Discrimination Law: Victimisation

The House of Lords retreat from the causative approach announced Nagarajan and leave claimants in a 'Khan’s Fork'


1. INTRODUCTION

Britain’s anti-discrimination legislation outlaws the victimising of persons who use that legislation. The legislation, by way of a number of statutes, covers discrimination regarding Race, Sex, Disability and (for Northern Ireland) Political Opinion or Religious Belief. Victimisation provides a separate course of action for anyone treated less favourably ‘by reason that’ they brought a discrimination claim, or did something else by reference to the legislation.

In Chief Constable of West Yorkshire Police v Khan the House of Lords rejected the ‘causative’ - or but for - approach to the phrase ‘by reason that’, which the House established in R v Birmingham City Council, ex parte EOC [1989] 1 AC 1156, and James v Eastleigh BC [1990] 2 AC 751 (for direct discrimination) and Nagarajan v LRT [1999] 4 All ER 65, [2001] AC 502 (for victimisation). The House also restated the view that the comparator for establishing less favourable treatment should be a person who has not done the act in any sense at all and clarified what was meant by ‘less favourable’.

2. THE LEGISLATION

Victimisation is defined in section 2, Race Relations Act 1976 as:

‘(1) a person (“the discriminator”) discriminates against another person (“the person victimised”) in any circumstances relevant for the purposes of this 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 under the Act against any person; or
(b) given information or evidence in connection with such proceedings; or
(c) otherwise done anything under or by reference to the Act in relation to any person; or
(d) alleged that any person has committed an act which (whether or not the allegation so states) would amount to a contravention of the Act, or by reason that the discriminator knows that the person victimised intends to do any of those things, or suspects that the person victimised has done, or intends to do, any of them.

Section 4(1), Sex Discrimination Act 1975, section 55(2), Disability Discrimination Act 1995 and article 5(3), Fair Employment and Treatment Order 1998 each provides a definition that is materially the same. The acts described in paragraphs (a) to (d) are generally known as ‘protected acts.’
3. FACTS AND DECISION

In September 1996 Sergeant Khan applied to become an Inspector within his force. However, his Chief Constable failed to support the application. That failure led Khan to issue proceedings under the Race Relations Act. Then in October, Khan applied to be an Inspector with the Norfolk Police. Acting on legal advice, the Chief Constable refused to provide the Norfolk Police with a reference. Instead, he stated:

"Sergeant Khan has an outstanding industrial tribunal application against the chief constable for failing to support his application for promotion. In the light of that, the chief constable is unable to comment any further for fear of prejudicing his own case before the tribunal."

Following that, Khan brought separate proceedings claiming that he had been victimised. The Chief Constable argued that the reason for withholding a reference was to avoid prejudicing his own case in the discrimination proceedings brought by Khan. The House of Lords, reversing all the decisions below, allowed the Chief Constable’s appeal. In doing so they addressed three issues regarding the definition of victimisation. Lords Nicholls, Mackay of Clashfern, Hoffman and Scott each made separate speeches. Lord Hutton agreed with Lords Nicholls and Hoffman. The House considered three elements of the definition of victimisation: (i) with whom is the claimant compared to establish less favourable treatment; (ii) what amounts to is less favourable; and (iii) the meaning of ‘by reason that’.

A. Treated Less Favourably Than Whom?

The Chief Constable argued the treatment given to Sergeant Khan should be compared with the treatment that would have been given to an employee who had brought other proceedings, such as libel, or constructive dismissal. This argument was first raised in Kirby v Manpower Services Commission [1980] ICR 420, where an employee at a job centre was moved to less desirable work because he disclosed confidential information regarding suspected discrimination by some employers. The EAT compared Kirby’s treatment to that of a worker who had disclosed confidential information, but unrelated to discrimination. As this hypothetical worker would have been similarly moved to less desirable work, the EAT concluded that Kirby had not been treated less favourably. However, the Court of Appeal, in Aziz v Trinity Street Taxis [1988] 2 All ER 860 rejected this approach and held that the comparison should not include any element of the protected act. Otherwise, as Slade, LJ reasoned (at 869), if a defendant could show that he would have treated a ‘Kirby comparator’ in the same way as the claimant, the ‘absurd result’ would be that the claimant would ‘necessarily fail’.

