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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF AN APPEAL

ON APPEAL FROM A DECISION OF THE INDUSTRIAL TRIBUNAL

BETWEEN:

JOHN JOSEPH RICE

Appellant;

and

YVONNE McEVOY

Respondent.

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GIRVAN LJ, COGHLIN LJ and HART J

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GIRVAN LJ (giving the judgment of the Court)

Introduction

[1] This is an appeal by John Joseph Rice who was the respondent in proceedings brought by the respondent to the appeal who was the claimant in proceedings in an industrial tribunal ("the tribunal") who claimed that in the course of her employment as a salaried partner solicitor by the appellant she had been subjected to discriminatory detrimental treatment because of her sex and age under both the sex and age discrimination legislation. She also claimed that she had suffered victimisation discrimination because the appellant had victimised her by refusing to pay her full occupational sick ("full sick pay") rather than minimum statutory sick pay ("statutory sick pay"). The tribunal dismissed the respondent's claims for unlawful sex and unlawful age discrimination but it upheld her claim of victimisation brought under the sex discrimination legislation but dismissed her victimisation claim under the age discrimination legislation. The appellant appeals against the tribunal's decision upholding the respondent's sex discrimination victimisation claim. No appeal has been brought in respect of any of the other decisions of the tribunal.

[2] The appellant's notice of appeal raised three questions of law which the appellant contends arose in the proceedings.

(1) Did the Industrial Tribunal misdirect itself in law by concluding that it did not need to arrive at any conclusions regarding whether the respondent had a contractual entitlement to 3 months occupational sick pay before deciding that by failing to pay to her occupational sick pay the appellant had victimised the respondent contrary to Article 8(2) of the Sex Discrimination (Northern Ireland) Order 1976?

(2) Did the Industrial Tribunal misdirect itself in law by concluding that considerations of decency and good industrial relations practice dictated that the appellant should have exercised his discretion in the respondent's favour by paying to her 3 months occupational sick pay?

(3) Was the Industrial Tribunal wrong in law to conclude that the appellant victimised the respondent contrary to Article 8(2) of the Sex Discrimination Order (Northern Ireland) 1976 by withholding from her 3 months occupational sick pay?

[3] Ms McGrenera QC appeared with Mr Wolfe on behalf of the appellant. Mr Potter appeared on behalf of the respondent. The Court is grateful to counsel for their helpful written and oral submissions.

Factual Background

[4] The appellant is the senior partner in a solicitors' practice based in Belfast engaged mainly in the field of criminal law. The respondent was employed as a solicitor in the appellant's firm for at least some 15 years. Latterly she was employed as the only "salaried partner" within the firm. Her area of expertise is conveyancing although she also has significant experience in civil litigation. When she first commenced employment with the appellant it was on the clear understanding that she would not be carrying out criminal law work.

[5] By the end of 2008 there was a marked decline in conveyancing work due to the onset of the economic recession. The appellant came to the conclusion that the respondent was bringing far less revenue into the practice than the criminal practitioners. During the winter of 2008/2009 some of the respondent's colleagues in the practice sought to persuade the appellant that because of the imbalance of workloads the respondent should be placed on the offices PACE rota which would involve attending police stations in respect of the interviewing of clients.

[6] During a series of meetings between the appellant and the respondent in December 2008, January 2009 and February 2009 the respondent gave the appellant the impression that she was not willing to do either normal criminal work or PACE work. In relation to one of those meetings on 29 January 2009 the tribunal found that the true position was that the appellant was urging the respondent to go into the PACE rota but that he was not purporting to instruct her to do so. The tribunal concluded that the effect of what the appellant said at that meeting was to put pressure on the respondent to voluntarily agree to go onto the PACE rota even though the appellant knew that she did not want to do so. While this was viewed by the tribunal to be an unpleasant tactic from the respondent's point of view the tribunal considered that it was not an unreasonable approach for the appellant to take in light of the dire state of the then prevailing market for conveyancing services.

