STATUTORY INTERPRETATION, VICTIMISATION UNDER EQUALITY LAW AND ITS ‘ON-OFF’ RELATIONSHIP WITH CONTEMPT OF COURT

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ABSTRACT

Lord Steyn once stated that the victimisation of those who complain of discrimination under the equality legislation should be treated as seriously as the discrimination itself. Empirical research, demonstrating the fear of reprisals, supports this. If, say, employees can be denied promotions, grievance processes, transfers, or references because of a complaint, their careers could be frozen for years, or even destroyed. This would undermine the legislation’s principal rubrics against discrimination and harassment. Hence, the equality legislation has provided an independent cause of action for victimisation. Yet, from the earliest days of this legislation (beginning with the Sex Discrimination Act 1975), the courts have afforded the victimisation provisions a particularly narrow construction. In 1993, it was suggested that the resulting ‘weak’ victimisation provisions could be ‘supplemented’ with the law of (criminal) contempt of court, by filling the gaps left by the narrow interpretations and moreover, providing a stronger ‘deterrent value’ of criminal proceedings.

This paper explores that suggestion by reviewing the subsequent case law. It begins by setting out the legislation and the problematic ‘narrow’ interpretations. This is followed by an outline of the relevant principles of contempt of court, and then reviews some prominent victimisation cases. This review shows that indeed principles of contempt have been imported into some of these cases, but not in the way anticipated. It reveals that first, contempt was used to *restrict*

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the victimisation provisions, second, it was ignored to fill obvious gaps in these provisions, and third, that some victimisation cases ought to have been referred for contempt, but were not. It concludes by identifying that this ‘on-off’ relationship between victimisation and contempt of court exposes the judiciary’s reluctance to take the administration of justice as seriously for equality law as it does for other fields.

INTRODUCTION

Research over the years has shown that fear of victimisation is a major deterrent to complaining of discrimination.¹ Hence, Lord Steyn has asserted that the victimisation of those who complain of discrimination under the equality legislation should be treated as seriously as discrimination itself.² If employees can be denied promotions, grievance processes, transfers, or references because of a complaint, their careers could be frozen for years, or even destroyed. This would undermine the legislation’s principal rubrics against discrimination and harassment. As such, the equality legislation, dating back to the Sex Discrimination Act 1975, has provided an independent cause of action for Victimisation. Yet, from these earliest days, the courts have given the victimisation provisions a particularly narrow construction. In 1993, Miller and Ellis suggested that the resulting ‘weak’ victimisation provisions could be ‘supplemented’ with

¹ See e.g. J Gregory, *Victimisation is Discrimination* (1990) 20 EOR 23; EHRC, ‘Section 20 investigation into the Metropolitan Police Service’ < <https://www.equalityhumanrights.com/en/our-work/news/investigation-met-police-reveals-significant-weaknesses-handling-discrimination> > accessed 15 September 2016.

² *Nagarajan v LRT* [2001] AC 502 (HL), [79].

(criminal) contempt of court, by filling the gaps left by the narrow interpretations and moreover, providing a stronger ‘deterrent value’³ of criminal proceedings.

The notion is not implausible. As Bingham LJ observed in *Cornelius v University College of Swansea*, the victimisation provisions had an ‘obvious although partial analogy to the law of contempt’.⁴ The weakness of Miller and Ellis’ proposition is that it relies on the same judiciary to resort to another field of law to undermine their own restrictive decisions. But this is not to say that they have ignored contempt of court when deciding cases of victimisation. This paper argues that the courts have indeed imported principles of contempt, but not in the way anticipated.

The paper begins by setting out the legislation and the problematic ‘narrow’ interpretations. This is followed by an outline of the relevant principles of contempt of court, and then reviews some prominent victimisation cases. This review shows that indeed principles of contempt have been imported into some of these cases, but not in the way anticipated.

This paper begins with an outline of the relevant principles of contempt of court, and then revisits some prominent victimisation cases to show first, how contempt was used to restrict victimisation, second, how it was ignored to fill obvious gaps in the victimisation provisions, and third, that some victimisation cases ought to have been referred for contempt. It concludes by identifying this ‘on-off’ relationship between victimisation and contempt of court exposes

³ [1993] PL 80, 87. The article cited ‘problem’ cases: *Kirby v Manpower Services Commission* [1980] ICR 420 (EAT), *Aziz v Trinity Street Taxis* [1989] QB 463 (CA), and *Cornelius v University College of Swansea*, [1987] IRLR 141 (CA).

⁴ [1987] IRLR 141, 145. See also Slade LJ in *Aziz v Trinity Taxis Ltd.* [1989] 1 QB 463, 484; and Buxton LJ, in *Rhys-Harper v Relaxion* [2001] ICR 1176 (CA) [38], reversed [2003] UKHL 33 (HL).

the judiciary's reluctance to take the administration of justice as seriously for equality law as it does elsewhere.

1 The Legislation and Early Cases

Most cases under consideration here were heard before the Equality Act 2010 came into force, with its revised definition of victimisation, more of which will be discussed further below. The first discrimination statutes to carry victimisation provisions were the Sex Discrimination Act 1975, followed shortly by the Race Relations Act 1976 (RRA 1976). Both definitions were substantially the same. For instance, RRA 1976, section 2 provided:

(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
- (b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Act; or
- (c) otherwise done anything under or by reference to this Act ..., or
- (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 Act ...

Paragraphs (a) to (d) are known generally as 'protected acts'. Like other discrimination or harassment, victimisation was outlawed only for certain activities, such as employment. Thus,

RRA 1976, section 4(2), outlawed discrimination (which included victimisation)⁵ by employers:

It is unlawful for a person, in the case of a person employed by him at an establishment in Great Britain, to discriminate against that employee —

(a) in the terms of the employment which he affords him; or

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

(c) by dismissing him, or subjecting him to any other detriment.⁶

So, for employment cases, the elements for liability appeared to be: (1) the victim did a protected act; (2) the employer treated the victim less favourably in the terms of employment, or access to opportunities etc; (3) it did so ‘by reason that’ the victim did the protected act.

Miller and Ellis identified three cases in particular for criticism. The first problem arose in *Kirby v Manpower Services Commission*.⁷ Here, an employee at a job centre was moved to less desirable work because he disclosed confidential information regarding suspected discrimination by some employers. The Employment Appeal Tribunal (EAT) rejected his claim of victimisation because any person disclosing confidential information of *any nature* would have been moved to other work. Thus, the EAT held that that treatment was not less favourable. The Court of Appeal in *Aziz v Trinity Street Taxis*⁸ overruled *Kirby* and held that the comparison should *not* include any element of the protected act. But any hopes that this was a

⁵ Note that RRA 1976, s 2 (above) defined victimisation as a form of discrimination.

⁶ SDA 1975, 6 was substantially the same.

⁷ [1980] ICR 420, (EAT).

⁸ [1989] QB 463 (CA).

more liberal judgment were undermined when the Court went on to hold that the third limb ‘by reason that’, incorporated an element of conscious motive.⁹ Finally, in *Cornelius v University College of Swansea*,¹⁰ the Court of Appeal held that the protected act of having ‘brought proceedings’, did not to apply to a person merely *maintaining* them.

