Neutral Citation No: [2020] NICA 17 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McC11222** *Delivered:* **06 /03/2020**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE FAIR EMPLOYMENT TRIBUNAL

Between:

BRENDAN WRIGHT PERSONAL REPRESENTATIVE OF THE ESTATE OF COLETTE WRIGHT (DECEASED)

Appellant;

and

BELFAST BIBLE COLLEGE LTD

First Respondent;

and

ALAN McCORMICK

Second Respondent.

Before: Morgan LCJ and McCloskey LJ

McCloskey LJ (delivering the judgment of the court)

Introduction

[1] Brendan Wright ("*the Appellant*") is the personal representative of the estate of Colette Wright deceased ("*the deceased*"). Mr Wright has been represented at both levels by one Geoffrey Wilson BA (QUB) who describes himself as a "*Legal Consultant*" and who, according to the decision under appeal, has some 15 years' experience "*specialising in employment and discrimination law*": see [50]. Belfast Bible College Limited ("*the College*") is one of two respondents. The second respondent is one Alan McCormick who was employed by the College as its Director of Operations.

[2] The deceased was employed by the College as a part time receptionist from 11 November 2003 to 29 April 2016. Her death occurred on 18 February 2017. The Appellant's capacity both at first instance and in this court has been that of personal

representative of her estate. In common with the Tribunal we shall describe the deceased as "*the Claimant*".

[3] The Claimant brought proceedings against the two respondents in the Fair Employment Tribunal ("*the Tribunal*") comprising an assortment of claims and complaints: direct discrimination on the ground of religious and/or political belief; indirect discrimination on the ground of sex; direct age discrimination and victimisation; breach of the statutory requirement to consult; unlawful victimisation; and unauthorised deduction from wages. The Tribunal was not required to adjudicate on this latter claim. By agreement of the parties, reflected in a formal order, the College agreed to make a payment of £1099. The Tribunal dismissed all of the other claims. The Appellant appeals against this decision.

The Proceedings at First Instance

[4] The case was initiated on 13 January 2016. The assorted claims were consolidated by order of the Tribunal dated 28 October 2016. There was a succession of case management exercises between April 2016 and November 2018. The Claimant's death occurred during this period. The substantive hearing was conducted during the first week of December 2018. The Tribunal promulgated its decision on F2 May 2019. The Notice of Appeal is dated 10 June 2019.

Procedure on Appeal

[5] At a case management listing before the court on 14 October 2019 it was agreed between the parties that this appeal would be determined by the mechanism of written submissions. During the period thereafter repeated indulgences in the form of extensions of time were accorded to the Appellant and his representative. At a belated stage, when the filing of all necessary written materials was being finalised, the Appellant's representative wrote to the court as follows:

> "*… an application for an oral hearing shall be made in due course. Given the complexity of the issues raised I would respectfully argue only a full oral hearing would give full justice to the Appellant's submissions and they also – I believe – raise relatively new and unusually complicated key points of law that is for Personal Litigant to make* [sic] ….."

Continuing and elaborating –

> "*… especially re the points made re the Greenwood case which regardless of the court's ultimate decision in this matter is of general public importance in that it touches on how industrial/fair employment tribunal cases are properly adjudicated upon (building up English and Meeks).*"

[6] At the stage of receipt of this communication the court was in possession of three bundles of evidential, legal and other materials provided by the Appellant and his representative. These included the Appellant's two detailed written submissions comprising 29 pages and 24 pages respectively. The court was also in receipt of the Respondents' skeleton argument (prepared by Ms Herdman of counsel). The panel determined to defer its final ruling on the unexpected request for an oral hearing until all of the materials lodged had been considered. We shall revisit this issue *infra*.