[7] In relation to a further meeting on 20 February 2009 the tribunal found it to have been a very acrimonious meeting. At the beginning of the meeting the appellant demanded proposals from the respondent as to how the economic consequences of the decline in demand for conveyancing services could be addressed but she declined to make any proposals. Instead she told the appellant that it was up to him to decide and said that she was unhappy about the attitude which the appellant had displayed during the course of the previous meetings. His response was that she was "always the victim". During the course of the meeting the appellant asked the respondent to think about her position over the weekend. While the respondent construed this as an implied request for resignation the tribunal concluded that in reality the appellant was talking about the respondent's position regarding the PACE rota and regarding criminal defence work.

[8] The respondent lodged a letter of grievance with the appellant dated 25 February 2009 ("the letter of grievance") claiming inter alia that the appellant had acted in a discriminatory manner as regards her sex and age. The respondent subsequently went on sick leave with effect from 27 February 2009. The medical certificates show that she was suffering from psychological ill-health. Before the tribunal the appellant accepted that she was genuinely unfit to work while she was off sick. During that period the respondent was paid the minimum statutory sick pay and did not receive full sick pay over that amount.

[9] The respondent lodged a claim with the tribunal on 19 July 2009 claiming unlawful deductions from wages, sex discrimination, age discrimination and victimisation discrimination under both the sex discrimination and age discrimination legislation. The unlawful wage deduction claim was withdrawn before the tribunal.

[10] Following the hearing the tribunal gave a written decision on 30 September 2010 dismissing the respondent's claims for unlawful deductions

of wages, sex discrimination, age discrimination and victimisation discrimination under the age discrimination legislation. However, as already noted the tribunal found that the respondent had suffered victimisation, discrimination under the sex discrimination legislation and awarded her total damages of £11,019.00.

[11] The appellant lodged a notice of appeal dated 10 November 2010 setting out the questions referred to in paragraph [2] above.

The Relevant Legislative Provisions

[12] The Sex Discrimination (Northern Ireland) Order 1976 provides so far as materially relevant as follows:

> **Article 6**
> "(1) A person ('the discriminator) discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Order 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 -
> …
>
> > (d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Order or give rise to a claim under the Equal Pay Act or under Articles 62 to 65 of the Pensions (Northern Ireland) Order 1995 or proceedings under Part I of Schedule 5 to the Social Security (Northern Ireland) Order 1989,
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> or by reason that the discriminator knows the person victimised intends to do any of those things, or suspects the person victimised has done, or intends to do, any of them."
>
> **Article 8**
>
> "(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Northern Ireland, to discriminate against her -

(a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or

(b) by dismissing her, or subjecting her to any other detriment."

Article 63

"(1) A complaint by any person ("the complainant") that another person ("the respondent")-

(a) has committed an act of discrimination or harassment against the complainant which is unlawful by virtue of Part III, or

(b) is by virtue of Article 42 or 43 to be treated as having committed such an act of discrimination against the complainant,

may be presented to an industrial tribunal."

Article 63A

"(1) This Article applies to any complaint presented under Article 63 to an industrial tribunal.

(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent -

(a) has committed an act of discrimination or harassment against the complainant which is unlawful by virtue of Part III, or

(b) is by virtue of Article 42 or 43 to be treated as having committed such an act of discrimination against the complainant,

> the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act."

The Tribunal's Decision on the Issue of Victimisation

[13] The tribunal concluded, correctly as both parties accept, that by lodging her letter of grievance the respondent had carried out a protected act falling within the victimisation provisions.

[14] It concluded that in comparing the treatment accorded to the claimant (that is to say, the withholding of full sick pay) a comparison had to be made with the treatment which would have been accorded to a hypothetical salaried partner who had carried out years of diligent service who then had to go on sick leave and who had never taken any grievance of any kind against the respondent in the past.

[15] It decided that the withholding of full sick pay constituted an unlawful act of victimisation. It concluded that the claimant had established facts which in the absence of an adequate explanation constituted prima facie evidence that the relevant act was an act of unlawful victimisation and that the respondent had not discharged the onus of proof imposed by Article 63A.

[16] In paragraph [66] and paragraph [67] the tribunal set out the basis for concluding there was a prima facie case thus:

(a) The respondent had rarely been sick previously.

(b) The appellant knew she was off ill because of psychological ill health.

(c) The respondent was a salaried partner.

(d) The appellant immediately took steps to ensure that she would not be paid more than the statutory minimum.