2 Criminal Contempt of Court

Criminal contempt is punishable by a fine and a maximum of two years’ imprisonment.¹¹ It is traditionally a common law offence, although nowadays it is also an offence under a number of statutory provisions,¹² most notably the Contempt of Court Act 1981, which placed strict liability publication contempt on to a statutory footing.¹³

Contempt of court is universal in nature, and can be applied to new and novel situations without apparently widening its scope.¹⁴ Hence, there are many varieties of contempt of court. The analogous one here is the *offence* of conduct interfering with the administration of justice, and in particular this means conduct deterring persons from participating in the legal process. As such, the goal of the victimisation provisions, the parallels become apparent. Given the vast, perhaps infinite, variety of scenarios that could amount to interfering with the administration of justice, it is difficult to pin down the law to anything more than a few general principles.

⁹ Ibid, 485.

¹⁰ [1987] IRLR 141 (CA).

¹¹ See Contempt of Court Act 1981, s 14(1), limiting imprisonment to two years for both criminal and civil contempt: *DPP v B* [2012] 1 WLR 3170 (CA), [21].

¹² See Law Commission, *Contempt of Court* (Consultation Paper No 209, 2012) Appendix F, p 6, listing 27 statutory offences, and over 50 examples of statutory provisions stating that particular conduct should be treated as if it were a contempt of court.

¹³ In response to *Sunday Times v United Kingdom* (A/30) (1979-80) 2 EHRR 245. (The ‘Thalidomide case’.)

¹⁴ *Att-Gen v Newspaper Publishing Plc* [1988] Ch 333 (CA), 368 (Sir John Donaldson MR).

For parties to the action, private pressure might be justified in a ‘common interest that fair, reasonable and moderate personal representations would be appropriate.’¹⁵ But if the conduct is public, the courts are more sensitive, and will not permit:

...conduct which was calculated so to abuse or pillory a party to litigation or to subject him to such obloquy as to shame or dissuade him from obtaining the adjudication of a court to which he was entitled.¹⁶

When deciding if the conduct in question amounted to contempt, ‘a court should consider [the facts] in the light of all the surrounding circumstances [including] the nature of any pending litigation and the stage it had reached’.¹⁷

The courts are concerned principally with the *effect* of the conduct, no matter the intent. It is unsurprising to find that where intent is required, it need not be the sole reason for the offending conduct.¹⁸ Hence, a newspaper publishing in defiance of a court order can be in contempt even though its principal intention was to enhance its circulation.¹⁹ Similarly, otherwise lawful conduct can amount to contempt if it interferes with the administration of justice. In *Rowden v Universities Co-operative Association*,²⁰ a witness was suspended and instructed to dismiss his son from the same employer, for having given evidence against their

¹⁵ *Att-Gen v Times Newspapers* [1974] AC 273 (HL) 318-319.

¹⁶ *Ibid*, 302 (Lord Morris).

¹⁷ *Ibid*.

¹⁸ *Att-Gen v Newspaper Publishing* [1988] Ch 333 (CA) 375 (Sir John Donaldson MR), 383 (Lloyd LJ); *Att-Gen v Times Newspapers* (Thalidomide) [1974] AC 273 (HL) 296, 299 (Lord Reid).

¹⁹ *Att-Gen v Newspaper Publishing* (Spycatcher) [1989] 1 FSR 457 (Ch), 486.

²⁰ (1881) 71 LT Jo 373 (Ch); 1 Law Cent 161 (Hein Online: *Law-Central*, Vol. 1, pp. 129-184 (1881)).

employer. The employer was held in contempt, despite (at the time²¹) its otherwise lawful right to dismiss workers for any reason or no reason: there is no 'greater exercise of power for intimidating witnesses' than furnished in this case; it was a 'gross contempt of Court'.²²

A deterrent principle also underpins the law of contempt. This is foremost in after-the-event cases, where the conduct, coming later, could not have affected the proceedings in question. *Rowden* is one such example. A more recent example is *Attorney General v Butterworth*.²³ Here, one Greenlees, a trade federation official, gave evidence to the Restrictive Practices Court (RPC) to the effect that a trade agreement made by the Federation was harmful to the public interest. The Court declared the agreement void, and afterwards, members of the Federation called on Greenlees to answer for his conduct and made various attempts to oust him from his posts as branch treasurer and delegate. Some, but not all, of this conduct was intended to punish him for testifying. The Court of Appeal found the conduct amounted to contempt, even though it came *after* the conclusion of the RPC proceedings.

The underlying policy for this ruling was not only the deterrent effect on the victim,²⁴ but more importantly, the chilling effect on others. As Lord Denning MR put it:

If this sort of thing could be done in a single case with impunity, the news of it would soon get round. Witnesses in other cases would be unwilling to come forward to give

²¹ Nowadays, an employer may dismiss a worker of less than 2 years' continuous service for no reason, but may encounter a number of prohibitions if it gives a reason, such as discrimination, jury service, trade union activities, and so on.

²² Ibid. See also *Re Martin (Peter) The Times*, 23 April 1986 (QB); *R v Kellet* [1976] QB 372 (CA).

²³ [1963] 1 QB 696 (CA). Applied, *Att-Gen v Jackson* [1994] COD 171 (DC), where threatening letters sent by prisoner to witnesses after conviction was held to be contempt.

²⁴ For an instance of purely private after-the-event retribution amounting to contempt, see *Chapman v Honig* [1963] 2 QB 502 (CA). Cf *Borrie and Lowe: The Law of Contempt* (4th edn), para 10.13.

evidence, or, if they did come forward, they would hesitate to speak the truth, for fear of the consequences.²⁵

In a similar vein, Donovan LJ asserted that the administration of justice was ‘a continuing thing’, meaning: ‘It has a future as well as a present; and if somebody pollutes the stream today so that tomorrow’s litigant will find it poisoned, does he appeal to the court in vain?’²⁶

In a brief concurring speech, Pearson LJ agreed that:

[S]uch victimisation, because it tends to deter persons from giving evidence as witnesses in future proceedings... is an interference with the due administration of justice as a continuing process...²⁷

Although perhaps essential to conduct where the proceedings are complete, the chilling principle can be detected in other forms of contempt. In *Attorney General v MGN Ltd*,²⁸ a murder suspect under arrest was vilified by some tabloids. Speaking for the three-judge Administrative Court, Lord Judge, LCJ, stated, ‘At the simplest level publication of such material may deter or discourage witnesses from coming forward and providing information helpful to the suspect...’²⁹ And in *R v Socialist Worker Printers and Publishers Ltd, ex parte Attorney General*,³⁰ a three-judge Divisional Court held that publishing the names of blackmail victims in defiance of the trial judge’s direction was contempt inter alia because it would deter other victims from coming forward.

²⁵ Ibid, 719. See *Borrie and Lowe* (4th edn): para 10.10, ‘Therefore, the basis of contempt in this context is that such conduct is likely to deter potential witnesses from giving evidence in future cases.’

²⁶ Ibid, 725.

²⁷ Ibid, 728.

²⁸ [2012] 1 WLR 2408 (Admin), at [31] (Lord Judge LCJ, Thomas LJ, Owen J).

²⁹ Ibid, [31].

³⁰ [1975] QB 637 (Lord Widgery CJ, Milmo and Ackner JJ).

Procedural Matters

The next question is whether lower courts and tribunals, where most discrimination cases are tried, are recognised as courts for the purposes of contempt, and in particular, contempts occurring out of court. As superior courts, the High Court, Court of Appeal, and the Supreme Court have ‘inherent powers’³¹ to punish for contempt committed against their own courts, or the lower courts.³² The procedure betrays just what a unique creature of law that contempt happens to be. Cases usually come before these courts by committal, and not indictment.³³ The cases are tried summarily without a jury, despite the risk of imprisonment and an unlimited fine.