The House of Lords followed Aziz. Lords Nicholls, Scott and Hoffman discussed this issue. For Lord Nicholls it boiled down to a choice between Kirby and Aziz. He concluded (at para 27): ‘There are arguments in favour of both approaches. On the whole I see no sufficient reason for departing from the...approach adopted by Slade, LJ in the Aziz case. Lord Scott was more trenchant. He rejected the Kirby approach, stating (at para 72) ‘That cannot be right.... It would enable employers to victimise employees who brought race discrimination proceedings against
them provided they, the employers, were prepared similarly to victimise any employee who had the temerity to sue them for anything.’ Lord Hoffman rejected Kirby with equal certainty (at para 48).

The point is that the approach in Kirby ensures that virtually no claim could succeed. This is because a ‘Kirby comparator’ has done the protected act except for the RRA element. Thus any employer could testify ‘I treat all complainants the same, whether or not the complaint is one of discrimination.’ Further, if one removes only the RRA element from the protected act, a tribunal is then effectively trying to identify less favourable treatment on grounds of race, which is covered by section 1, not section 2, thus rendering section 2 meaningless.

It is surprising that this argument - that was apparently settled in Aziz back in 1988 - is still being raised by employers. They may have been encouraged by the Court of Appeal’s reluctance to overrule its own decision on this element in Cornelius v University College of Swansea [1987] IRLR 141 where it held (at para 33) that an employer’s refusal to grant a transfer request or allow the grievance procedure, after the claimant had issued (sex) discrimination proceedings, was not less favourable treatment. (See further [2000] 29 ILJ 304.) Since then, in a number cases, counsel for the defendant has cited Cornelius in support of using a ‘Kirby comparator,’ only for the Court of Appeal to reject Kirby but ‘distinguish’ Cornelius. This occurred in Aziz (at 872), Khan [2000] ICR 1169, (at para 28) and Brown v TNT Express Worldwide [2001] ICR 182 (at para 33).

Employers may have also been encouraged by some sentiments expressed by the judiciary. For instance, Lord Nicholls’ comment (above) that ‘There are arguments in favour of both approaches’ is not the language to reject a case absolutely. In the same case in the Court of Appeal, Lord Woolf, MR stated (at para 24): ‘I would like to look favourably on [the] submission that you should ask whether the respondent was treated any differently from anyone else who brought proceedings’. But he ‘felt driven’ by precedent and his interpretation of section 2 to reject the ‘Kirby comparator’. In Khan, only Lords Scott and Hoffman echoed the certainty of Slade, LJ in Aziz. All the same, it must be assumed that now the House of Lords has rejected Kirby, no matter how reluctantly, it is bad law.

B. Was The Refusal of a Reference ‘Less Favourable’?

Despite not receiving a reference the Norfolk Police invited Sergeant Khan for an interview, which he failed. It was common ground that had a reference been given, containing the Yorkshire Police’s low assessment of Sergeant Khan’s managerial skills, he may not have even made the interview stage. In other words, the Chief Constable argued, Khan was treated more, not less favourably. The House of Lords rejected that argument. Only Lords Hoffman and Scott discussed the matter. Lord Scott concluded (at para 76):

‘It cannot... be enough for s 2(1) purposes simply to show that the complainant has been treated differently.....I think it suffices if the complainant can reasonably say that he would have preferred not to have been treated differently.’

This approach has echoes of the discrimination case (under s 1 SDA) R v Birmingham City Council, ex parte EOC [1989] 1 AC 1156 where a local authority operated a policy of favouring boys in the admission to grammar schools. They argued that as there was no evidence that
grammar schools were better than the other schools, girls had not been less favourably treated. The House of Lords held that as the girls were denied a choice which they - and their parents - valued, on reasonable grounds, they had been treated less favourably. It would seem that the courts should not be too pedantic about this element. There must be more than just different treatment, but it is enough if the complainant perceives - reasonably - that he has been treated less favourably.

