VICTIMISATION AND THE REASON WHY

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Key points:

- Section 27(1) EA 2010 provides a definition of “victimisation” which applies to protected acts done by reference to any/all protected grounds – consolidating the previous provisions scattered through the anti-discrimination legislation. Section 27(2) EA 2010 sets out the definition for “protected act”.

- It is sections 39(3) and (4) EA 2010 which render such conduct unlawful as against workers / employees. Of course, victimisation is not unique to the employment provisions and applies to goods and services etc also.

- The test for victimisation has changed. There is no longer the need to demonstrate ‘less favourable treatment’. The complainant need only show that they have been subjected to a “detriment” and that the reason why is because they did the protected act.

- The acts which fall within the definition of “protected act” are effectively the same as those covered by pre-existing legislation (NB the wording has been changed, ostensibly, to make it more accessible).

- The same burden of proof (the shifting burden of proof) which applies to discrimination claims applies to victimisation (s136 EA 2010).

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1 This talk is based on the relevant chapters written by Olivia-Faith Dobbie for the forthcoming Legal Action Group publication entitled the “Discrimination Law Handbook”. The text has been modified in part.
• Victimisation used to be regarded as a form of discrimination but now falls under s27 EA 2010, alongside harassment, as a form of “other prohibited conduct”. As such, it is technically no longer a form of discrimination, but this is unlikely to have any impact in practice.

The Law:

Section 27 provides that:

(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.

(2) Each of the following is a protected act –
    a) bringing proceedings under this Act;
    b) giving evidence or information in connection with proceedings under this Act;
    c) doing any other thing for the purposes of or in connection with this Act;
    d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.
The Protected Acts:

Subsection 27(2)(a): Bringing proceedings
It is thought that the EA 2010 has made no changes to the effect of this form of protected act, such that the previous cases are likely to remain authoritative. (See Chief Constable of West Yorkshire v Khan\(^2\) and St Helens Metropolitan Borough Council v Derbyshire and Others\(^3\) - Re: the distinction between acts done because the complainant has issued proceedings and acts which constitute reasonable steps in the litigation.)

Subsection 27(2)(b): Giving evidence in connection with proceedings
Again, it is thought that there are no changes to the effect of this protected act. Thus, the same limitations which currently apply will continue: Namely that evidence given at a time when there is no live claim will not be covered. Similarly, if the detriment is imposed before proceedings are issued, the witness will not be protected. However, if the evidence is given before the claim is issued and the detriment applied after issuing, the witness will be protected. (Note however, that all such situations would fall within the scope of the following subsection.) Previous case law is likely to remain authoritative in respect to section 27(2)(b) - see Kirby v Manpower Services Commission.\(^4\)

Subsection 27(2)(c): Doing any other thing...in connection with the Act
This is the catch-all provision which would cover the witnesses giving evidence and/or being subjected to a detriment prior to the proceedings being issued, as well as many other circumstances.

Subsection 27(2)(d): Making an allegation (whether or not express) that A or another person has contravened the Act

\(^3\) [2007] IRLR 540, at paragraph 30, per Baroness Hale
As with the equivalent provisions which pre-dated the Act, to fall within the scope of this form of protected act, there is no requirement for the complainant to make any express reference to the Act or even use the words ‘discrimination’ or ‘harassment’ etc. Where a person alleges treatment which could amount to a contravention of the Act (even though they do not put it in such terms) they are likely to fall within the scope of this section.

