FOLLOWING *CORDANT SECURITY LTD V SINGH* WHAT AMOUNTS TO A DETRIMENT FOR THE PURPOSES OF SECTION 39 OF THE EQUALITY ACT 2010?

Background

1. Section 39 of the Equality Act 2010 ("EA 2010") sets out the circumstances in which it is unlawful for an employer to discriminate against their employees. By virtue of section 39(2)(d) this includes "*by subjecting B* [the employee] *to any other detriment*".

2. The leading case on the meaning of "detriment" in this context was and still remains *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337. In a passage that has been much cited subsequently, Lord Hope explained at paragraphs 34 – 35 (emphasis added):

> *"… the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.*
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> *35. But once this requirement is satisfied, the only other limitation that can be read into the word is that indicated by Brightman LJ. As he put it in Ministry of Defence v Jeremiah [1980] ICR 13, 30, one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment": Barclays Bank plc v Kapur (No 2) [1995] IRLR 87. But, contrary to the view that was expressed in Lord Chancellor v Coker [2001] ICR 507 on which the Court of Appeal relied, it is not necessary to demonstrate some physical or economic consequence. As Lord Hoffmann pointed out in Khan's case [2001] ICR 1065, 1077, para 52, the employment tribunal*

has jurisdiction to award compensation for injury to feelings whether or not compensation is to be awarded under any other head…."

3. Accordingly:

   3.1 The essential test for deciding whether a particular act or omission amounts to a "detriment" is to ask whether the reasonable worker would or might take the view that s/he had thereby been disadvantaged as regards their work circumstances;

   3.2 Implicit in this test, which focuses upon the perspective of the employee who receives the allegedly discriminatory treatment, is the related element that the particular claimant must feel that s/he has been disadvantaged[1];

   3.3 It is not necessary for the employee to show some physical or economic consequence resulting from the treatment; injury to feelings alone will suffice if it meets the test set out in paragraph 3.1.

4. Lord Hope's endorsement in this passage in *Shamoon* of the Court of Appeal's earlier decision in *Barclays Bank v Kapur (No 2)* [1995] IRLR 87 that an unjustified sense of grievance cannot of itself amount to a detriment is examined further at paragraphs 10 - 12 below.

The discriminatory handling of an unjustified grievance: *Deer v University of Oxford*

5. In *Deer v University of Oxford* [2015] EWCA Civ 52; [2015] ICR 1213 the Court of Appeal considered the circumstances in which "detriment" could arise from the poor handling of an unjustified grievance, allegedly for reasons of victimisation".

[1] This aspect is further discussed when *Cordant Security Ltd v Singh* is considered below.

The facts

6. The claimant was employed by the respondent university as a research fellow. She had earlier brought a sex discrimination claim against the university which was compromised on payment of damages and an agreement to provide a reference. Her doctoral supervisor subsequently refused to provide her with a reference and she lodged a formal grievance complaining that this was victimisation. Her grievance was not upheld. The claimant then brought two victimisation claims under the Sex Discrimination Act 1975 contending that the university's handling of her grievance involved treating her less favourably because of the previous sex discrimination proceedings. The claims were struck out by the Employment Tribunal ("ET") on the ground that they were bound to fail as no detriment could be established because her grievance would have failed however the university had dealt with it. The Employment Appeal Tribunal ("EAT") dismissed the claimant's appeal.

The Court of Appeal's decision

7. However, the Court of Appeal allowed this part of the appeal, remitting the case to be heard on its merits by the ET, on the basis that if there had been failings by the university in the process they adopted in relation to the grievance and this had been because of the earlier sex discrimination claim (as the current case alleged), then the claimant would have a legitimate sense of injustice which in principle should sound in damages, even if in terms of the substantive outcome, the grievance would have been rejected and thus it would not have produced anything of value for her.