C. ‘By Reason That’

This is the controversial aspect of the case. The House of Lords reversed all the decisions below on this issue. A unanimous Court of Appeal thought they had applied the law as stated by the House of Lords in the recent case Nagarajan v LRT [1999] 4 All ER 65, (discussed [2000] 29 ILJ 304). In Nagarajan a four-to-one majority held that the phrase ‘by reason that’ should be given a straightforward causative interpretation, free from any conscious motivation on the defendant’s part. They relied on the interpretation given to section 1, SDA or RRA, which defines direct discrimination, in R v Birmingham City Council, ex parte EOC [1989] 1 AC 1156 and James v Eastleigh Council [1990] 2 AC 751. Section 1, SDA, defines direct discrimination as being treated less favourably on the grounds of sex. The House of Lords held in those cases that the ‘causative’ question raised by the phrase ‘on the grounds of’ should be resolved by a simple ‘but for’ test: would the complainant have received the same treatment from the defendant but for his or her sex? In Nagarajan the majority held that the phrase ‘by reason that’ was parallel to the phrase ‘on grounds of her sex’ (or ‘on racial grounds’) used in section 1. In particular Lord Steyn held (at 79) that this approach was also correct for section 2 because victimisation was as serious a mischief as direct discrimination and ‘common sense’ suggested that a tribunal should ask the ‘equally straightforward’ question: ‘Did the defendant treat the employee less favourably because of his knowledge of a protected act?’ Thus where an interview panel underrated an applicant (Mr Nagarajan) who had previously brought discrimination proceedings, it did not matter that they did so because they were either consciously, or subconsciously, motivated by his previous action. Of course Sergeant Khan argued that this simple causative test had to be resolved in his favour because but for bringing the discrimination claim (the protected act), he would have been given a reference. However, the House of Lords rejected his argument.

On the issue of causation Lord Nicholls (at para 29) stated that the phrase by reason that, ‘contrary to views sometimes stated’ does not raise a question of causation, which was a ‘slippery word’ that could relate to the ‘effective’ cause, or the ‘operative’ cause, or the ‘but for’ approach. He declared that:

‘...a causation exercise of this type is not required by either section 1(1)(a) [which defines direct discrimination] or section 2. The phrases on racial grounds [from s 1(1)(a)] and by reason that denote a different exercise: why did the alleged discriminator act as he did? What consciously or unconsciously, was his reason? Unlike causation, this is a subjective test’.

Lord Scott held (at para 77): ‘The proceedings [ie Khan’s racial discrimination proceedings] were the causa sine qua non. But the language used in section 2 is not the language of strict causation. The words by reason that suggest...that it is the real reason, the core reason, the causa causans, the
motive, for the treatment complained of that must be identified.’

In apparent contrast to Lord Nicholls, Lord Hoffman (at para 54) said that the issue was a question of causation, but that the causal questions raised by sections 1 and 2 ‘were not identical’ (at para 56). He explained this distinction by stating (at para 59):

‘...the [less favourable] treatment need not be, consciously or unconsciously, a response to the commencement of proceedings [i.e Khan’s racial discrimination proceedings]... It is true that an employee who had not commenced proceedings would not have been treated in the same way. Under section 1, one would have needed to go no further. Under section 2, however, the commencement of proceedings must be a reason for the treatment ...

There is obviously confusion over the precise meaning of the phrase by reason that. Lord Nicholls says it is not causative, Lord Hoffman said that it was. Lord Hutton’s position is unclear because he concurred with both Lord Nicholls and Lord Hoffman. Meanwhile Lord Scott said the phrase was one of not strict causation.

The reasoning becomes more obscure when read alongside the majority’s speeches in Nagarajan. Lord Nicholls - the only judge common to both cases - said in Khan (at para 29) that he explained in Nagarajan why the causative approach was not required. In fact, in Nagarajan, Lord Nicholls approved the ‘objective and not subjective’ approach applied to section 1 in EOC v Birmingham City Council, and again in James v Eastleigh BC, where Lord Goff specifically applied the ‘but for’ test. Lord Nicholls concluded in Nagarajan (at 71) ‘I can see no reason to apply a different approach to section 2’. In support of his decision, Lord Hoffman cited the following passage from Lord Steyn’s speech in Nagarajan (at 78):

‘[s 2]...contemplates that the discriminator had knowledge of the protected act and that such knowledge caused or influenced the discriminator to treat the victimised person less favourably...’

