Constable. Before those proceedings ended, he applied for another job and asked for a reference. The Chief Constable refused to provide it, on the basis that it would prejudice his position in the proceedings. Sergeant Khan then brought a new claim under section 2 (1) (a) of the Race Relations 1976 which is, to all intents and purposes, identical to section 4 (1) (a) of the 1975 Act. In your Lordships' House, the claim failed.

63. The reasoning of the House of Lords centred on the words "by reason that" (as found in this case in section 4(1) of the 1975 Act), as

discussed, for instance in paragraphs 29 to 34 in the speech of Lord Nicholls. At paragraph 31, Lord Nicholls said:

> "Employers, acting *honestly and reasonably*, ought to be able to take steps to preserve their position in pending discrimination proceedings without laying themselves open to a charge of victimisation. This accords with the spirit and purpose of the Act. Moreover, the statute accommodates this approach without any straining of language. An employer who conducts himself in this way is not doing so because of the fact that the complainant has brought discrimination proceedings. He is doing so because, currently and temporarily, he needs to take steps to preserve his position in the outstanding proceedings. Protected act (a) ("by reason that the person victimised has – (a) brought proceedings against the discriminator… under this Act") cannot have been intended to prejudice an employer's proper conduct of his defence, so long as he acts *honestly and reasonably*. Acting within this limit, he cannot be regarded as discriminating by way of victimisation against the employee who bought the proceedings" (emphasis supplied).

The other members of your Lordships House who heard the appeal in *Khan* (Lord Mackay of Clashfern, Lord Hoffmann, Lord Hutton and Lord Scott of Foscote) all gave reasoned speeches. I mean no disrespect to them by suggesting that, at least for present purposes, the passage I have referred to in the speech of Lord Nicholls can fairly be taken as encapsulating the reasoning.

64. As the printed cases for both parties in this appeal show, this reasoning has been interpreted as meaning that there is, as it were, an "honest and reasonable" exception or defence open to a defendant to a claim brought under the victimisation provisions.

65. My Lords, it is with some diffidence that I suggest that, while the conclusion as expressed in paragraph 31 in *Khan* is correct, both its juridical analysis, founded as it no doubt was, on the arguments addressed to the House, and its subsequent interpretation, are not entirely satisfactory. There are two reasons for my concern, apart from the fact that, as pointed out by Lloyd LJ in paragraph 66 in the Court of Appeal, "the point which has been called the 'honest and reasonable

employer' defence is not found in the legislation itself". First, the reasoning in *Khan* seems to me to place a somewhat uncomfortable and unclear meaning on the words "by reason that".

66. Secondly, under the victimisation provisions, it is primarily from the perspective of the alleged victim that one determines the question whether or not any "detriment" (in this case, in section 6(2)(b) of the 1975 Act) has been suffered. However, the reasoning in *Khan* suggests that the question whether a particular act can be said to amount to victimisation must be judged from the point of view of the alleged discriminator. Of course, the words "by reason that" require one to consider why the employer has taken the particular act (in this case the sending of the two letters) and to that extent one must assess the alleged act of victimisation from the employer's point of view. However, in considering whether the act has caused detriment, one must view the issue from the point of view of the alleged victim.

67. In that connection, Brightman LJ said in *Ministry of Defence v Jeremiah* [1980] ICR 13 at 31 that "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment". That observation was cited with apparent approval by Lord Hoffmann in *Khan* at paragraph 53. More recently it has been cited with approved in your Lordships' House in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285. At paragraph 35, my noble and learned friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that "an unjustified sense of grievance cannot amount to 'detriment'". In the same case, at paragraph 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added "if the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice".

68. In my judgment, a more satisfactory conclusion, which in practice would almost always involve identical considerations, and produce a result identical, to that in *Khan*, involves focussing on the word "detriment" rather than on the words "by reason that". If, in the course of equal pay proceedings, the employer's solicitor were to write to the employee's solicitor setting out, in appropriately measured and accurate terms, the financial or employment consequences of the claim succeeding, or the risks to the employee if the claim fails, or terms of settlement which are unattractive to the employee, I do not see how any distress thereby induced in the employee could be said to constitute

"detriment" for the purposes of sections 4 and 6 of the 1975 Act, as it would not satisfy the test as formulated by Brightman LJ in *Jeremiah*, as considered and approved in your Lordships' House. An alleged victim cannot establish "detriment" merely by showing that she had suffered mental distress: before she could succeed, it would have to be objectively reasonable in all the circumstances. The bringing of an equal pay claim, however strong the claim may be, carries with it, like any other litigation inevitable distress and worry. Distress and worry which may be induced by the employer's honest and reasonable conduct in the course of his defence or in the conduct of any settlement negotiations, cannot (save, possibly, in the most unusual circumstances) constitute "detriment" for the purposes of sections 4 and 6 of the 1975 Act.