To a degree, the procedure, nowadays laid down by statutory instrument,³⁴ governs these powers. In particular, the rules recognise the High Court’s jurisdiction over contempts made in relation to proceedings in an ‘inferior court’.³⁵ An ‘inferior court’ has been defined in the House of Lords as a body that ‘discharges judicial rather than administrative functions and forms part of the judicial system of the country rather than the administration of the government’.³⁶

³¹ *R v Lefroy* (1864) 5 B & S 299; 122 ER 842. See also *Borrie and Lowe* (4th edn), para 13.3; Joint Committee on Statutory Instruments, *Eleventh Report of Session 2012-13* (2012-13, HL Paper 68, HC 135-xi) paras 1.4 < <http://www.publications.parliament.uk/pa/jt201213/jtselect/jtstatin/68/68.pdf> > accessed 8 Sept 2015.

³² *R v Parke* [1903] 2 KB 432 (DC). See the discussion in *Law Society v Otobo* [2011] EWHC 2264 (Ch) [17], citing H Jacob: ‘The Inherent Jurisdiction of the Court’, [1970] CLP 23, esp 28-29, 48.

³³ See *Re Lonrho* [1990] 2 AC 154 (HL), 177, (Lord Keith), noting that the last reported prosecution by indictment of a newspaper for contempt was *R v Tibbits and Windust* [1902] 1 KB 77, a practice ‘that ought not to be revived’.

³⁴ Civil Procedure Rules 1998 SI 1998/3132, Part 81, s 3.

³⁵ Save for Contempt in the Face. Ibid, Rules 81.12-81.14. CCA 1981, s 19, states that ‘“court” includes any tribunal or body exercising the judicial power of the State’, and “legal proceedings” shall be construed accordingly’.

³⁶ *Att-Gen v BBC* [1981] AC 301 (HL), 339H (Viscount Dilhorne); see also 360A (Lord Scarman) holding that it should be a body ‘exercising judicial functions [which] can be demonstrated to be part of this judicial system’.

It would seem unarguable that litigation under the discrimination legislation, wherever it occurs, is more judicial than administrative in nature. Some related examples bear this out. Industrial (now Employment) Tribunals³⁷ and Mental Health Tribunals³⁸ have been recognised as ‘courts’ for the purpose of contempt. For the purpose of vexatious litigant restraints,³⁹ the Leasehold Valuation Court⁴⁰ and Investigatory Powers Tribunal⁴¹ have been recognised as ‘inferior courts’. On this logic, it seems certain that the Special Educational Needs and Disability Tribunal (SENDIST) would be included. It was stated *obiter* that SENDIST and even a Local Authority Appeal Panel (dealing with exclusions from schools) exercise ‘judicial responsibilities’.⁴²

Finally, contempt proceedings are normally brought by the Attorney General, although there are examples of individuals with sufficient interest instigating contempt proceedings with punishment as the goal.⁴³ To date, no contempt proceedings have been brought in relation to a discrimination complaint, although, as suggested below, this could be because of a (misplaced) belief that all forms of victimisation are provided for comprehensively by the equality legislation.⁴⁴

3 Restricting the Scope of the Victimisation Provisions

³⁷ *Peach Grey v Sommers* [1995] ICR 549 (DC) 557-559; see also *Harris (Andrews) v Lewisham & Guy’s NHS Trust* [2000] ICR 707 (CA), [17], [32].

³⁸ *Pickering v Liverpool Daily Post and Echo Newspapers* [1991] 2 AC 370 (HL).

³⁹ Supreme Court Act 1981, s 42.

⁴⁰ *Att-Gen v Singer* [2012] EWHC 326 (Admin).

⁴¹ *Ewing v Security Service* [2003] EWHC 2051 (QB).

⁴² *R (N) v London Borough of Barking and Dagenham Independent Appeal Panel* [2009] ELR 268 (CA) [33].

⁴³ *Connolly v Dale* [1996] QB 120 (QB), at 125; *Raymond v Honey* [1983] 1 AC 1 (HL); *In Re the William Thomas Shipping Company* [1930] 2 Ch 368 (Ch).

⁴⁴ See, ‘4 Victimisation Cases Amounting to Contempt of Court’.

When interpreting the victimisation provisions, rather than adopting orthodox rules of statutory interpretation, some cases have relied instead on principles of contempt of court. This is betrayed *inter alia* by the use of language. The statutory ‘causative’ phrase ‘by reason that’⁴⁵ was key to the decisions in two prominent cases notable for the use of the language of contempt to restrict the reach of the law of victimisation. In *Chief Constable of West Yorkshire v Khan*,⁴⁶ a reference was refused, and in *Cornelius v University College of Swansea*,⁴⁷ a transfer and grievance procedure was denied. In both cases these denials were made pending the outcome of discrimination proceedings. And in both cases the subsequent claim for victimisation failed.

The judgments in each case relied on a distinction between the bringing, and maintaining, of proceedings. This is a fragile and futile distinction. The protected act in question, couched under section 2(1)(a) (‘bringing proceedings’) is indistinguishable from ‘maintaining’ them. In any case, ‘maintaining proceedings’ would just as readily fall within the protected act of section 2(1)(c), having ‘otherwise done anything under or by reference to this Act’. Thus, whether the proceedings were ‘brought’, or maintained, should have made no difference. But for the purpose of contempt, the stage of proceedings is a relevant factor.⁴⁸ It will often be the case that as the date of a trial nears, litigant anxiety increases, and with it their vulnerability to pressure. If the distinction had any substance at all, it comes from the law of contempt.

Moreover, in addition, the Court of Appeal in *Cornelius* noted that:

⁴⁵ From either RRA 1976 s 2(1), or SDA 1975 s 4(1). See above, p 000.

⁴⁶ [2001] ICR 1065 (HL).

⁴⁷ [1987] IRLR 141 (CA).

⁴⁸ See e.g. *Att-Gen v Times Newspapers* [1974] AC 273 (HL), 302 (Lord Morris). See above, text to n 15.

No doubt, like most experienced administrators, they recognised the risk of acting in a way which might embarrass the handling or be inconsistent with the outcome of current proceedings. They accordingly wished to defer action until the proceedings were over.⁴⁹

In likening the conduct to that of ‘most experienced administrators’, the Court signalled that it considered the conduct to have been reasonable. The House of Lords in *Khan* more obviously expressed a similar sympathy for the employer, stating that ‘Employers, acting reasonably and honestly, ought to be able to take steps to preserve their position in pending proceedings,’⁵⁰ and that the refusal was ‘a reasonable response to the need to protect the employer’s interests as a party to litigation.’⁵¹

Bearing in mind the victimisation provision under consideration, what is revealing here is that this *language*, focussing on the reasonableness of the conduct, rather than its cause (‘by reason that’), is so patently out of place; but it is familiar to the law of contempt, which permits a certain degree of ‘reasonable’ pressure or ‘fair and temperate’ criticisms between litigants.⁵² The sweeping statements were made without reference to either the statutory language or its purpose. Beyond crossing the relatively undemanding and straightforward threshold of less favourable treatment,⁵³ the victimisation provisions at the time were not concerned with the *gravity* of the conduct. Thus, the reasonableness of the conduct was irrelevant to liability. In

⁴⁹ Ibid, [33] (Bingham LJ, for the Court).