The Claimant's Case

[7] Bulk and verbosity are two notable characteristics of the materials which have been placed before this court on behalf of the Appellant. The multiple claims brought by the Claimant against the Respondents have been noted above. In its attempt to expose the heart of the case against the Respondents the court has noted the following illuminating passage in the Appellant's lengthy written submission to the Tribunal:

> "*It is common case that my wife was the only catholic employee at the college right throughout her 12 years of employment …*
>
> *It was always a mystery to my late wife and myself that she, as a practising catholic etc, got the job as part time receptionist … my late wife was very happy working there until … Mr Alan McCormick … became its Director of Operations in 2009 …*
>
> [He] *engaged in a series of discriminatory acts against my late wife culminating in her selection for redundancy in November 2015 … he was an elder in Greenwell Street Presbyterian Church in Newtownards which is well known for being to the far right of the Presbyterian church.*"

[8] The Appellant's first instance submission also records that his wife was selected for redundancy on 4 November 2015. This upset her greatly and she did not return to work subsequently. (The court knows that the first of the Tribunal claims was initiated on 13 January 2016.) In April 2016 the Claimant applied for voluntary redundancy, successfully. The Claimant was represented by Mr Wilson at two meetings at the college, held on 17 November and 9 December 2015. Mr Wilson threatened legal action at both meetings. An offer of a payment of £500 additional to the Claimant's statutory redundancy entitlement was evidently refused.

The Decision of the Tribunal

[9] As noted above the substantive hearing of the case was preceded by a protracted period of case management. The hearing occupied some four days in December 2018. It was followed by a written submission from the Appellant

consisting of 29 pages. The Tribunal's decision was published some five months later.

[10] The Tribunal's decision records the provision of a list of "*legal and factual issues*" agreed by the parties. These are rehearsed at [11]–[20] and total upwards of 20. The vast majority of these are purely facts, relating mainly to words allegedly spoken by and the alleged conduct of the second Respondent and others on specified occasions and the provision (or not) of wages and a pay statement to the Claimant. There is a notable emphasis on what was allegedly said at "redundancy meetings" attended by the Claimant on 4 and 11 November 2015 and the content of related letters written by the College.

[11] Having outlined the multiple claims against the Respondents and noted the list of agreed issues the decision of the Tribunal then records those who gave oral evidence: the Appellant, Mr Wilson, the Appellant's daughter, the second Respondent, the College's recruitment co-ordinator and its former Principal. The decision notes the absence of any witness statement or comprehensive statement of instructions from the Claimant. It further records at [25]:

> "*No evidence was given during the hearing in support of the claimant's claims of direct age and political discrimination.*"

[12] The decision then records that the Claimant was the only Roman Catholic employee in a workforce of 30. Her period of employment was 11 November 2003 to 29 April 2016. It notes in particular:

> "*Mr McCormick who describes himself as a "Protestant Evangelic Christian" has been employed by the College since 2008. The backbone of the Claimant's case was that Mr McCormick had been 'consistently nasty' to the Claimant because she was a Catholic and he is an Evangelic Christian.*"

The decision does not identify any agreed facts. Nor does it distinguish between uncontested factual assertions and findings of fact in respect of contentious factual matters. Rather everything is arranged under the single chapter heading "Facts". This is followed somewhat confusingly by a series of individual headings "Allegations of …… (etc)". The challenge for the reader is to disentangle from some 70 paragraphs the Tribunal's factual findings.

[13] This court identifies the following main factual findings in the decision of the Tribunal:

(a) The Claimant was "*very happy*" in her employment until the issue of her possible redundancy was first canvassed in early November 2015.

(b) A heated exchanged between the Claimant and Mr McCormick in 2009/10 entailed an apology to the Complainant from Mr McCormick and was "*a one-off incident under which both parties had drawn a line*" in which the Claimant was treated in the same manner as the hypothetical Evangelic Protestant Comparator would have been.

(c) The Claimant had failed to discharge her burden of establishing the assertion that Mr McCormick had disclosed her religious affiliation to a fellow employee, something first raised by the Claimant when she had a meeting with Mr Wilson on 5 August 2016.

(d) A single conversation between the Claimant and Mr Beggs in which the issue of the church habitually attended by the Claimant arose was entirely innocuous.

(e) *Ditto* any alleged snubbing of the Claimant by Mr McCormick on the date of his interview for the post which he subsequently secured at the College, in 2008.

(f) *Ditto* the allegation that the Claimant had been obliged to photocopy some literature of an anti-Catholic nature emanating from Martin Luther, the Protestant reformer.

(g) Mr McCormick had organised and participated in his work capacity in retreats at various specified Roman Catholic centres, confounding any suggestion that he was motivated against the Claimant on account of her Catholic religious affiliation.