Unfortunately, in this part of his speech, Lord Steyn was merely repeating counsel’s submission (on the point that motivation could either conscious or subconscious). Lord Steyn went on to state (at 80) - in contrast to Lord Hoffman - that the ‘parallel provisions [in sections 1 and 2]...are readily capable of parallel meanings’ and so the causative approach - the ‘but for’ test - for section 1, was suitable for section 2.

The appeal in Nagarajan turned on whether it was enough that the employer’s motivation (in reacting to previous proceedings) was subconscious. The House of Lords, applying the ‘straightforward’ causative test, held that it was. Nothing said in Khan upsets the ratio decidendi of Nagarajan, which was that motivation could be either conscious or subconscious. The speeches in Khan at best side-stepped, and at worst ignored, the wider statements in Nagarajan concerning causation. Nevertheless, a unanimous House of Lords clearly rejected the ‘straightforward’ causative approach. And so, following Khan, that is what the law is not. The ‘but-for’ test is not suitable for cases of victimisation. But it is less easy to say what the law is.

The key to understanding that, so far as it is possible, lies in the decision of the whole House depending upon a fine distinction, between the bringing and existence of proceedings. To this end Lords Nicholls, Hoffman and Scott drew support from Cornelius v University College of Swansea [1987] IRLR 141. Here, Ms Cornelius brought proceedings against her employer under
the SDA and, pending the outcome, she was refused a transfer and access to the grievance procedure. Consequently she brought a separate action of victimisation. The Court of Appeal reasoned (at 145-146) that:

‘The existence of the proceedings plainly did influence [the employer’s] decisions. 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. But that had ... nothing to do with the appellant’s conduct in bringing proceedings under the Act.’

Lords Nicholls, Hoffman and Scott noted that the feature of this passage was that College had acted on the *existence* of the proceedings, not the *bringing* of them. Lord Mackay did not rely on *Cornelius*, but relied on the same distinction when holding (at 45):

‘It is clear that if the proceedings had been terminated when the request for a reference was made the obstacle to giving it would have been removed and I have no doubt that the chief officer has clearly established that...he did not refuse a reference by reason that Sergeant Khan had raised proceedings against him under the Act.’

By focussing on what would happen when the proceedings had finished, Lord Mackay revealed that he too distinguished between the *existence* of the proceedings and the event of Sergeant Khan bringing them.

The fine distinction between the *bringing* and *existing* of proceedings shows a drift away from the ‘straightforward’ approach adopted by the House of Lords in *Nagarajan*, where Lord Nicholls himself said (at 71): ‘... in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible.’ Khan may have defeated this distinction by adding a second protected act to his claim: under section 2(1)(c), RRA, he had ‘otherwise done anything under or by reference to this Act.’ As well as having *brought* proceedings, he was ‘otherwise’ maintaining them in existence.

Thus far it could be ventured that the *ratio decidendi* of *Khan* is that a defendant who acted by reason of the *existence*, and not the *bringing*, of the proceedings can not be liable under section 2(1)(a), RRA (by reason that the person has ‘brought proceedings...’). Standing alone, this proposition sabotages the purpose of the House’s own rejection of the *Kirby* comparator for proving less favourable treatment. Employers could simply argue that they responded to all proceedings in this way, whatever their nature. So long as the employer acted when proceedings were pending, virtually no claim of victimisation could succeed under section 2(1)(a).