(e) The appellant had in the preceding years been decent and reasonable in his dealings with the respondent.

(f) He had in the past explicitly agreed through contract to pay at least one salaried partner up to 3 months contractual sick pay in the event of him becoming sick.

[17] Having found a prima facie case the tribunal considered the respondent's explanation and considered it unsatisfactory. The tribunal's reasoning may be summarised thus:

(a) The appellant in her written statement stated that "As I understood it our contractual situation covering staff was for statutory sick pay only to be paid. There was no basis for her to be given full pay while she was off sick." The tribunal in effect concluded that the employer must have appreciated that he had in fact a discretion to pay full sick pay. He had entered into a contract with Mr Broderick to provide him with full sick pay for 3 months. He had paid Mr Leslie full sick pay over and above the statutory sick pay entitlements. He had paid the respondent full sick pay for a day or two off on previous occasions. The tribunal, accordingly, appears to have found the appellant's purported reliance on a lack of contractual obligation to pay full sick pay as an unconvincing reason as to why he had not paid it.

(b) In cross-examination before the tribunal the appellant did not limit himself to the initial explanation based on the respondent's lack of contractual entitlement to full sick pay. He said that he did not want to make the pitch more difficult and said that he was trying to stimulate her to come back to work. It is clear that the tribunal found this added explanation unconvincing.

(c) It was not clear to the tribunal why the "pitch" would have made more difficult for the respondent to come back if she was paid full sick pay.

(d) The implication of his reference to "stimulating her to come back" was that he doubted the genuineness of her illness (a point which was never explicitly asserted before the tribunal). The evidence did not support the view that the appellant ever took the view that the respondent was not genuinely ill. The implication that she was not came late in the day and was self-serving, that being a point that the tribunal considered could be put on the scales in looking at the genuineness of the explanation.

(e) The "stimulation" explanation did not negative a retaliatory reason for withholding full sick pay. Considerations of decency and of good industrial relations practice dictated that he should exercise his discretion in her favour rather than against her on the question of paying full sick pay.

The Parties' Cases

[18] Ms McGrenera drew attention to the respondent's pleaded case which was that it was custom and practice for all members of the professional staff

to be paid during such leave off sick. The respondent in her pleaded case relied on the payment of full sick pay to a female member of staff, Ms Sherlock, who had been off work with depression for 8-10 weeks. This was not in fact the case. Ms Sherlock, although alleged by the respondent to have received full sick pay, was in fact in receipt only of statutory sick pay during her protracted period of absence.

[19] Counsel contended that the tribunal erred in finding that the respondent had suffered less favourable treatment. While the tribunal appeared to accept that it could not find any basis for concluding that the respondent enjoyed a contractual entitlement to full sick pay over and above statutory sick pay, it nevertheless substituted its view of what was appropriate in order to construct an entitlement for the respondent based broadly on considerations of reasonableness and fairness. The tribunal in paragraph [12] of its decision had stated the respondent made a case to the tribunal that she had a moral and contractual entitlement to full sick pay. In fact her pleaded case was that she had a contractual entitlement to it.

[20] Counsel contended that the hypothetical comparator as formulated by the tribunal was an impermissibly narrow description and removed from consideration the treatment of other professional staff in the context of sick pay. In any event the tribunal did not even seek to establish how the hypothetical comparator as defined would have been treated before concluding there was a prima facie case. It provided no analysis at all with regard to how a hypothetical comparator would have been treated. The tribunal failed to decide the question whether she had a contractual entitlement to such pay. Although the tribunal stated that it would be proceeding on the basis that the relevant comparator was a hypothetical salaried partner it inexplicably referred to the contractual arrangements of Mr Broderick. Since the respondent had no contractual entitlement to anything other than sick pay Mr Broderick was not in a comparable situation. The tribunal impermissibly concluded Mr Broderick's entitlement supported its view that it would be fair and just that the appellant should pay the respondent full sick pay. The tribunal then went on to disregard the evidence that Ms Sherlock was not paid full pay when she was off work for an extended period. What the tribunal did in fact do was to substitute its own view of what would be fair and reasonable in the circumstances rather than focussing on the actual entitlement of the respondent to claim full sick pay. What is absent from the tribunal's reasoning is any explanation or inferential basis for concluding that there was less favourable treatment when the best evidence was that the respondent was treated no less favourably than the true actual comparator Ms Sherlock.