(h) In late 2014 the College had a budget deficit stimulating various cost saving measures. When this recurred in 2015 the senior management team decided that redundancies would be necessary, beginning with the administration team. "*The Tribunal accepted that the College had demonstrated that there was a genuine redundancy situation*".

(i) Dr Mitchell (and not Mr McCormick) led the redundancy process. All staff were informed in October 2015 of the need to make 2 – 2.5 full time administrative jobs redundant. It was assessed that the Claimant's reception duties could be absorbed into the balance of the administrative staff team. Two other posts were identified. Dr Mitchell then began formal consultations with the Claimant and the occupants of the other two posts, dating from 4 November 2015. On the occasion of this meeting the Claimant was informed that her post "*… was at risk and subject to completion of full and proper consultation she may be dismissed by reason of redundancy*". She became "*very upset*" during the meeting, was permitted to leave work early and did not return to work thereafter.

(j) "*The Tribunal accepts that the Claimant telephoned both her daughter and her husband in an upset state to inform them that she had been told she had been made redundant. However the Tribunal considers that she was mistaken ….*" No final redundancy decision had been made.

(k) At the second of the redundancy consultation meetings, on 11 November 2015, the Claimant stated that "*… she had no questions, she understood the need for cut backs and there were no bad feelings*".

(l) The Claimant's first meeting with Mr Wilson was held two days later. His notes of the meeting documented nothing relating to possible alleged discrimination against the Claimant.

(m) A third meeting attended by both the Claimant and Mr Wilson occurred on 17 November 2015. At this stage Mr Wilson's assessment was that a breach of the regulations governing and protecting part-time workers was the most likely successful avenue of redress for the Claimant. At the third obligatory meeting, on 9 December 2015, only Mr Wilson attended.

[14] In the next ensuing 40 paragraphs (approximately) the Tribunal rehearses extensively the evidence of Mr Wilson and others making, with a couple of exceptions *(infra),* no clearly formulated findings. The evidence is rehearsed uncritically and without comment.

[15] The next section of the Tribunal's decision, consisting of 13 paragraphs, is entitled "Law" followed by a series of subheadings.

[16] In the final chapter of its decision, entitled "Conclusion" and consisting of 13 paragraphs, the Tribunal addresses, sequentially, the claims of (a) direct discrimination, (b) indirect discrimination and (c) victimisation. As regards the claim of direct discrimination:

(i) The decision refers to "*the detailed findings of fact made in relation to allegations of discrimination on grounds of religious belief detailed in paragraphs 33 – 41 above*": this court's digest of these findings is contained in [12](a) – (g) above.

(ii) These were "*a succession of unconnected or isolated specific acts …* [and] *… there is therefore no basis upon which the Tribunal can infer from the facts found in respect of these earlier allegations that the Claimant was discriminated against on grounds of her religion*".

(iii) "*Similarly there are no grounds upon which the Tribunal can conclude on the facts found that the Claimant has been treated less favourably than the*

hypothetical Evangelic Protestant comparator in relation to the redundancy process which began in September/October 2015. The facts found do not support the Claimant's contention that Mr McCormick treated her less favourably than the hypothetical comparator, motivated by prejudice against devote Catholics because of his own religious beliefs".

(iv) Mr McCormick's role was peripheral in the redundancy process and any action taken by him was at the direction of Dr Mitchell who, it was conceded, did not have a discriminatory motive. It was not Mr McCormick's decision to make the Claimant redundant. Most significantly of all, the administrative posts of two Protestant female employees were also identified as being redundant and the two post holders were treated in the same way as the Claimant. Both these employees were eventually made redundant.

(v) The Tribunal did not accept the contention that the Claimant had been the victim of unlawful religious discrimination because the College had not engaged in positive discrimination to recruit more Roman Catholics to its workforce.

[17] As regards the claim of <u>indirect sex discrimination</u>:

(i) The College's decision to make redundancies initially within the administrative section did not constitute the application of a provision, criterion or practice which was discriminatory placing women at a particular disadvantage when compared with men.

(ii) The College had devised selection criteria to be applied only in the event of compulsory redundancy.