⁵⁰ [2001] ICR 1065 (HL), [31] (Lord Nicholls).

⁵¹ Ibid, [59] (Lord Hoffman).

⁵² See above, text to n 8.

⁵³ See e.g. *R v Birmingham City Council, ex parte EOC* [1989] AC 1155 (CA and HL) (grammar schools perceived as better, despite no evidence); *R v Secretary of State for Education and Science, ex parte Keating*, *The Times* 3 Dec 1985, (single-sex school for girls treated boys less favourably); *Gill v El Vino* [1983] QB 425 (CA), (table service only in wine bar for women denied women a choice).

Khan itself, the refusal to provide a job reference was held to be less favourable, even though it would have been negative.⁵⁴

Subsequently, the House of Lords attempted to provide a more rational explanation for these decisions. In *St Helens Borough Council v Derbyshire*,⁵⁵ the House suggested that the ‘reasonable and honest defence’ in *Khan* was no more than stating that the claimant had suffered no ‘detriment’, as required by the employment provisions of the legislation, such as RRA 1976, section 4(2)(c), set out above.

This switching of the ‘honest and reasonable defence’ from the element of ‘by reason that’ to ‘detriment’ was an attempt to legitimise the discretion to assess the reasonableness of the conduct (or its effect), and where convenient, import principles of contempt. Apart from the obvious problem that the House in *Khan* expressly held the quite the opposite (that *Khan had* suffered a detriment)⁵⁶ this explanation lacks credibility simply because being caused ‘any other detriment’ need not have played any part in the two cases. The provision of references, grievance processes, and transfers, fall quite readily under section 4(2)(b), ‘opportunities for ... transfer ... or to any other benefits, facilities or services...’⁵⁷ and withholding them, when they are normally provided, was less favourable treatment.

In any case, a literal reading of the statutory phrase ‘subjecting him to any other detriment’ suggests merely that the employer causes the worker to suffer a detriment. Thus, there are two considerations of relevance. First, the suffering of the claimant, and second, whether this was

⁵⁴ [2001] ICR 1065, [28] (Lord Nicholls), [42] (Lord MacKay), [52] (Lord Hoffman), [76] (Lord Scott). Lord Hutton agreed with Lord Nicholls and Lord Hoffman [61].

⁵⁵ [2007] ICR 84 (HL).

⁵⁶ [2001] ICR 1065 [14] (Lord Nicholls), [53] (Lord Hoffman), [37]-[38] (Lord Mackay). Lord Hutton agreed with Lord Nicholls and Lord Hoffman [61].

⁵⁷ In *Khan*, Lord Mackay alone made this point for the job reference, *ibid* [37]-[38].

caused by the employer. As relatively innocuous conduct, such as standard reactions in defence to litigation, can cause considerable detriment (a frozen career), the *gravity* of the defendant's conduct is a relatively minor, if irrelevant, consideration. (Perversely, despite endorsing the honest and reasonable approach, the majority suggested that the matter should be judged from the worker's perspective.⁵⁸) Using this element to focus of the gravity of the conduct once again suggests the mindset of a judge considering a case of contempt rather than statutory victimisation.

Given the fragility of the distinction (between the bringing and existence of proceedings) and the misplaced reliance on the element of 'detriment', these decisions are better explained on the 'reasonableness' basis, which itself was informed by the law of contempt. A consideration of the case of *Derbyshire* reinforces this view.

In *Derbyshire*, the employer wrote directly to all 510 members of staff (bypassing their trade union and the claimants' solicitor) stating that should an equal pay claim, pursued by just 39 members, succeed, the resulting cost was likely to cause redundancies. The employment tribunal found as fact, that the letter was 'effectively a threat', 'intimidating,' and 'directed against people who were in no position to debate the accuracy of the ... pessimistic prognostications'. The tribunal considered that reasonable reactions could include 'surrender induced by fear, fear of public odium or the reproaches of colleagues.'⁵⁹

As a consequence, the 39 claimants brought a separate claim of victimisation, succeeding in the employment tribunal and the EAT, but losing in the Court of Appeal (which followed *Cornelius* and *Khan*). A unanimous House of Lords restored the decision of the employment

⁵⁸ [2007] ICR 84 (HL), [26] (Lord Hope), [66], [70] (Lord Neuberger, with whom Lord Carswell agreed).

⁵⁹ Para 4(d) of the ET Reasons, cited, [2007] ICR 84 (HL), [38].

tribunal. Lord Bingham held that the tribunal was entitled to distinguish *Khan* because: ‘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.’⁶⁰ Lord Hope interpreted the tribunal’s reasoning as a finding that the employer’s conduct ‘while no doubt honest, could not be said to have been reasonable.’ In other words, the tribunal had applied *Khan* properly and was entitled to its finding of fact.⁶¹ Baroness Hale held that the correct test was whether the employer’s conduct caused the claimant a ‘detriment’. As the tribunal had addressed that question,⁶² its decision could not be disturbed.⁶³ Lord Neuberger came to much the same conclusion,⁶⁴ but added, in line with Lord Hope’s reasoning, that the tribunal had found the employer’s conduct did not satisfy the ‘honest and reasonable’ test.⁶⁵ Lord Carswell agreed with Lord Neuberger.

The only distinction between this case and *Khan* was the gravity, or ‘reasonableness’, of the conduct. Some of the language used betrays this, with references to public odium, pressure, and indeed, reasonableness. As such, the cases of *Khan*, *Cornelius*, and *Derbyshire* become indistinguishable under the law of victimisation.⁶⁶ They are only distinguishable if analysed under the law of contempt.

It is apparent that the courts considered the employers’ conduct in *Cornelius* and *Khan* to be ‘fair and temperate’,⁶⁷ and not calculated to subject the claimants to obloquy.⁶⁸ It will be recalled that when deciding if the conduct was improper (for contempt), ‘a court should

⁶⁰ [2007] ICR 84, [9].

⁶¹ Ibid, [17] and [28].

⁶² Para 4(d) of the ET Reasons, cited, *ibid*, [38].

⁶³ Ibid, [36] and [39].

⁶⁴ Ibid, [68] and [75].

⁶⁵ Ibid, [74].

⁶⁶ Save for the *type* of less favourable treatment, which was in *Derbyshire* causing a detriment, rather than the withholding of an ‘opportunity for a transfer’, or a ‘benefit’.

⁶⁷ *Att-Gen v Times Newspapers* [1974] AC 273 (HL), 297-298 (Lord Reid).

⁶⁸ Ibid, 302 (Lord Morris).

consider [the facts] in the light of all the surrounding circumstances...'⁶⁹ An important circumstance in both cases was the 'general policy' nature of the conduct. The denials of a reference, transfer, or grievance procedure, were all standard responses in litigation, thus suggesting again, that the conduct was 'reasonable'. This is in contrast to *Derbyshire*, where the letters were intended to pressurise the claimants into a compromise, and had more of an *ad hoc* flavour about them. Any 'general policy defence' has no place in the law of victimisation, as it would be isolating only responses to discrimination complaints, which is effectively identifying *discrimination*, and leaving the victimisation provisions redundant. The point for the present purpose is that if this 'general policy' distinction played any part in the rationes decidendi of these cases, it has no relationship to the victimisation provisions, but is consistent with the law of contempt.