69. As already mentioned, it seems to me that in practice, the "honest and reasonable" test suggested by Lord Nicholls in paragraph 31 of *Khan* would, at least in any case I can conceive of, be very likely to yield precisely the same result as the approach, having had the benefit of argument in support from Mr Hendy and Ms Gill focusing on the word "detriment" in the present appeal, I would prefer. It is hard to imagine circumstances where an "honest and reasonable" action by an employer, in the context or conduct of an employee's equal pay claim, could lead to "detriment", as that term has been considered and explained in the cases to which I referred, on the part of the employee. In this case, at any rate, I am content to proceed on the basis that the Council would succeed in defeating the claims if it could establish that, in sending the two letters, it had acted as an honest and reasonable employer in the circumstances.

70. It is right to mention that the decision of the European Court of Justice in *Coote v Granada Hospitality Limited (Case-185/97)* [1999] ICR 100 was not cited in *Khan*. If it had been, it might well have caused the House to reconsider the precise juridical basis for its conclusion, but not the conclusion itself. In particular, it seems to me significant that the European Court focused in paragraph 27 on the purpose of the relevant Directive (76/207/EEC) as being to require victimisation legislation not to be limited merely to dismissal. This was on the basis that that was "not the only measure which may effectively deter a worker from making use of the right to judicial protection". In other words, the European Court focused on the effect of the relevant act on the alleged victim, rather than the purpose of the alleged discriminator when carrying out the act. One finds similar emphasis in paragraph 24 of the judgment.

71. I should add that I have had the benefit of reading in draft the opinion of Lord Hope, with which I respectfully agree.

Did the Tribunal go wrong?

72. I turn now to the second point, namely whether the Tribunal erred as the majority of the Court of Appeal concluded. It seems to me that the decision of the Tribunal is clear, accurate and concise in its analysis of the law, its description of the facts and, in paragraph 4 which I have quoted in full, its reasoned conclusions.

73. Mr Jeans, no doubt reflecting the Council's strong feelings on the matter, mounted a very strong defence of the two letters. An employer in the position of the Council, facing potentially severe consequences if the appellants' equal pay claims succeeded, would, he said, have been under a duty to draw the financial and employment consequences to the attention, not only of the employees who were pursuing the claims, but also to all the other employees who would be affected. The only way of taking that course was, he said, to approach the employees directly, because the Union was backing the appellants. Mr Jeans also drew attention to the praise that the Tribunal gave to the terms of the letters.

74. I fully appreciate the force of the point. However, the Council cannot, in my judgment, suggest that no reasonable tribunal could have concluded that the two letters would not have been sent, in the circumstances, to the people to whom they were sent, by an honest and reasonable employer (and in this connection, it is fair to record that there is no suggestion of a lack of honesty on the part of the Council). The Tribunal and the EAT in this case were each chaired by someone experienced in this field, and had, in the normal way, a representative of the employers and of the employees. It seems to me quite clear that each tribunal carefully considered the contents of the two letters, the identity of the people to whom they were sent, and the circumstances in which they were sent, and had no real hesitation in concluding that they did not satisfy the "honest and reasonable" employer test. In this connection, the contents of paragraph 4(d) of the Decision and paragraph 26 of the EAT's reasons speak for themselves.

75. It is true that the Tribunal did not expressly in terms address the "honest and reasonable" employer defence. However, it is quite clear that the Tribunal considered *Khan*, and no fair minded person reading

paragraph 4 (d) could be in any doubt whatever as to the view of the Tribunal on this issue. Quite apart from this, with what might be characterised as uncanny prescience, it seems to me that the Tribunal actually approached that issue on the juridical basis that I would prefer, namely by considering whether the two letters could fairly be said to have given rise to "detriment" within the meaning of sections 4 and 6 of the 1975 Act - see the opening sentence of paragraph 4(d). Accordingly, whether the Tribunal approached the central question by reference to what Lord Nicholls said in *Khan* or on what I would have thought would be a slightly more appropriate basis, it reached an eminently justifiable answer for unassailable reasons, subject at least to the point to which I now turn, namely the concern which Jonathan Parker and Lloyd LJJ had about paragraph 4(e) of the Decision.