(iii) The Claimant, after consultation and negotiation with her representative, had requested and was granted voluntary redundancy. But for this the redundancy consultation exercise would have been resumed.

(iv) There was in any event a genuine business reason for the Claimant's redundancy, based on "*the wish to protect the core business of course delivery*" in the context of an overall workforce which was predominantly female.

[18] As regards the <u>victimisation</u> claim:

(i) "*The Tribunal has found as a fact that the reason why the Claimant's pay was not paid into her account in the February 2016 payroll was due to a genuine error compounded by the fact that it did not have sight of the Claimant's bank statements until shortly before the full hearing. The Tribunal is satisfied that*

this did not have anything to do with the fact that Mr Wilson had sent a letter …… or that proceedings were lodged …."

(ii) The College's handling of Mr Wilson's post-redundancy request for a reference on behalf of the Claimant could not justify an inference of victimisation.

(iii) The Tribunal's omnibus conclusion was that the complaints of victimisation on the basis of gender, political/religious belief and age were not sustained.

Appeal to this Court

[19] The Notice of Appeal, which is dated 10 June 2019, is supplemented and clarified by the Appellant's 23 page written submission, undated, on its face prepared with the assistance of Mr Wilson. This document in turn was followed by the Appellant's "Replying Final Submissions", also undated, evidently his response to the Respondents' skeleton argument.

[20] From the foregoing materials the following matters emerge with reasonable clarity:

(i) There is no appeal against the Tribunal's dismissal of the claims of religious discrimination, political discrimination, age discrimination or indirect discrimination.

(ii) The appeal is solely against the Tribunal's dismissal of the victimisation claim.

(iii) The complaint of apparent bias against the Tribunal canvassed initially in the Notice of Appeal is not pursued.

[21] The appeal against the dismissal of the victimisation claim is based on four grounds:

(i) Failure to apply the correct legal test.

(ii) Inadequate reasons.

(iii) Perversity.

(iv) Procedural unfairness.

The First Ground of Appeal

[22] At [18]–[19] of its decision the Tribunal rehearsed the agreed issues concerning the victimisation claim for its determination:

> "Whether the claimant was less favourably treated by the respondent because her representative had sent a letter on 17 November 2015 threatening legal action, and specifically:
>
> (a) Whether the respondent failed to pay the claimant the proper amount of wages in December 2015, and
>
> (b) Whether the respondent failed to provide the claimant with a pay statement in December 2015.
>
> 17. Whether the claimant was subjected to less favourable treatment by the respondent because she had lodged an originating claim with the Fair Employment Tribunal in January 2016, and specifically,
>
> (a) Whether the respondent refused to give the claimant an agreed reference.
>
> (b) Whether the respondent failed to pay the claimant her wages for January 2016.
>
> (c) Whether the respondent refused to allow the claimant to take voluntary redundancy while she was pursuing her claims with the Fair Employment Tribunal.
>
> (d) Whether the respondent failed to provide the claimant with a pay statement in January 2016."

[23] At [95] the Tribunal directed itself in the following way:

> "FETO, the SDO and the Age Discrimination Regulations make similar provisions prohibiting victimisation. A person ("A") discriminates by way of victimisation against another person ("B") in any circumstances relevant for the purposes of the legislation if—
>
> (a) he treats B less favourably than he treats or would treat other persons in those circumstances; and
>
> (b) he does so for one of the following reasons:

(c) B has—

i. brought proceedings against A or any other person under this Order; or

ii. given evidence or information in connection with such proceedings brought by any person or any investigation under this Order; or

iii. alleged that A or any other person has (whether or not the allegation so states) contravened this Order; or

iv. otherwise done anything under or by reference to this Order in relation to A or any other person; or

v. A knows that B intends to do any of those things or suspects that B has done, or intends to do, any of those things.

(6) Paragraph (4) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith."

[24] The Tribunal determined the victimisation claim at [112]–[113] in these terms:

"**Victimisation**

The Tribunal determines that the claimant has not established facts from which it can infer that she has been victimised contrary to the 1976 Order, FETO or the Age Regulations. The Tribunal has found as a fact that the reason why the claimant's pay was not paid into her account in the February 2016 payroll was due to a genuine error compounded by the fact that it did not have sight of the claimant's bank statements until shortly before the full hearing. The Tribunal is satisfied that this did not have anything to do with the fact that Mr Wilson had sent a letter dated 17 November 2015 or that proceedings were lodged with the Fair Employment Tribunal in January 2016.