Another feature common to these three cases which aligns them to contempt is that they all involved a response to on-going litigation, rather than conduct short of litigation, such as reporting or complaining about discrimination.⁷⁰ The significance of this feature was most flagrantly realised in a single case, *Deer v University of Oxford*.⁷¹ Here, the mishandling of a grievance procedure was held to cause the claimant a 'detriment', as she held a 'legitimate sense of injustice', even though the grievance would have failed in any case. In the same case, the withholding of papers pending (subsequent) litigation was held *not* to cause the claimant a detriment, as it was done on 'reasonable' legal advice.⁷²

⁶⁹ *Att-Gen v Times Newspapers* [1974] AC 273 (HL), 302 (Lord Morris). See text to n 15.

⁷⁰ See *Pothecary Witham Weld v Bullimore* [2010] ICR 1008 (EAT), [18]-[19], where Underhill J acknowledged this distinction.

⁷¹ [2015] ICR 1213 (CA).

⁷² *Ibid*, [48] and [52] respectively.

An example of just how readily courts will consider the irrelevant matter of the reasonableness of the defendant's conduct arose in *Nicholls v Corin Tech*.⁷³ Here, Mr Nicholls was suing his former employer for disability discrimination. Outside the room where the hearing had taken place for the day, it was alleged that the defendant (owner and director of the employer) with three others approached Mr Nicholls; the defendant then abused him, and threatened physical injury ('I will give you a disability') if he maintained his claim. Mr Nicholls then sued for victimisation. The issue was whether the conduct was related to Mr Nicholl's prior employment. Underhill J correctly emphasised that the statutory formula at the time required that the conduct arose out of and was '*closely connected*' to the employment relationship,⁷⁴ but then put a gloss on this, directing that the conduct had to be 'intended or calculated to deter Mr Nicholls from continuing with his proceedings'; otherwise it was open for a tribunal to find no liability.⁷⁵

Bearing in mind that the issue in this case was *not* the relationship of the conduct to the proceedings, but its relationship to his prior employment, this rider was unnecessary. At the time, the conduct had to be 'by reason that' Mr Nicholls had done a 'protected act' (e.g. having brought proceedings), and for this to bite, the conduct had to be 'closely connected' with the prior employment relationship. If the facts alleged were established, it should not matter whether the conduct was intended to deter Mr Nichols, punish him, done out of spite, or done with no apparent motive.⁷⁶ In fact, one would have to concoct quite a scenario where an employer's reaction to an employee's discrimination proceedings against it was *unrelated* to the employment relationship. Even if the issue *were* the relationship between the conduct and

⁷³ (EAT, 4 March 2008), UKEAT/0290/07/LA.

⁷⁴ DDA 1995, s 16A(3). Emphasis supplied.

⁷⁵ (EAT, 4 March 2008), UKEAT/0290/07/LA, [14].

⁷⁶ See e.g. *Nagarajan v LRT* [2001] AC 502 (HL), holding that motive had no part in the victimisation provisions and, 512 (Lord Nicholls), 523 (Lord Steyn), overruling an obiter dictum to that effect from *Aziz v Trinity Street Taxis* [1989] QB 463 (CA) 485.

the *proceedings*, the gloss went beyond anything suggested in *Khan* and was unnecessary. This case was decided after *Derbyshire*, yet no attempt was made to connect the defendant's conduct, or intent, to 'causing a detriment', or any other element of the statutory formula. The judge's resort to the language of contempt of court was for no apparent reason, but the effect of it, once again, was to restrict the scope of the victimisation provisions.

In conclusion, the attempt in *Derbyshire* to 'legitimise' a 'reasonableness test' by switching the question to the element of detriment was misplaced as it was just one of many features of employment protected by the legislation, and misconceived because 'detriment' suggests a focus on the claimant's suffering rather than the gravity of the defendant's conduct. However, this slippage may have been endorsed, albeit inadvertently, by the amended definition of victimisation, provided Equality Act 2010, section 27:

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
 - (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.

The main purpose of this revision was to remove the comparative element (*less favourable treatment*), which had caused problems, as noted above.⁷⁷ This also brings the victimisation provisions into line with the growing number of victimisation provisions provided by Part V of the Employment Rights Act 1996, which cover areas such as whistle blowing, jury service, health and safety, Sunday working, family leave and working time rights.

⁷⁷ See *Kirby v Manpower Services Commission* [1980] ICR 420 (EAT), overruled, *Aziz v Trinity Street Taxis* [1989] QB 463 (CA), noted above, p 000. The replacement of the phrase *by reason that* with *because* ought not to make any difference. A similar amendment was made to the definition of direct discrimination, where it was not intended to change the legal meaning: Explanatory Note (61). The change was intended to make the definition 'more accessible' to 'ordinary users of the Act'.

But the choice of wording brings problems. It is no longer necessary that the defendant treated the victim ‘less favourably’, but rather that the defendant *subjects him to a detriment*. This means that the element of ‘detriment’ is no longer confined to one aspect of employment, but can now be applied legitimately to all cases of victimisation, thus endorsing the *Derbyshire* logic. Moreover, the phrase facilitates the misconceived notion, again from *Derbyshire*, that the focus should be on the *gravity*, and hence the *reasonableness*, of the defendant’s conduct.

As such, under section 27, courts could now consider the seriousness of the conduct irrespective of whether the conduct related to, say, ‘opportunities for transfer’ or ‘any other benefits’ of employment. If they conclude that pressure to compromise, or abandon, proceedings was ‘fair and temperate’, or that the withholding of a reference was a ‘reasonable response’, or that a suspension of a benefit or promotion opportunity was done upon ‘reasonable’ legal advice, or even just part of the general policy invoked against *all* litigants, the *Derbyshire* logic suggests they may conclude that the claimant had suffered no ‘detriment’.

Such a misconceived notion of detriment not only jars with a literal reading of the statute, it is also at odds with the legislative history of section 27. In its response to its Consultation, the Government stated:

We recommended ending the need for a comparator through aligning with the approach in employment law because this offers a more effective, workable system – not one in which it would necessarily be easier to win a case, but one where attention rightly

focused on considering whether the ‘victim’ suffered an absolute harm, irrespective of how others were being treated in the same circumstances.⁷⁸

Subsequently, the Explanatory Notes to the Equality Bill, and the resulting Act, provided this example of victimisation:

A woman makes a complaint of sex discrimination against her employer. As a result, she is denied promotion. The denial of promotion would amount to victimisation.⁷⁹

Assuming the ‘complaint’ amounts to proceedings, the facts of this example are on all fours with *Cornelius*, the only difference being the denial of a promotion rather than a transfer. More generally, it suggests that a ‘normal’, or ‘reasonable’ reaction to litigation does not necessarily exonerate the defendant. This is so even where the reaction is one taken against all litigants, whether or not they are complaining of discrimination. Of course, this is the approach of (still binding) EU law.⁸⁰ Given the approach taken in these ‘litigation cases’, courts seem likely to follow the principles of contempt and a focus on the gravity of the conduct. We wait to see whether the courts will defer to this legislative history and EU law, or whether they continue to assess the ‘litigation cases’ by the standards of contempt of court. Case law suggests the latter will prevail.

⁷⁸ Government Equalities Office, *The Equality Bill – Government response to the Consultation* (Cm 7454, 2008) para 735. See also, Department for Communities and Local Government, *Discrimination Law Review. A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain. A consultation paper*. (June 2007), para 161.