[21] Mr Potter, on behalf of the respondent, argued that where, as in the present case, a claimant's entitlement is conditional on the exercise of the employer's discretion that discretion must be exercised genuinely and

rationally. A failure to exercise the discretion genuinely and rationally amounts to a breach of the implied term of trust and confidence. The tribunal properly found there was a prima facie case that the appellant had victimised the respondent pursuant to Article 63A. It correctly concluded that the respondent had not discharged the onus of proof or evidential burden under Article 63A. It rejected the appellant's case that there was no basis for the claimant being paid sick pay. The appellant failed to address the matter of Mr Broderick's contractual entitlement. The appellant had in the past exercised his discretion to pay full sick pay. The appellant's explanations for not exercising the discretion were difficult to understand. Given the tribunal's view that there was a provision for discretionary payment of full sick pay and in all the circumstances the appellant could only genuinely and rationally exercise his discretion by way of a positive exercise thereof. The tribunal properly found it unnecessary to determine whether the claimant had been entitled in contract to his full sick pay.

The Relevant Legal Principles

[22] In order to establish that discrimination by way of victimisation has occurred –

(a) circumstances relevant for the purposes of the provisions of the Order must apply;

(b) the alleged discriminator must have treated the person allegedly victimised less favourably than in those circumstances he treats or would treat other persons in similar circumstances ("the less favourable treatment issue"); and

(c) he must have done so by reason of the fact that the person victimised has done one of the protected acts ("the reason why issue").

[23] For a complainant to have suffered comparable discrimination he or she must have been detrimentally affected by the way the employer has afforded her access to some benefit, facility, service or opportunity or subjected him or her to some other detriment.

[24] In the absence of a true comparator it is necessary to approach the question of comparative treatment hypothetically.

[25] 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.

[26] In determining whether the alleged victim has been less favourably treated than others the comparison is a simple comparison between the treatment afforded to the complainant who has done the protected act and the treatment that had or would have been afforded to other employees who had not done so.

[27] As Lord Nicholls points out in Shamoon v Chief Constable of the RUC [2002] NI 174 tribunals usually proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the claimant. Thus the less favourable treatment issue is treated as a threshold which a claimant must cross before the tribunal is called on to decide why the claimant was afforded the treatment of which she or he complains.

[28] However, while in many cases it is convenient and helpful to adopt the two stage approach to the less favourable treatment issue and the reason why issue there is essentially one single question: did the claimant on the prescribed ground receive less favourable treatment than others. Sometimes the less favourable treatment issue cannot be resolved without at the same time deciding the reason why issue the two issues are intertwined (Lord Nicholls in Shamoon at paragraph [8]).

[29] There can be cases where the position held by the complainant was the only one of its kind and was incapable of being compared with that held at the relevant time by anyone else in the employer's organisation. The words "or would treat" in Article 6 of the Order permit the question whether there was discrimination against a woman on the ground of her sex to be approached as a hypothesis. It would defeat the purpose of the Order if this question could not be addressed simply because the complainant was unable to point to anyone else who was in fact in the same position as she was (per Lord Hope in Shamoon at paragraph 52).

[30] The victim who complains of discrimination must satisfy the fact finding tribunal that, on the balance of probabilities, he has suffered discrimination falling within the statutory definition. This may be done by placing before the tribunal evidential material how he or she would have been treated if she had not been a member of the protected class. Actual comparators may constitute such evidential material but they are only a tool which may or may not justify an inference of discrimination. The usefulness of the tool will depend on the extent of the circumstances relating to the victim. The more significant the differences the less cogent will be the case for drawing inferences. The fact that a particular chosen comparator cannot because of material differences qualify as the statutory comparator by no means disqualifies him from an evidential role. It may, in conjunction with other material, justify a tribunal drawing an inference (per Lord Scott in Shamoon at paragraph [109]).

[31] In the absence of comparators of sufficient evidential value some other material must be identified that is capable of supporting the requisite inferences of discrimination. Unconvincing denials of a discriminatory intent given by the alleged discriminator coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision might in some cases suffice (per Lord Scott in Shamoon at [116]).