Although there was a factual discrepancy concerning how the College had dealt with Mr Wilson's post-employment request for a reference on behalf of the claimant, this was not such that

> *the Tribunal could draw an inference of victimisation. The claimant's representative conceded that he had overlooked the issue of a reference when negotiating the terms of voluntary redundancy and therefore there was in fact no agreement to provide an agreed reference. Further, there had been no request for a reference made by any prospective employer. Had such a request been received, the respondent had confirmed that a reference would have been provided in accordance with its policy as notified to the claimant in the letter from Dr Mitchel dated 2 May 2016. On this basis the Tribunal determines that the claimant had not suffered a detriment and that this part of her claim must fail."*

[25] It is necessary to consider also in this context certain earlier passages in the Tribunal's decision. These form part of what is in effect a chronological narrative of events. They document *inter alia* the Claimant's first engagement of Mr Wilson and his subsequent interaction, both in writing and by attendance at meetings, with College representatives. Within these passages one finds – at [68] – an almost concealed finding by the Tribunal that at the stage when a meeting was held on 20 January 2016 the Claimant had not been selected for redundancy. The Tribunal noted that while the Claimant had been absent from work throughout December 2015 (commencing on 4 November 2015) she had received her normal wages. Dr Mitchell confirmed that the Claimant had a contractual entitlement to company sick pay during the first three months. At [74] it is stated:

> "*The Claimant was to be paid her full pay backdated to 4 November 2015 even though she was absent without any certification from 4 November 2015 until 1 December 2015. The Respondent did not seek to recover payment for the uncertified period from the Claimant.*"

At the January and February 2016 meetings Mr Wilson informed College representatives firmly that the Claimant would not under any circumstances return to her employment. Furthermore, she was "*… open to the possibility of voluntary redundancy but not on the terms previously offered*": [76]. A possible agreed redundancy payment was ventilated. Furthermore, Dr Mitchell "*… confirmed that the Claimant would be paid at the end of February 2016, four months instead of three months sick pay, backdated as a gesture of goodwill to 4 November 2015 …*"

[26] By letter dated 22 February 2016 – see [77] – Dr Mitchell wrote to the Claimant:

> "*…advising that the College had been informed that she was definitely not returning to work and that she may be interested in taking voluntary redundancy without enhancement. He informed her that the College was not able to proceed without a*

legally recognised compromise agreement and that the original enhanced offer still stood (£5637.63 plus any additional holiday pay and an apology for upset and 'a very positive reference for all your years of service to the College'). He advised that if not acceptable then the College was willing to restart the redundancy process afresh. He confirmed that she would be paid outstanding sick pay at the end of February and that from 4 March 2016 she would be paid statutory sick pay."

The decision of the Tribunal continues this discrete narrative, at [78]:

> *"An instruction was given by Dr Mitchel to pay the outstanding pay to the claimant in the February 2016 payroll. Payroll documentation and payslips issued to the claimant which led the respondent to believe that two payments were made to the claimant on 25 February 2016 in the sums of £881.52 (for December 2015 and January 2016 wages) and £644.96 (for February 2016 wages). Due to a clerical error, payment of £881.52 was made into Dr Mitchel's bank account instead of the claimant's account. At the Hearing it was confirmed by an examination of the claimant's bank statements that these payments had not reached her account. As a result of further enquires with the College's bank, it came to light during the Hearing that the monies had been paid in error into Dr Mitchel's bank account." The Tribunal accepted that Dr Mitchel was unaware that this error had been made until it was brought to his attention at the hearing. Following on from this an agreement was reached between the parties' representatives that the College would pay to the claimant the agreed sum of £1,099.00 and that this should be made an Order of the Tribunal. The Tribunal was invited to draw an inference that this was a deliberate act of victimisation because of the contents of Mr Wilson's letter of 17 November 2015."*

This is followed without any break in the text by these findings:

> *"The tribunal accepted, after consideration of the records of the Case Management Discussions, that the respondent's representatives did not receive copies the claimant's bank statements until 20 November 2018 and that the belief that the payment had been made to the claimant was genuine and reasonable in the circumstances. The Tribunal therefore did not accept representations that this constituted a deliberate act to deprive or delay payment to the claimant or that it was related to Mr Wilson's letter or the fact that she had lodged proceedings with the Fair Employment Tribunal."*

[27] The narrative continues, at [80]:

> *"On 5 April 2016, Mr Wilson wrote to Professor Ken Brown, Chairman of the Board of the College, intimating that he intended to lodge a second claim with the Fair Employment Tribunal that the claimant had been further victimised because the College had refused to consider a voluntary redundancy package unless she withdrew all her claims on the basis of a compromise agreement. He also sought clarification of the relationship between the College and QUB and suggested that there would be significant media attention if the case was to go to a full hearing. He advised that he would refrain from lodging a further claim, naming Professor Brown as an individual respondent, until 14 April 2016 to give the College an opportunity of reconsidering voluntary redundancy."*

This discrete chapter continues at [81]–[84]:

> *"Following receipt of this letter, Dr Mitchel instructed Mr McCormick in his absence to send an email to Mr Wilson to confirm that the College was willing to make an offer of voluntary redundancy on the same terms offered to other staff who had requested a voluntary redundancy package. This was confirmed in Mr McCormick's email dated 11 April 2016 which also set out the compensation figures.*
>
> *A final meeting was arranged for 28 April 2016, attended by Ms Hogg of Croner Consulting and Dr Mitchel. Mr Wilson again attended on behalf and in the absence of the claimant and it was agreed that the claimant's last day of employment would be 29 April 2016. Her redundancy payment of £5,200.25 comprised:*
>
> | | |
> |---|---|
> | *Statutory Redundancy pay* | *£2,516.76* |
> | *Plus 20% enhancement of* | *£ 503.36* |
> | *12 weeks' notice pay @ £139.82* | *£1,677.84* |
> | *9 days' outstanding holiday pay @ £55.81* | *£ 502.29* |
>
> *It was agreed that this amount would be paid to the claimant as quickly as possible or in the next payroll. There was no "agreed reference" discussed at this meeting. Mr Wilson further conceded that the voluntary redundancy package did not contain an agreed reference due to an omission on his part.*

> *On 2 May 2016 Dr Mitchel wrote to the claimant formally accepting her request for voluntary redundancy and confirming the employment termination date to be 29 April 2016 and the amount of her redundancy pay entitlement. He confirmed that her final salary and holiday pay would be paid through payroll. He informed her that it was company policy not to provide an open reference but the College would be pleased to respond quickly to any request made by a potential future employer. He expressed thanks for her contribution to the College over the years and wished her well for the future. Dr Mitchel left the employment of the College on 31 July 2016."*

[28] In August 2016 the Claimant informed Mr Wilson that her February wages did not include what was due to her in respect of the period 14 December 2015 to end of January 2016. Mr Wilson did not raise this with the College. Rather he sent a letter dated 5 September 2016 requesting "*an exemplary reference* (etc)" for the Claimant. The letter was addressed to Mrs Harris, an employee of the College. The decision continues at [87]:

> *"Mrs Harris had left her employment with the College on 18 August 2016 and then went on holiday out of the jurisdiction and did not receive the letter. The response drafted by the respondent's representative stated that the letter, when found was forwarded to Mrs Harris. However, the tribunal accepted Mr McCormick's evidence that the envelope was brought to him some time later for opening. No response was sent to Mr Wilson or directly to the claimant."*

This is followed by an explicit finding:

> *"The tribunal accepted this was not a deliberate attempt by Mr McCormick to thwart the claimant's attempts to find another job as the College had agreed to provide a reference if so requested by a prospective employer and no such request was received."*

The decision then notes that during the intervening period of approximately one month the second of the Claimant's Tribunal claims, alleging unlawful discrimination in failing to provide the reference, had been initiated (on 12 September 2016).