⁷⁹ Explanatory Notes to the Equality Bill 2008, para 105. Explanatory Notes to the Equality Act 2010, para 106, and the Revised Explanatory Notes (October 2010) to the Equality Act 2010, para 103.

⁸⁰ Case C-185/97, *Coote v Granada Hospitality Ltd*, [1999] ICR 100 (ECJ), [27].

But there is perhaps a more serious point lurking here. One must wonder why the judges felt strongly enough to ignore the statutory wording, and import principles from a field of *criminal* law. The parallels with contempt are not enough to explain this, as the next discussion reveals.

4 The Limited Reach of Victimisation - Contempt Ignored

The cases above demonstrate how the principles of contempt were used to limit the reach of victimisation under equality law. But there are other cases where quite the opposite *ought to* have occurred, but did not. The first hint of this came in *Cornelius*, an example of the ‘on-off’ relationship with contempt occurring in a single judgment. Here, the principle of ‘reasonableness’ was imported from contempt to justify the employer’s conduct, yet the tenet⁸¹ that the defendant’s principal motive was subsidiary to the *effect* of the conduct was absent. Elsewhere, there is a distinct body of case law on post-employment victimisation, where the victimisation provisions could have been supplemented with contempt principles to achieve their obvious purpose.

Post-Employment Victimisation

It is not uncommon for employers to victimise ex-workers for having brought a discrimination claim, typically by providing no reference, or a negative reference, or even supplying unsolicited detrimental comments to the new employer.⁸² In these situations, the claim is also

⁸¹ *Att-Gen v Newspaper Publishing (Spycatcher)* [1989] 1 FSR 457 (Ch), 486. The same criticism could be levelled at *Chief Constable of West Yorkshire v Khan* [2001] ICR 1065 (HL) (see above, p 000), and *Aziz v TST* [1989] QB 463 (CA).

⁸² *Metropolitan Police Service v Shoebridge* [2004] ICR 1690 (EAT).

a thing of the past, having been won, lost, or settled out of court. As such, these scenarios resemble *Butterworth* and *Rowden*,⁸³ as after-the-event contempt cases, where there is an interference with justice as a ‘continuing process’. However, the equality legislation on this issue has a rocky history.

The original major discrimination statutes⁸⁴ were not expressed to cover post-employment victimisation. As noted above, for instance, RRA 1976, section 4(2), outlawed discrimination and victimisation by an employer ‘in the case of a person employed by him...’. The provisions were gradually amended expressly to cover post-employment victimisation under the influence of an ECJ ruling, in *Coote v Granada*, on the basis that such conduct came within the purpose of the victimisation provisions, under the deterrent principle.⁸⁵ Subsequent directives extending EU law beyond sex discrimination codified *Granada*.⁸⁶

Before these developments, a post-employment race *discrimination* case (under section 4, RRA 1976), came to the Court of Appeal. In a decision that fed subsequent victimisation cases, in *Adekeye v Post Office (No.2)*⁸⁷ the Court gave section 4 an all too predictable unambitious interpretation. A (black) claimant had been dismissed and brought an internal appeal seeking reinstatement. This was unsuccessful and the claimant alleged that the appeal process directly discriminated her because white workers guilty of similar misconduct were not dismissed.⁸⁸ The claim was rejected for two reasons. First, the ‘ordinary and natural’ meaning of ‘in the case of a person employed by him’ in section 4(2) referred only to *current* employees.⁸⁹

⁸³ See above, p 000.

⁸⁴ i.e. SDA 1975 and RRA 1976, DDA 1995. See above, p 000.

⁸⁵ Case C-185/97, *Coote v Granada Hospitality Ltd*, [1999] ICR 100 (ECJ), [27].

⁸⁶ Race Directive 2000/43/EC, art 7(1); Framework Directive 2000/78/EC, art 9(1) (religion or belief, disability, age or sexual orientation).

⁸⁷ [1997] ICR 110 (CA).

⁸⁸ Her claim against the actual dismissal was out of time.

⁸⁹ [1997] ICR 110, 118. RRA 1976, s 4 is set out above, p 000.

Second, the Court rejected as ‘extraordinary’ the argument that the more broadly worded Equal Treatment Directive 76/207 (covering sex discrimination) could inform a broader interpretation of the concurrent Sex Discrimination Act 1976, which being in *pari materia*, compelled an equally broad interpretation of the RRA 1976.⁹⁰

Even after *Granada* was decided, the Court of Appeal rigidly stuck to this line. In 2002, in *Jones v 3M Healthcare Ltd (No.2)*,⁹¹ it entertained four joined appeals of post-employment discrimination and victimisation under the similarly worded Disability Discrimination Act 1995.⁹² Three of the claims involved job references. The Court of Appeal chose a somewhat officious distinction of *Granada*, confining it to sex discrimination, and was dismissive of the impending Directive covering disability discrimination:

The regimes proposed in the Framework Directives for Equal Treatment ... augur legislative changes in domestic employment [law] but obviously do not impact on the judicial construction of the 1995 Act.⁹³

At the time, 2002, the Court of Appeal had weighty authority to adopt a different path. Ringing down the courts and tribunals was Lord Bingham’s then recent advice that domestic discrimination legislation should be afforded a purposive approach, and that for the trio of Acts with parallel provisions in force at the time,⁹⁴ ‘it is legitimate if necessary to consider those Acts in resolving any issue of interpretation which may arise.’⁹⁵ Thus, it could have readily

⁹⁰ [1997] ICR 110, 119.

⁹¹ *Jones v 3M Healthcare Ltd (No.2)*; *Bond v Hackney Citizens Advice Bureau*, *Angel v New Possibilities NHS Trust*, *Kirker v Ambitions Personnel (Nottinghamshire) Ltd*, [2002] ICR 1124 (CA). Reversed, [2003] ICR 867 (HL).

⁹² DDA 1995, s 4(2).

⁹³ [2002] ICR 1124, [28].

⁹⁴ SDA 1975, RRA 1976, and DDA 1995.

⁹⁵ *Anyanwu v South Bank Student Union* [2001] 1 WLR 638 (HL) [2].

adopted this purposive approach with the blessing of the House of Lords. Little imagination was required, because the ECJ in *Granada* had already provided a demonstration on how to go about this. The situation was rescued by the House of Lords⁹⁶ with a purposive approach adopted in deference to *Granada*.

As if the legislative notion of post-employment victimisation were jinxed, the Equality Act 2010 again omitted it from the provisions, this time, in all likelihood, because of a drafting error.⁹⁷ Predictably perhaps, the EAT⁹⁸ failed to engage the recently established *Ghaidan* approach,⁹⁹ or even to consider the long-standing *Inco Europe Ltd*¹⁰⁰ mechanism (permitting corrections to an obvious *casus omissus*), despite the obvious error in the legislative drafting and its failure to comply with EU law.¹⁰¹ The matter was rescued, this time by the Court of Appeal.¹⁰²

Of course, the law of contempt does not recognise the post-employment boundary in itself, only the sometimes coincidental post-litigation boundary, with its focus on the deterrent principle. In none of these victimisation cases can the principles of contempt be detected, let alone mentioned. Yet, the consequences of these acts of retaliation or punishment were serious for the victims. Although they differ from *Butterworth* and *Rowden*¹⁰³ in that the retaliatory acts were not dismissals, they had potential to do comparable, or even more, harm. Former

⁹⁶ *Relaxion v Rhys-Harper* [2003] 2 CMLR 44, which also reversed a post-employment sex discrimination case ([2001] 2 CMLR 44 (CA)), and overruled *Adekeye v Post Office (No.2)* [1997] ICR 110.