8. Lord Justice Elias gave the leading judgment on behalf of the Court of Appeal. The key parts of his reasoning on this issue are to be found in paragraphs 26 and 46 - 48 as follows (emphasis added):

> *"26. In fact it seems to me — as it did to Underhill LJ as he said when granting permission to appeal — that although the concepts of less favourable treatment and detriment are distinct, <u>there will be very</u>*

few, if any, cases where less favourable treatment will be meted out and yet it will not result in a detriment. This is because being subject to an act of discrimination which causes, or is reasonably likely to cause, distress or upset will reasonably be perceived as a detriment by the person subject to the discrimination even if there are no other adverse consequences. That is perhaps more starkly the position in cases of discrimination on race or sex grounds where it can be readily seen that the act of discrimination of itself causes injury to feelings. But similar reasoning applies to victimisation discrimination. This is also an important protection for an employee or ex-employee, and a real and burning sense of injustice or unfairness may be experienced by someone who is discriminated against on this ground. It is perhaps possible that there may be evidence showing that in fact in a particular case the claimant did not suffer any sense of grievance or injustice notwithstanding less favourable treatment, but the normal inference would surely be that he or she did.

"46……If there was a failure to carry out a proper investigation and the reason was the fact that the settled claim….had been lodged by the claimant, then the claimant would have established her case notwithstanding that a fuller investigation would in fact have produced nothing of value.

"47. Ms McCafferty[2] accepted that there will be cases where procedural failings may give rise to a detriment even although it is plain that they had no effect on the substantive outcome of the investigation, but she submits that this is not such a case.

"48. In principle I do not see why not: if the claimant were able to establish that she had been treated less favourably in the way in which the procedures were applied and the reason was that she was being victimised for having lodged a sex discrimination claim she would have a legitimate sense of injustice which would in principle sound in damages. The fact that the outcome of the procedure would not have changed will be relevant to any assessment of compensation, but it does not of itself defeat the substantive victimisation claim. It seems to me that [the] case must depend on a consideration of the merits…"

[2] The respondent's counsel

9. Thus, the Court of Appeal accepted that the poor handling of an unjustified grievance was capable of giving rise to hurt feelings if the employee in question was treated less favourably for reasons that were discriminatory or amounted to victimisation.

Discussion

10. The earlier decision of the Court of Appeal in *Barclays Bank v Kapur (No. 2*), cited by Lord Hope in *Shamoon* (see paragraphs 2 and 4 above) was not referred to in Lord Justice Elias' judgment. However it may be inferred that the Court was aware of it, since the judge did refer to *Derbyshire v St Helens Metropolitan Borough Council* [2007] ICR 841, in which Baroness Hale reviewed the earlier authorities and commented, as the Court of Appeal had decided in *Kapur:* "*an unjustified sense of grievance cannot amount to a detriment*": see paragraph 25 of *Deer*.

11. In any event, in my view there is no conflict between the Court of Appeal's respective decisions in *Kapur* and *Deer* over what may amount to a "detriment". The decision in *Kapur*, cited with approval in *Shamoon*, did not concern a complaint that the employer had adopted an unfair process or procedure for considering a formal grievance. Rather, the observation about an "unjustified sense of grievance" (quoted in the previous paragraph) was a reference to the employee's general sense of dissatisfaction that underlay the (unmeritorious) discrimination claim.

12. Specifically, the claims in *Kapur* related to the employer's failure to credit the claimant employees' previous service aboard for pension purposes. This was found to have been done on non-discriminatory grounds; it was attributable to previous compensation they received from the respondent when the claimants, who were of Asian origin, lost their original employment in Kenya as a result of the Africanisation policy. Having determined that the race discrimination claims were thus unfounded, the Court of Appeal also expressed agreement with the EAT's conclusion that a further reason for

rejecting the claims was that there had been no "detriment" and the claimants' unjustified sense of grievance in not having their earlier service credited for pension purposes could not of itself supply that "detriment": see paragraphs 42 – 46.

13. Whilst it is apparent from the above cited excerpt from paragraph 47 of Lord Justice Elias' judgment in *Deer* that counsel for the respondent university did not dispute that "*there will be cases where procedural failings may give rise to a detriment even although it is plain that they had no effect on the substantive outcome of the investigation"*; for the reasons set out at paragraph 26 of the Court's judgment (also quoted above), this appears to have been a sensible and realistic concession.

14. Although he opined that an instance of less favourable treatment on discriminatory grounds would usually give rise to sufficient injury to feelings to amount to a "detriment", Lord Justice Elias concluded paragraph 26 of his judgment by recognising that: "i*t is perhaps possible that there may be evidence showing that in fact in a particular case the claimant did not suffer any sense of grievance or injustice notwithstanding less favourable treatment". Cordant Security Limited v Singh* UKEAT/0144/15/LA, which I now turn to discuss, was just such a case.