[29] To summarise, as regards the Claimant's victimisation claim, the Tribunal made the following specific findings of relevance:

(i) From 14 December 2015 the Claimant was the recipient of a formal offer of financial compromise, in the amount of £5637.53, with certain associated terms, including a "*no tribunal proceedings*" clause.

(ii) This offer remained open during the subsequent period of around one month.

(iii) The rejection of the offer was conveyed by Mr Wilson to the College at a meeting held on 20 January 2016.

(iv) The Claimant had not been selected for redundancy at this stage.

(v) The College's willingness to achieve consensual resolution and its (separate) willingness to pay the Plaintiff her wages in respect of mid-December 2015 to end January 2016 was communicated.

(vi) The information requested by the College to facilitate payment of the aforementioned wages was not provided by the Claimant. In short certification of absence by a medical practitioner was required and this had not been waived. This was subsequently provided by the Claimant.

(vii) The failure to lodge the appropriate monies in the Claimant's bank account in respect of the one and a half month period in question was the product of a genuine error (the court's summary). It was not a deliberate act and it was unrelated to the commencement of the Tribunal proceedings on 13 January 2016: see [78].

[30] It would appear that as the proceedings, which ultimately had a lifespan well in excess of three years, and the hearing (with a duration of four days) advanced, the particulars of the alleged victimisation practised by the Respondents against the Claimant telescoped somewhat. Ultimately, they were twofold, focusing on the non-payment of wages during the relevant one and a half months and the non-provision of an "*agreed*" reference. As regards the latter, the Tribunal specifically recorded Mr Wilson's acknowledgement that there was no agreement to provide a reference. It is clear from reading the decision as a whole that this had simply been a negotiating make weight which did not form part of the agreement ultimately struck between the parties on 28 April 2016: see especially [82]–[83] and [86] of the Tribunal's decision. Furthermore, the Tribunal clearly accepted the Respondent's willingness to provide a reference in the event of a request from a prospective employer: see [87]. On the basis of these findings this aspect of the victimisation claim could not conceivably succeed.

[31] The second aspect of the victimisation claim was considered in detail by the Tribunal and addressed in the findings rehearsed above. The culmination of this discrete chapter was the voluntary payment by the Respondents of the sum in question during the course of the Tribunal proceedings. The essence of the Appellant's detailed written submissions on this issue is that the Tribunal's finding of (in summary) *no deliberate act* by the Respondents and its failure to make a finding

of an unconscious discriminatory motive constitutes an error of law. The riposte to this is straightforward. It is clear that the Respondents were meeting the case that the non-payment of the wages in question was a conscious act of victimisation on their part against the Claimant. The language in which the Tribunal has formulated its findings must be considered against the background. There is no suggestion of error of law in this respect. The real complaint is that the Tribunal should have found an unconscious victimisation motive. This is demonstrably untenable for the twofold reason that (a) the Claimant plainly was not making this case and (b) the multiple findings favourable to the Respondents made by the Tribunal in substance precluded a finding in these terms. The substance of the Tribunal's findings was that the Respondent's motives were impeccable throughout the events under scrutiny. Furthermore, as stated in Ms Herdman's skeleton argument:

> "*It is well established that victimisation may involve both conscious and subconscious bias. That said, the question of subconscious bias simply did not arise on the facts of this case and therefore did not fall to be considered in detail by the Tribunal in the impugned decision. Nothing in the impugned decision supports the argument that the Tribunal misunderstood the parameters of the legal test regarding victimisation.*"

The court accepts this submission in full. For the reasons given the first ground of appeal is unsustainable.

The Second Ground of Appeal

[32] The second ground of appeal is formulated in these terms:

> "*It is submitted that the Tribunal gave inadequate reasoning re its decision on the victimisation claims and therefore erred in law.*"

Much judicial ink has been spilled on the contours of the judicial obligation to provide a reasoned decision. Stated succinctly the essence of the legal test is whether the judicial text conveys adequately to the parties why they have won or lost and includes a sufficient statement of the reasoning to enable an appellate court or tribunal to determine whether the first instance court/tribunal has made an error of law: see for example *Deman v AUT* [2003] EWCA 329 at [44] and, generally, *Flannery v Halifax Estate Agents* [1999] 1 WLR 372.