⁹⁷ EA 2010, s 108. See, *Rowstock Ltd v Jessemey* [2014] 1 WLR 3615 (CA), [36].

⁹⁸ *Rowstock Ltd v Jessemey* [2013] ICR 807, reversed [2014] 1 WLR 3615 (CA).

⁹⁹ Encapsulated in, *Vodafone 2 v Revenue and Customs Commissioners* [2010] Ch 77 (CA) [38]. Permission to appeal refused by the Supreme Court: UKSC 2009/0162 (16 Dec 2009). < <https://www.supremecourt.uk/docs/pta-0910-1002.pdf> > accessed 6 April 2016.

¹⁰⁰ *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 (HL).

¹⁰¹ [2013] ICR 807.

¹⁰² *Rowstock Ltd v Jessemey* [2014] 1 WLR 3615 (CA).

¹⁰³ See above, p 000.

employees may well be able to find alternative work; but with the handicap of no reference, or an erroneous negative reference, they might find only lower-paid, less skilled employment, or no work at all. In the context of negligent misstatement, House of Lords authority is forthright on this matter. In *Spring v Guardian Assurance*, Lord Slynn said:

[I]n many cases an employee will stand no chance of getting another job, let alone a better job, unless he is given a reference. There is at least a moral obligation on the employer to give it.¹⁰⁴

Lord Woolf went further and expressed the view, that in respect of some types of employment,

it is necessary to imply a term into the contract that the employer would, during the continuance of the engagement or within a reasonable time thereafter, provide a reference at the request of a prospective employer which was based on facts revealed after making ... reasonably careful enquiries¹⁰⁵

Further, a post-employment retaliatory act, such as derogatory comments made to the current employer, may lead to a dismissal.¹⁰⁶ Such treatment of former employees, because they had issued discrimination proceedings, was a clear interference with the administration of justice as a continuing process.

Given the potential serious consequences of post-employment victimisation, it is remarkable that the courts on found a solution under compulsion by the ECJ, rather than supplement the

¹⁰⁴ [1995] 2 AC 296, 335.

¹⁰⁵ Ibid, 354. See also Lord Goff, at 319.

¹⁰⁶ *Metropolitan Police Service v Shoebridge* [2004] ICR 1690 (EAT).

legislation with the principles of contempt, as the House of Lords had done with *Khan* and *Derbyshire*, and the Court of Appeal in *Cornelius* and *Deer*. One distinguishing feature was that these after-the-event cases were not ‘litigation cases’. But this makes little difference in the law of contempt. The remaining distinction is that this time, it was the workers rather than the employers, who required the court’s sympathy.

4 Victimisation Cases Amounting to Contempt of Court

None of the courts involved in the post-employment cases referred the conduct to the Attorney General for contempt proceedings. *Rowden* and *Butterworth* suggest that serious consequences for someone’s career and its deterrent effect warranted this. In other fields, the courts have not been afraid to ‘fill the moral gaps’ of legislation by creating an offence,¹⁰⁷ or use public policy to do so with the civil law.¹⁰⁸ Here, even that would not be necessary, because, as noted above, contempt can be applied to new and/or novel situations without apparently widening its scope.¹⁰⁹ Neglecting to refer these cases effectively condones such conduct as a ‘mere civil wrong’, reparable with compensation, rather than the more serious criminal interference with the administration of justice, which this conduct often is.

¹⁰⁷ See e.g. *Shaw v DPP* [1962] AC 220 (HL), *Knulier v DPP* [1973] AC 435 (HL).

¹⁰⁸ See e.g. A Burrows, *The relationship between common law and statute in the law of obligations* (2102) LQR 235, 248 (Part 6) and the cases cited within, including, *Parry v Cleaver* [1970] AC 1 (HL), *Samuals v Davies* [1943] KB 526 (CA).

¹⁰⁹ *Att-Gen v Newspaper Publishing Plc* [1988] Ch 333 (CA), 368 (Sir John Donaldson MR). See above, p 000.

Thus, the third and final consideration is whether defendants in many cases of victimisation should have been referred for contempt of court. Aside from the post-employment cases, three examples are considered below.

The first case is *Nicholls v Corin Tech*,¹¹⁰ discussed above.¹¹¹ If the accusation of a threat of physical injury were proven, this would be the most serious contempt of the three, warranting imprisonment.¹¹² The second is *St Helens MBC v Derbyshire*, also discussed above.¹¹³ The relevant contempt here is, at common law, interfering with the administration of justice, and/or under the Contempt of Court Act 1981 (CCA 1981), applying to publications, which include ‘any speech, writing broadcast or other communication addressed to the public or any section of the public’.¹¹⁴ The letters sent by the employer were ‘publications’ for this purpose, while the 510 workers constituted the ‘section of the public’.

As a matter of contempt, this case resembles *Attorney General v Hislop*.¹¹⁵ Here the satirical magazine *Private Eye* published defamatory articles about Sonia Sutcliffe (wife of the ‘Yorkshire Ripper’) suggesting that she knew her husband was a murderer and gave the police false alibis. Ms Sutcliffe sued *Private Eye* for libel. Before the trial, *Private Eye* repeated the allegations pointing out that Ms Sutcliffe would be cross-examined on them. The Court of Appeal held that the articles were designed to pressurise Ms Sutcliffe to abandon her claim and as such they amounted to contempt at common law and under the 1981 Act. McCowan LJ stated that there is:

¹¹⁰ UKEAT/0290/07/LA (EAT, 4 March 2008).

¹¹¹ Text to n 77.

¹¹² See e.g. *R v William Pittendrigh* (1985) 7 Cr App R. (S) 221, (9 months for threatening ‘if you shit on him, you’ve had it’); *R v Maloney (Grant)* (1986) 8 Cr App R. (S) 123: ‘You’re in for a seeing to.’ (6 months).

¹¹³ [2007] ICR 84 (HL). See text to n 58.

¹¹⁴ CCA 1981, s 2(1).

¹¹⁵ [1991] 1 QB 514 (CA).

[A]ll the difference in the world between a private discussion between lawyers aimed at bringing to Mrs Sutcliffe's attention that she might be cross-examined about certain matters and holding her up to public obloquy in terms neither fair nor temperate but of abuse, which is what I conclude without hesitation occurred in this case.¹¹⁶

And Nicholls LJ, observed: 'There is an enormous difference between bringing home to an opponent the strength of one's own position and the weakness of his, and vilifying him in public.'¹¹⁷

The circumstances in *Derbyshire* and *Hislop* were alike in many ways. There was private pressure to abandon the proceedings. There was also public pressure (*a fortiori* on a daily basis, in person, from work colleagues), as well as public 'odium' or 'obloquy'. The difference is that the letters were not misrepresentations (in the ordinary legal sense of misstatements of existing fact), even though the forebodings never materialised. It should be noted though, the editor's belief at the time that the allegations were true was considered irrelevant to liability.¹¹⁸ More importantly, the emphasis in *Hislop* was not on the untruthfulness of the articles, but on their *effect* upon the claimant,¹¹⁹ suggesting that untruthfulness is not a necessary ingredient for contempt. In *Hutchinson v AEU*,¹²⁰ the *Daily Worker* attacked a litigant who was seeking an injunction to prevent his removal as union president, stating that union members 'will no doubt have no mercy upon those who seek to upset working-class decisions in the capitalist courts.'