Change No.1:
Subsection 27(2)(d) EA 2010 appears to be broader in its scope than the equivalent provisions which applied previously - Under the old victimisation provisions, a claimant could only succeed in a claim for victimisation where their allegation if proven would have amounted to a contravention of the relevant act. The restrictive ambit of this is demonstrated by the case of Waters v Metropolitan Police Commissioner.5

In this case, the protected act relied on was an allegation (which the claimant made to her superiors) about sexual harassment she had suffered from one of her male colleagues. The harassment had occurred outside the course of their employment. She was then subjected to a detriment by reason of having made such allegation. The Court of Appeal held that her claim for victimisation could not succeed. The reason was because, even if she were able to prove the sexual harassment against the male colleague, given that it occurred outside the scope of his employment, no liability could pass to the employer. Accordingly, even if proven, the facts alleged could not have amounted to unlawful discrimination by the employer and therefore there was no protected act in the first instance. Since there was held to be no protected act, any mistreatment she was subjected to could not, logically have been by reason of the protected act.

5 [1997] IRLR 589
The new Act is phrased differently. Rather than the complainant being required to make allegations which ‘would amount to a contravention’ of the relevant act (if proven) all that would now seem to be required is an allegation that any person has contravened the Act. Accordingly, it would seem, that even if the facts alleged could not (as a matter of law) amount to a breach of the Act, but the complainant alleges breach nonetheless, they will be protected from suffering detriments under this subsection.

Change No.2:

‘Being involved in a relevant pay disclosure’

A relevant pay disclosure is a protected act which falls within the scope of s27, by reason of s77(4) EA 2010, which states:

‘(4) The following are to be treated as protected acts for the purposes of the relevant victimisation provision-
(a) seeking a disclosure that would be a relevant pay disclosure;
(b) making or seeking to make a relevant pay disclosure;
(c) receiving information disclosed in a relevant pay disclosure.’

The definition of the term ‘relevant pay disclosure’ is set out in s77(3) EA 2010, which states:

‘(3) A disclosure is a relevant pay disclosure if made for the purpose of enabling the person who makes it, or the person to whom it is made, to find out whether or to what extent there is, in relation to the work in question, a connection between pay and having (or not having) a particular protected characteristic.’

This provision is designed to promote transparency surrounding pay. The EA 2010 does not impose a ban on pay secrecy clauses but does prohibit employers from subjecting an employee to a detriment if the employee’s breach of the secrecy clause amounts to a “relevant pay disclosure”
Change No.3:

No need to prove “less favourable treatment” merely a “detriment”

Unlike the various forms of discrimination protected under the EA 2010 which refer to ‘less favourable treatment’ in connection with a protected characteristic, the new victimisation provisions protect persons from suffering a ‘detriment’ because they have done a protected act.

In the victimisation provisions which pre-dated the EA 2010, the term ‘less favourable treatment’ was used. The effect of this change in terminology is that under the new Act, a person alleging victimisation is not required to identify a real or hypothetical comparator who has been and/or would have been treated more favourably.

There is no longer a need to carry out any form of comparative exercise. Now, all that needs to be shown is that a person (the complainant) has been subjected to a detriment and that the reason for that is because they have done or may do and/or it is believed they have done or may do a protected act.

The Explanatory Notes to the Equality Act identify various examples of how the victimisation provisions will apply, including the following

- ‘A woman makes a complaint of sex discrimination against her employer. As a result, she is denied promotion. The denial of promotion is victimisation.

- An employer threatens to dismiss a staff member because he thinks she intends to support a colleague’s sexual harassment claim. This threat could amount to victimisation.\(^6\)

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\(^6\) See paragraph 100-103 of the Explanatory notes to the Act.
A further example appeared in the Explanatory Notes to the Equality Bill as follows:

- A man with a grudge against his employer knowingly gives false evidence in a colleague’s discrimination claim against the employer. He is subsequently dismissed for supporting the claim. His dismissal would not amount to victimisation because of his untrue and malicious evidence.\(^7\)

Even though victimisation no longer requires evidence of less favourable treatment (by way of a comparative exercise) such evidence would nonetheless be highly valuable when seeking to prove that the reason for the treatment was because of the protected act. This is because where a complainant can point to another person in materially similar circumstances (save for the fact that that other person has not done a protected act) who has not been subjected to a detriment, the tribunal or court is likely to infer that the reason for the detriment was the protected act by reason of s.136 EA 2010 (burden of proof).