No detriment from the handling of a fabricated grievance: *Cordant Security v Singh*

The facts

15. The facts of this case were unusual. Furthermore, although he was involved in the ET proceedings, by the time of the hearing before the EAT, the claimant had been debarred from resisting the appeal, so the court only heard legal argument on behalf of the employer.

16. The claimant was employed by the first respondent, Cordant Security Limited, as a security guard. He was of Indian ethnic origin. An allegation was made by a site supervisor that the claimant smelt of alcohol; in

consequence one of his managers sent him home on the day in question (a Friday). When he returned to work the following Monday, the claimant alleged that the supervisor had used racially abusive language toward him on the previous Friday and he set this out in letters that he handed in to his employers. The allegation that the claimant had been drinking alcohol was investigated and a disciplinary meeting held. At the disciplinary hearing the claimant repeated his allegation that the supervisor had behaved in a racist way towards him. After contacting the HR department, the manager conducting the hearing indicated that no action would be taken in respect of the race complaint unless or until the claimant submitted an official grievance. The disciplinary hearing proceeded, but the charge was not upheld.

17. The claimant brought proceedings for race discrimination in relation to the alleged use of racist language by the supervisor (who was sued as the second respondent) and his employer's failure to address his complaint about this.

18. The ET found that the claimant had invented the allegation of racist abuse. However, the Tribunal went on to find that given the marked difference in treatment between the white supervisor's complaint that the claimant smelt of alcohol (which was promptly actioned: the claimant was sent home, the matter was investigated and disciplinary proceedings were commenced) and the claimant's complaint about the supervisor's racist language, which was not actioned at all, even though it had been set out in three letters submitted by the claimant to his employers. In the absence of an alternative credible explanation from the employer, the ET concluded that the reason for this different and less favourable treatment was the claimant's race. The Tribunal then concluded that the direct discrimination claim succeeded. In so doing, the ET did not refer to the question of whether the claimant had suffered a "detriment" or make any findings in relation to this.

19. In its subsequent decision on remedy, the ET noted that in his evidence at the Remedies Hearing, the claimant had reiterated that he believed the failure to investigate his complaint was an act of race discrimination but he "*did not explain the effect on him of that particular aspect*". The ET then referred to the impression they had gained from the claimant's evidence that the depression and upset he had suffered stemmed from the disciplinary proceedings he had faced. For these reasons the Tribunal said that they were not satisfied that the employer's failure to investigate his complaint had caused any injury to his feelings. They commented: "*Although in the ordinary case it might indeed be surprising that an individual suffered no injury to feelings as a result of a discriminatory failure to investigate his complaint of racial abuse, it is perhaps less surprising here, when it is borne in mind that the complaint itself was entirely invented by the claimant".* Thus, the Tribunal made no award for injury to feelings or other damages, but simply granted a declaration in respect of what they had found to be the employer's discriminatory failure to investigate the complaint.

The EAT's decision

20. The EAT (Mr Justice Lewis, presiding), allowed the employer's appeal and set aside the declaration.

21. The EAT held that the ET had erred in law in failing to address the question of whether a "*detriment*" had been suffered before finding for the claimant on liability. In order to conclude that the direct discrimination claim had been established, the Tribunal needed to find not only that there had been less favourable treatment because of race, but that unlawful discrimination had occurred which came within one or other of the circumstances listed in Part 5 of the EA 2010, including section 39(2)(d). Similarly, the jurisdiction to grant a declaration pursuant to section 124 only arose if there had been a contravention of Part 5 of the Act.

22. After reviewing the relevant case law, particularly both *Shamoon* and *Deer* (discussed above), the EAT proceeded to consider whether the claimant had or might have suffered a "detriment" in this case, albeit his complaint to his employers was itself wholly false on the ET's findings.