76. In my opinion, there is simply nothing wrong with paragraph 4(e). The majority of the Court of Appeal appear to have taken the view that, when properly read, it indicates that the Tribunal considered that, by trying to settle the equal pay claims, the Council was acting illegitimately, and that therefore sending the two letters could amount to victimisation. With all due respect, that is simply not what paragraph 4 (e) is saying. The purpose of the paragraph is quite clear from the question raised in its second sentence and from the conclusion expressed in the final sentence. The Tribunal was faced with the slightly difficult problem raised by the reasoning in *Khan*, namely whether it could be said that the two letters were sent "by reason that" the appellants had brought their equal pay claims. Once one gives the words "by reason that" the simple meaning of "because", the answer is clear. However, because this House in *Khan* gave the words "by reason that" a rather restricted meaning (in order to arrive at the "honest and reasonable" defence), the words arguably presented a slight difficulty for the appellants, and it was that difficulty that the Tribunal was dealing with in paragraph 4(e), and which it resolved quite correctly.

77. Quite apart from this, it seems to me inconceivable that, in paragraph 4 (e), the Tribunal could have been concluding that it was impermissible for an employer to try and settle an equal pay claim in light of what was said in paragraph 4 (d). In paragraph 4 (d), the Tribunal clearly accepted the point made by means of the rhetorical question posed by counsel, namely that it should be perfectly permissible for an employer facing an equal pay claim to send a letter with a view to settling the claim and/or pointing out the consequences of its success. Furthermore, one wonders why the Tribunal would have bothered to consider the effect of the two letters, as it did so carefully in paragraph 4 (d), if it considered that the sending of any letter which

sought to settle the claim or discourage an employee from pursuing an equal pay claim would constitute victimisation. It seems to me that, as my noble and learned friend Lord Hope suggested during the argument, Jonathan Parker LJ in paragraphs 51 and 52, and Lloyd LJ in paragraph 64, may have misled themselves by quoting part only of paragraph 4 (e), and in particular, not the opening two sentences or the last sentence.

78. In any event, even if the Tribunal went wrong in some way in paragraph 4(e), it seems to me that there can be no doubt as to its conclusion or as to the justified basis on which it was reached. In that connection I cannot improve on the way Mummery LJ, who has considerable experience in this field, expressed himself at the end of his judgment:

> "38. The tribunal's findings on the reason for sending the letters are clear. Even though the Applicants had legal representation, the Council sent the letters direct to each individual Applicant. The letters seeking a settlement were coupled with letters sent to the Applicants' colleagues who had already settled. There was no need for the Council to communicate with them for settlement purposes. All the letters were sent shortly before the hearing. The Council's object was to get the Applicants' agreement, despite the view of their union, not to go on with the equal pay case they had brought against the Council and which their colleagues making similar equal pay claims had already settled. The tribunal concluded that the letters had an intimidating effect on those bringing the equal pay claims who had not settled. Such letters would not have had that effect on a claimant who had settled. The letters also had a different affect on the individual Applicants than they would have had on the legal representatives of the Applicants.
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> 39. The critical point is that, in determining the Council's reason for sending the letters, the tribunal looked beyond the contents of the letters to all the surrounding circumstances. It was entitled to do so and to conclude from all the circumstances that the Council's reason for sending the letters was that the Applicants had brought (and were still bringing) the equal pay proceedings against them. For that purpose the Council used means aimed at persuading the Applicants to abandon the equal pay proceedings rather than have them tried by the tribunal. Settlements are, of course, intended

> to avoid adjudication. But the objection is not to the Council seeking a settlement of the proceedings brought by the Applicants. It is to the particular means by which it sought to achieve the settlement. It is reasonably clear from the extended reasons, when read as a whole, that the tribunal did not regard the Council's treatment of the Applicants as a reasonable means of protecting its interests in the litigation. The Council could have protected its legitimate interests in the conduct of its defence to the litigation by seeking to achieve a settlement with those bringing proceedings against them by other means that were reasonable, such as negotiations with the Applicants' union or their legal representatives. The Council went further than was reasonable as a means of protecting its interests in the existing litigation and the reason for it doing so was, the tribunal found, that the Applicants had brought the equal pay claims against the Council and were continuing to bring them".

Conclusion

79. Accordingly, I would allow the appeal and I agree with the order proposed by my noble and learned friend Lord Bingham of Cornhill.