As such, those running victimisation claims under the EA 2010 are advised to put forward such evidence where available. It is likely that the change in terminology and the elimination of the requirement to carry out a comparative exercise will have little practical effect in most cases.

**What is a ‘detriment’ under the Act?**

‘Detriment’ is not defined in the Act but is a concept which has existed in discrimination law and whistle-blowing for some time. The term ‘detriment’ is thought to cover a very wide range of acts from seemingly trivial ones, to far more serious egregious matters. In the Explanatory Notes introduced in the House of Commons on 19 November 2009 [Bill 5].

\(^7\) See paragraph 117 of the Explanatory Notes introduced in the House of Commons on 19 November 2009 [Bill 5].
Notes, at paragraph 100, it states: “...victimisation takes place where one person treats another badly because he or she in good faith has done a “protected act”…”

As such, it is thought that there is no change to the concept of detriment itself, merely that it has been imported into the definition of victimisation. Accordingly, previous cases in which the term “detriment” was explored are likely to continue to be authoritative. (See Shamoon v Chief Constable of the Royal Ulster Constabulary⁸ and Barclays Bank plc v Kapur and others (No.2)⁹).

Change No.4:

The reason why: ‘because’ the person has done a protected act

The Act states that victimisation occurs when a person is subjected to a detriment ‘because’ they have done a protected act. Under the pre-existing victimisation provisions, the terminology was different, using the phrase: ‘by reason that the person has done a protected act’.

It is notable that ‘because’ is used throughout the Act, for direct discrimination and victimisation, whereas under the old provisions, the phrases: ‘by reason of’ and/or ‘on the grounds of’ were used. It is thought that the reason for the change in wording is simply to make the concepts more accessible. This change is likely to have little or nil practical effect.

It goes without saying that under the Act (as with the pre-existing provisions) there is still the requirement to show a causal connection between the protected act and the detriment and/or the protected characteristic and the less favourable treatment. Of course, the protected

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⁸ [2003] IRLR 285 at paragraphs 31-37
⁹ [1995] IRLR 87
act / characteristic need not be the *only* or even the *principal* reason for the treatment, but must be an effective cause.

Accordingly, where the alleged victimiser / discriminator subjects the complainant to a detriment / less favourable treatment *solely* for another reason, such that the treatment is not in any way caused by the protected act / protected characteristic, there will be no victimisation / discrimination respectively. As before, this will require investigation into the reason for the treatment, either conscious or subconscious.

In the context of victimisation, it will not be sufficient for a claimant to show that ‘but for’ the protected act, he/she would not have been subjected to the detriment. (This can be seen from the case of *Khan* (above) where although it could be said that ‘but for’ the claimant bringing a claim, the claimant would not have suffered the less favourable treatment (the refusal of a reference) - the reason for the refusal was the employer’s desire to protect his legal position given that proceedings had not yet concluded. (See also the discussion in *St Helens Metropolitan Borough Council v Derbyshire and Others* [2007] IRLR 540).

As before, there is no need to prove any motivation or intent on the part of the alleged victimiser / discriminator in order to establish liability. A person can apply a detriment to another and/or treat them less favourably without deliberately, intentionally and/or maliciously doing so. Indeed, the perpetrator could be totally unaware that the reason he/she subjected the person to the detriment / less favourable treatment is because of their protected act / protected characteristic. (See *Nagarajan v London Regional Transport*10).

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The reason for the treatment is thus a question of fact for the tribunal or court to determine in each case. Of course, where the alleged victimiser has no knowledge of the complainant’s protected act /protected characteristic (some protected characteristics may not be readily apparent i.e. some disabilities, early stages of pregnancy, etc) it is logically impossible for any treatment to be consciously and/or subconsciously because of such. (See Scott v London Borough of Hillingdon.)\textsuperscript{11}

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\textsuperscript{11} [2001] EWCA Civ 2005