[32] In deciding the issue whether the claimant has been treated less favourably by the alleged discriminator the conduct of the hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. Circumstances may be relevant even if no reasonable employer would have attached any weight to them in considering how to treat the employer (per Lord Browne-Wilkinson in Glasgow City Council v Zafar [1998] 2 All ER 953 at 956 and per Lord Rodger in Shamoon at paragraph [132]).

[33] In determining the reason why issue it is necessary for the tribunal to consider the employer's mental processes, conscious and unconscious. If on such consideration it appears that the protected act had a significant influence on the outcome victimisation is established (see Lord Nicholls in Nagarajan v London Regional Transport[1999] IRLR 572 at 575, 576). The question is 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 (per Lord Nicholls in Chief Constable of West Yorkshire v Khan [2001] IRLR 830 at paragraph 29).

[34] The reverse burden of proof provisions in Article 63A apply to claims of victimisation under Article 6 because they are claims of discrimination (Pothecary Witham Weld v Bullimore [2010] IRLR 572.

[35] In a case where a claimant has raised a prima facie case for the purposes of Article 63A it must in principle be enough to say with such reasons as may be appropriate "we are not persuaded that his explanation was right" rather than "we reject his explanation." It is preferable for a tribunal to make positive findings one way or the other (see Pothecary Witham Weld v Bullimore.)

Discussion

[36] The respondent's initial claim was firstly that she had a contractual entitlement to full sick pay by practice and custom and secondly that her treatment compared to that of Ms Sherlock (who was an employee who had not done a protected act) showed discrimination by victimisation. The claim so formulated however could not succeed once it was shown that Ms Sherlock had not in fact received full sick pay but only statutory sick pay while she was

off sick for a protracted period. Moreover although the tribunal declined to decide whether she had a contractual entitlement to such pay, on the evidence before the tribunal it was bound to find that she had no contractual entitlement as such to full sick pay.

[37] In the absence of a contractual obligation to pay full sick pay the appellant clearly could have exercised his discretion to permit full sick pay to be paid to the employee. The evidence established that on occasion the appellant did permit the payment of full sick pay to employees. He did not have in place any formulated sick pay policy and the evidence indicated that he retained to himself an untrammelled discretion. Where an employer reserves to himself a discretionary power it is an implied term of the employee's contract that the employer will exercise his discretion genuinely and rationally. Where he exercises his discretion against an employee this results in the employee not being afforded access to a benefit and being subjected to a detriment. If the employer's action is a result of her doing a protected act then discrimination by victimisation will have occurred.

[38] The respondent's initial basis of claim having failed, the question for the tribunal was whether on the evidence the respondent was entitled to succeed on a different basis. The tribunal not being bound by the same strict principles of pleadings in the High Court was bound to determine the case on the evidence actually adduced.

[39] Contrary to Ms McGrenera's argument, the provisions of Article 63A do apply in victimisation discrimination claims as the analysis in Pothecary shows. It is thus necessary to consider whether on the evidence before the tribunal it was correct in concluding that the evidence showed facts from which the tribunal could conclude, in the absence of an adequate explanation, that the appellant had committed an act of victimisation discrimination.

Was the Tribunal entitled to find a prima facie case?

[40] In the present case the tribunal concluded that the appellant's decision not to pay Ms Sherlock full sick pay was not in itself determinative of the less favourable treatment issue. The position of the respondent was, in the tribunal's view, distinguishable from that of Ms Sherlock, the respondent being a more senior salaried partner with many years of service and demonstrated commitment. It would be reasonable to infer that the appellant should reasonably have been sympathetic to the respondent. The tribunal took into account the fact that the appellant had treated Mr Broderick more favourably by conferring on him a contractual entitlement to full sick pay. While the appellant was an employer not contractually bound to treat the respondent in the same way as Mr Broderick he clearly had a discretion to do so. Thus the appellant –

(a) exercised his discretion against the respondent;

(b) did so soon after the protected act; and

(c) did so in respect of the respondent (who had done the protected act) when it would be reasonable to infer that he would have wanted to show fairness and equality of treatment between employees.