[33] This court, in its appellate role, undertakes an objective audit of whether this duty has been discharged. It does so in particular by examining the case made by the claimant, the respondent's defence, the issues to be determined and the terms in which the Tribunal's determination is expressed. We refer particularly to [24]–[31] above, without repeating same. This court concludes that the Tribunal's

determination of the victimisation claim amply satisfies the applicable legal test. The Tribunal has made relevant findings which are expressed in clear and comprehensible terms and, objectively, can leave the parties in no doubt about why the victimisation claim was dismissed. Furthermore, there is no hint of error of law in either how the tribunal conducted this exercise or the manner in which it was concluded. The second ground of appeal fails in consequence.

The Third Ground of Appeal

[34] The third ground of appeal is perversity, formulated thus:

> "*The Tribunal made a perverse factual finding re its finding at [112] of its decision that the respondents did not have sight of my late wife's bank statements until shortly before the hearing …*"

This ground of appeal, erroneously and impermissibly, ignores altogether the Tribunal's associated findings, at [78] in particular, rehearsed above. Secondly, perversity is a self-elevated threshold. Thirdly, we consider it clear that the Tribunal's core reasoning and conclusion in rejecting the victimisation claim would have been the same even if, as the Appellant contends, it should have made the discrete factual finding that the Respondents had been in possession of the relevant bank statements from approximately one year following the initiation of the proceedings. This ground of appeal is, therefore, simply not to the point. Furthermore, it conflates perversity with inadequate reasoning. It has no merit and must be dismissed accordingly.

The Fourth Ground of Appeal

[35] The fourth and final ground of appeal enshrines a complaint of procedural unfairness in one discrete respect. Both the essence of this ground and its manifest lack of merit are exposed in the following passages in the skeleton argument of Ms Herdman:

> **"***This ground of appeal is based on an inaccurate factual basis. The respondent had attended at the Tribunal for the hearing on 12th December 2018. No one attended on behalf of the claimant, a postponement having been requested at 8.07 am on the morning of the hearing. In light of the absence of the attendance of the claimant, the Tribunal declined to deal with the matter and directed that closing submissions would be dealt with in writing rather than requiring the parties to attend in person on another date. The direction regarding closing submissions is confirmed at paragraph 27 of the impugned decision where it is also noted that the claimant/appellant was permitted an extension of time for the lodging of written submissions.*

> *The respondent did not make oral closing submissions on 12th December 2018 in the absence of the claimant/appellant or his representative as alleged. The respondent was simply in attendance when the Tribunal directed that the final submissions would be dealt with in writing rather than in an oral hearing. The claimant raised no complaint at the relevant time about the direction that closing submissions would be dealt with in writing rather than orally and availed of additional time afforded by the Tribunal. There has been no breach of the claimant's Article 6 rights and it is submitted that this ground of appeal ought to fail."*

It is also relevant to consider [27] of the Tribunal's decision:

> *"The Tribunal provided written directions to the parties for the exchange and submission of written closing submissions, as due to illness, the claimant's representative was unable to attend to give oral submissions at the end of the evidence. Following an application by the claimant's representative and after consideration of written representations by the parties' representatives, the time for making written submissions was extended by the Employment Judge."*

[36] This ground of appeal is a combination of bare assertion and speculation. It is confounded by the objectively ascertainable facts, which point inexorably to the conclusion that the Claimant's hearing before the Tribunal was not vitiated by the procedural unfairness alleged or, indeed, any other ascertainable form thereof.

Omnibus Conclusion

[37] We return to the issue noted at [5]–[6] above. This court is satisfied that there is no need for an oral *inter-partes* hearing in order to determine this appeal. With specific reference to Mr Wilson's submissions to the contrary: we are unable to identify any novel or complex point of law, this case ultimately is mainly factual in nature, both parties have been treated with absolute equality of arms and the court does not require any clarification or elaboration, oral or otherwise, of any part of the written argument. The ultimate touchstone is that of fair hearing. We consider that the Appellant's rights in this respect are fully observed by adherence to the mechanism agreed between the parties. No good reason for departing therefrom has been demonstrated.

[38] For the reasons and on the grounds elaborated above the court rejects every ground of appeal. The appeal is dismissed in consequence.