¹¹⁶ Ibid, 535.

¹¹⁷ Ibid, 530.

¹¹⁸ Ibid, 526-527 & 531.

¹¹⁹ Ibid, 526.

¹²⁰ *The Times* 25th August, 1932 p 4.

Goddard J found the newspaper guilty of contempt for the pressure it placed on the litigant as well as possible witnesses. The attack contained no misrepresentations.

In *Hislop*, the Court of Appeal held that as the articles were intended to dissuade Ms Sutcliffe from pursuing her claim, they could not have been made in good faith, and so there was guilt even under CCA 1981, which does not apply to ‘public interest’ articles published in good faith.¹²¹ The same logic applies here. The reason for the sending out the letters was to pressurise the claimants into abandoning their equal pay claim.

The conduct in *Hislop* was a ‘serious contempt’.¹²² It was only the editor’s contrition and resolution not in future publish comment connected to proceedings to which *Private Eye* was a party, that persuaded the Court not to imprison the editor.¹²³ And this, in Lord Parker’s LJ case, was only after ‘considerable hesitation’.¹²⁴ Any conduct coming close to one of the most flagrant and notorious contempts of modern times must risk being in contempt of court, and yet, in none of the eight speeches involved was it suggested.¹²⁵

The third case is *Commissioner of Police for the Metropolis v Maxwell*.¹²⁶ Here, the claimant was a Detective Constable within Specialist Operations Counter Terrorism Command Special Branch of the Metropolitan Police. He is of mixed race and is gay. He had issued proceedings for some 120 incidents of discrimination by his employer and colleagues. In response, one colleague leaked details of ‘their side of the story’, ridiculing the claim, to *The Sun* newspaper,

¹²¹ CCA 1981, s 5.

¹²² [1991] 1 QB 514 (CA), 539 (Parker LJ), 533 (Nicholls LJ), 536 (McCowan LJ).

¹²³ Ibid, 539 (Parker LJ), 533 (Nicholls LJ), 536 (McCowan LJ). The publisher and editor were each fined £10,000, plus ‘considerable’ costs.

¹²⁴ Ibid 539.

¹²⁵ [2007] ICR 84 (HL), [2006] ICR 90 (CA), UKEAT/0952/03/ILB (EAT, 23 July 2004).

¹²⁶ EAT, 14 May 2013, UKEAT/0232/12/MC.

which in turn informed the claimant's solicitor of its intention to publish. In the event it did not publish (perhaps fearing contempt proceedings).

This act may have been laced with motives of punishment, revenge, and indignation. But it was most obviously an attempt to hold the claimant out to public obloquy, and thus dissuade him from persisting with the claim. It was not surprising that the employer was found liable for victimisation. Publicly ridiculing the victim's claim would also seem to exceed the 'fair and temperate' thresholds required for contempt, especially given the circumstances: the employer knew the claimant was mentally fragile (he was off sick with stress at the time); he had already suffered several incidents of victimisation before he had issued the proceedings; and the employer was the police, lending exceptional credibility to its side of the story whilst correspondingly undermining his.

The notable feature here is that, apart from being relayed to the claimant's solicitor, the story was never published. Nonetheless, a threat to publish can amount to contempt,¹²⁷ and for a few days at least, the claimant must have been in fear of the adverse publicity, creating a real risk (as opposed to a remote possibility)¹²⁸ that he might abandon the claim. Even where there is no risk, with sufficient intent, a failed attempt to interfere with the administration of justice can attract guilt.¹²⁹ Thus, the leak, and the newspaper's threat to publish, each amounted to a

¹²⁷ *Re Mulock* (1864) 3 Sw. & Tr. 599; 164 ER 1407.

¹²⁸ *R. v. Duffy, ex p Nash* [1960] 2 QB 188 (DC) 200 (Lord Parker LCJ). See also, *Att-Gen v News Group Newspapers Plc* [1989] QB 110 (QB), 125; *Att-Gen v Sport Newspapers Ltd* [1991] 1 WLR 1194 (QB), 1208, 1210.

¹²⁹ See e.g.: '[I]f the publication created no ... risk, ... common law contempt ... could only be established if those responsible for the publication intended it to have consequences affecting the ... proceedings which it neither achieved nor was ever likely to achieve.': *Re Lonrho* [1990] 2 AC 154 (HL), 213 [10] (Lord Bridge). See e.g. *Welby v Still* (1892), 66 LT 523, 8 TLR 202, excerpted in *Borrie and Lowe* (4th edn), para 10.7). See also, *Re B (JA) (an Infant)* [1965] Ch 1112 (Ch), 1123 (Cross J): 'the mere fact that no harm has been done in this particular case is neither here nor there'. For a similar approach to intending to pervert the course of justice, see *R v Vreones* [1891] 1 QB 30 (Crown Cases Reserved).

contempt. Alternatively, it has been advanced, *obiter*, that a person can be guilty of attempted contempt,¹³⁰ which *inter alia* this surely was.

The reason for these oversights is difficult to fathom, especially as they were not addressed in the cases, even by counsel. One possibility flows from the court's reluctance to step into an area of employment law covered by Parliament. This occurred (in)famously in *Johnson v Unisys Ltd*,¹³¹ where the House of Lords held that damages were not available for the *manner* of a dismissal, even though it was in breach of the contractual term of mutual trust and confidence. The reason, in part, was that the House did not want to 'circumvent'¹³² the limited remedy¹³³ provided for the *statutory* right not to be unfairly dismissed. If presented with the argument that the defendant should be referred for contempt, a court might similarly be wary of stepping into an area now regulated by Parliament. The cases are distinguishable though, because *Johnson* was claiming for something he would otherwise not get. In these victimisation cases, liability has been established, and the claimant would gain nothing (financially at least) if the employer were convicted of contempt. Moreover, it is not unusual for one event to lead to civil and criminal proceedings against the same defendant. Road traffic accidents are an obvious example.

5 Conclusion

The victimisation provisions may well be drafted too rigidly to account specifically for conduct defending litigation. In response, the courts have taken the rather odd position of importing

¹³⁰ See *Balogh v St Albans Crown Court* [1975] QB 73 (CA), 85 (Lord Denning MR), 94 (Lawton LJ), although doubted by Stephenson LJ, at 87.

¹³¹ [2003] 1 AC 518.

¹³² See e.g. *ibid* [66] (Lord Hoffman).

¹³³ At the time, £11,000. It is now the lower of either £78,962 (ERA 1996, s 124 (1ZA)(a), from 6 April 2016, SI 2016/288) or a year's pay (by SI 2013/1949 art 2(3)).

principles of contempt to *restrict* the scope of victimisation, but then thoroughly ignoring those principles *extend* its scope to fulfil its purpose. Only when compelled by EU law, did the courts yield on post-employment victimisation. As well as ignoring their instincts on contempt to *progress* equality law, in each and every case, the judgments failed to consider whether the conduct should be referred for contempt. The victimisation provisions cannot have been intended to provide defendants with an air-raid shelter from the criminal law.

Miller and Ellis' prediction that the law of contempt could supplement the victimisation provisions could not have been more wrong. Quite reverse has occurred. One can only conclude from this 'on-off' association with the law of contempt, that the judiciary (and perhaps the Attorney General) do not consider the proper administration of discrimination law to be as important as the administration of justice elsewhere.