The tribunal concluded that these primary facts gave rise to an inference that the discretion was exercised by the appellant adversely to the respondent because she had brought a grievance. It required an explanation from the appellant.

[41] It was not the appellant's case that he had in place a fixed policy to be applied in all equivalent circumstances. The initial way in which he presented his case was that in the absence of a contractual obligation to pay full sick pay there was no justification for paying it. Such a case disregarded the fact that he had a discretion to pay full sick pay. On a fair reading of paragraph [70] of the decision the tribunal concluded that his approach was disingenuous. The appellant must have known that he could have paid full sick pay if he wanted to (out of compassion, in recognition of past services, good industrial practice and to ensure equality of treatment between those like Mr Broderick who had a contractual entitlement and those like the respondent who had a discretionary expectation of fair and equal treatment).

[42] This was a case in which there was a clear connection between the equal treatment issue and the reason why issue. The tribunal's finding that there was a case to answer was a finding that the evidence pointed to a prima facie case that the reason why the appellant treated the respondent as he did was because she had done the protected act. The absence of an absolutely comparable employee required the tribunal to consider those who were in somewhat if not absolutely comparable positions. Lord Scott's comments on comparators (see paragraph [30] above) demonstrate that it is open to a tribunal to draw inferences from a party's treatment of other employees who are not in absolutely comparable situations (cf. Mr Broderick in this instance).

[43] The tribunal's conclusion that there was a prima facie case was one that was open to a reasonable tribunal on the evidence. The tribunal having arrived at the justifiable conclusion that there was a case to answer under Article 63A it is necessary to consider whether it correctly approached the evidence relating to the appellant's explanation of his treatment of the respondent.

The Tribunal's treatment of the appellant's explanation

[44] The question for the tribunal was why the appellant acted as he did. It was for the appellant to persuade the tribunal that he did not act as he did with any discriminatory victimising intent. While the onus was on the appellant to negative such an intent the tribunal was bound to carefully consider the appellant's mental processes, conscious and unconscious. The question was not one that fell to be answered by determining what a reasonable employer would have done in the circumstances. If an employer acts in a wholly unreasonable way that may assist in drawing an inference that the employer's purported explanation for his actions was not in fact the true explanation and that he was covering up a discriminatory intent. However it is not in itself determinative of the issue.

[45] In paragraph [77] of the decision the tribunal stated:

> "In determining this aspect of the case in favour of the claimant, we arrive at no conclusions and we need to arrive at no conclusions on the question whether or not the claimant was or was not contractually entitled to 3 months sick pay. Even in the absence of any contractual entitlement, considerations of decency and considerations of good industrial relations practice dictated that (to paraphrase the form of words used by him in the course of his oral testimony) the respondent should exercise his discretion in her favour as regards sickness pay rather than exercising his discretion against her."

[46] The wording adopted by the tribunal in this paragraph is at least suggestive that it reached its determination to reject the appellant's explanation because it considered that no reasonable employer in the circumstances would have failed to exercise the discretion in favour of paying full sick pay. Furthermore, in paragraph [75] the tribunal does not appear to reach a concluded view that the appellant's alleged motivation for refusing full sick pay ("not to make the pitch more difficult" and "trying to stimulate the respondent to come back") did not in fact represent his true reasoning. Thus at paragraph [75] it stated:

> "In any event even if one were to accept the accuracy of the stimulate explanation such an explanation is not inconsistent with there also being alongside it a retaliatory reason for the withholding of the additional sick pay. (As already noted above, the retaliatory reason will

> still meet the relevant requirement of the victimisation discrimination definition, even if it is not the main reason for the according of the relevant treatment)."

Paragraph [75] followed a general but somewhat unparticularised statement in paragraph [73] that the tribunal agreed with *some* of the respondent's criticisms of the appellant's actions which had been made in the context of the case.

[47] Since the tribunal has failed to show in clear terms that it rejected the appellant's explanation and why and has expressed itself in terms suggesting the application of an inappropriate reasonableness test we conclude that the respondent's victimisation claim must be remitted for rehearing by a freshly constituted tribunal. That tribunal will have to consider the case afresh and reach its own determinations on all issues on the evidence adduced before it.

[48] In view of this conclusion it is not necessary or appropriate to answer the questions of law raised in the notice of appeal.