23. Mr Justice Lewis summarised the position thus (emphasis added):

> *"25……First, it is a necessary element of a finding of a contravention of section 39(2)(d) of the Act that the employee has suffered a detriment. Secondly, a sense of grievance or injustice may amount to a sufficient detriment where a person is treated less favourably in terms of the treatment of a complaint. Thirdly, however, in the present case, on the facts as found by the Tribunal, the First Respondent could not show any detriment. The allegation was fabricated and if it had been investigated there would have been no substantive benefit to the Appellant as it would have been found to be untrue. The Tribunal expressly found that the First Respondent did not suffer any injury to feelings as a result of the failure to investigate the fabricated complaint. Any injury to feelings arose from other circumstances not the way in which his allegation of misconduct had been dealt with. In those circumstances, on the facts, this is one of the cases where the First Respondent did not suffer any sense of grievance or injustice as a result of the less favourable treatment. The Tribunal accordingly erred in granting a declaration that there had been direct discrimination in respect of the failure to investigate the First Respondent's allegation…..*
>
> *"26 The question arises as to whether a person who has knowingly fabricated an entire complaint could ever have suffered a detriment by reason of a failure to investigate that complaint. We recognise that where an entire complaint is knowingly fabricated it may be difficult for a Claimant to establish that he or she has suffered a detriment because that complaint is not investigated. The Claimant will not have suffered any substantive disadvantage as a result of the failure to investigate as the complaint is untrue. The usual inference that a person who has been treated less favourably will have a sense of grievance or injustice may be rebutted if the entire complaint is knowingly fabricated and the complainant may be unable to establish that he has any, or any legitimate, sense of grievance. It is, however, necessary to bear in mind the range of circumstances in which complaints are made. They may range from a complaint which turns out to be unsubstantiated*

(although genuinely believed in), through those complaints that are exaggerated or partially true, to those which are entirely fabricated. Whether or not a person has a real sense of grievance or injustice arising out of less favourable treatment involving the failure to investigate a particular complaint is a matter for the Tribunal to decide having regard to all the circumstances of the case."

24. Accordingly, the twin pillars of the EAT's conclusion that no "detriment" had or could have been suffered by the claimant in this case, were: (i) he had lost no substantive benefit; as he had fabricated the complaint it would have been found to be untrue upon investigation; and (ii) on the ET's findings of fact he had suffered no injury to feelings as a result of the employer's race-based failure to investigate it.

The implications

25. There are unlikely to be many cases where an ET will conclude that a claimant who has been treated less favourably on grounds of race has not suffered some form of distress in consequence. If some injury to feelings has resulted, the "detriment" test will be made out.

26. As the EAT in *Singh* observed in paragraph 26 of their judgment (cited above), there are a spectrum of possibilities in relation to unmeritorious formal grievances; they may, legitimately, fail in a number of circumstances that do not involve fabrication on the part of the employee (as had occurred in *Singh*). Consistent with the reasoning of the Court of Appeal in *Deer*, in such circumstances "detriment" and thus discrimination may still arise if the mishandling of the grievance has involved less favourable treatment because of a protected characteristic or victimisation. However, the prospects of a claimant showing that they suffered consequential distress amounting to a "*detriment*" will be significantly reduced if it is found that the grievance in question was a deliberately false one, rather than one pursued in good faith.

27. Of course, even if "*detriment*" is shown and thus liability made out, if the successful ET claim only concerns the discriminatory handling of an unmeritorious grievance it is unlikely to attract more than modest compensation for injury to feelings, as the Court of Appeal pointed out in paragraph 48 in *Deer* (see paragraph 8 above).

28. As the *Singh* decision illustrates, it will be for the claimant to show "*detriment*", whether by reference to their injury to feelings or other loss or damage. Whilst, unlike the instant case, there will be some circumstances where this can be inferred from a finding of less favourable treatment because of a protected characteristic / victimisation, that will always depend upon the particular factual context.

29. It will be unnecessary for an employee to show they suffered a "*detriment*" in order to make out their claim if they can bring themselves within another limb of section 39 EA 2010. In the *Singh* case, it does not appear from the EAT's judgment that consideration was given to whether the circumstances could have fallen instead within section 39(2)(b) which covers discrimination "*in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service*"[3]. It might perhaps have been argued that failing to investigate an employee's written complaint fell within this provision on the basis that an employer's grievance procedure is a "benefit, facility or service" to its employees.

[3] "A" is the employer and "B" is the employee for these purposes.

30. The test for what amounts to a "detriment" identified and discussed at paragraphs 2 and 3 above remain unaffected by the EAT's decision in *Singh*.

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