However, Lord Nicholls added a further dimension when concluding (at para 31) that ‘Employers, acting reasonably and honestly, ought to be able to take steps to preserve their position in pending proceedings without laying themselves open to a charge of victimisation.’ Similar sentiments were expressed in the other speeches. Lord Mackay noted (at para 44) that the Chief Constable ‘acted in accordance with perfectly understandable advice.’ Lord Scott said (at para 80) that this approach still allowed for the case where the employer ‘singled out’ a worker for less favourable treatment but allowed ‘justice to be done to an employer who...would otherwise be placed...in an unacceptable Morton’s fork’. And Lord Hoffman observed (at para 59) that the Chief Constable’s act may have been ‘a reasonable response to the need to protect the employer’s interests as a party to litigation.’
It is now possible to qualify the *ratio* as being that there is no liability under section 2(1)(a), RRA, where the defendant acted, *reasonably and honestly*, by reason of the existence, and not the bringing, of proceedings. The qualification appears to safeguard the decision from abuse by employers who may otherwise use it, for example, to ’single out’ workers. However the qualification carries a series of problems.

First and most obviously, there is no such requirement in the legislation that for liability, the defendant *does not* act reasonably and honestly. Second, focussing on the predicament of the ‘reasonable and honest’ employer undermines the policy of the provisions, which is the removal of deterrents to enforcing the anti-discrimination legislation. The Law Lords’ speeches are littered with statements sympathetic to the employers’ dilemma. Nowhere did a judge express sympathy for the worker who - as well as having acted just as ‘reasonably and honestly’ as their employer - will have his or her career frozen for the duration (conceivably several years) of the proceedings, simply because they used anti-discrimination legislation. This decision places the worker in an unacceptable ‘Khan’s fork’, suffering either discrimination or a frozen career.

Whilst both the employer and the worker will find themselves in a difficult position, the provisions on victimisation are not aimed at resolving the employer’s predicament. Empirical research shows that victimisation is a serious problem in the workplace. (See for instance (1990) 30 *EOR* 23 where a study of 103 unsuccessful claimants revealed that over a half suffered a detriment of some sort following the action.) Accordingly Lord Steyn pronounced in *Nagarajan* (at 79) that victimisation was as serious a mischief as discrimination itself. It is now inconceivable, one hopes, that a tribunal would embark on such a diversion from the statutory wording and purpose in a case of discrimination under section 1, no matter how ‘reasonably and honestly’ the defendant had acted.

Third, this ’extra element’ of acting reasonably and honestly actually does little to save the decision from sabotaging the purpose of rejecting *Kirby*. It will be recalled (see above) that Lord Scott rejected *Kirby* because (at para 72) ’It would enable employers to victimise employees who brought race discrimination proceedings ...provided ....the employers were prepared similarly to victimise any employee who had the temerity to sue them for anything.’ In most cases though, employers will prove that they acted ‘reasonably and honestly’ by showing that the company normally treats in the same way, any worker who brings *any* proceedings. Indeed, that was the defence in *Khan*. And so the qualification does little to prevent this decision subverting the rejection of *Kirby*. Accordingly, employers can escape liability (once again) when, for example, suspending a worker on full pay, or refusing a transfer, promotion, access to a grievance procedure, or the usual - but discretionary - incremental pay rise or bonus. So long as all workers are equally ‘victimised’ pending the outcome of proceedings, a claim of victimisation will fail and Lord Scott’s words on the *Kirby* comparator count for little.

The fourth problem with the sentiments expressed is that they carry an indication that a tribunal should look for an *intent* to victimise - or simple vengeance - on the part of the employer. Under the provisions, an employer who acted reasonably and honestly, on ‘understandable advice’ and did not ’single out’ a worker for treatment, *can* be liable for victimisation. For instance, where several months into discrimination proceedings the employer announces, ‘I’ve had enough of this trial, it’s gone on far too long. All the claimant’s transfer requests are to be refused.’ Such an employer would rely on *Khan* stating that he reacted to the *existence*, not the *bringing*, of proceedings. If a tribunal then demands honest and reasonable behaviour it must find the employer liable. Yet the only difference between this example and *Khan* is vengeance, which should not be an ingredient for liability.
Lord Nicholls’ speech appeared to go further than that by including a *racial* motive. After approving *Cornelius*, he identified a ‘second strand’ to the case, noting that (at para 30) ‘the College’s behaviour had nothing to do with the bringing of proceedings *under the 1975 [Sex Discrimination] Act*. The decisions would have been the same, whatever the nature of the proceedings, if the subject matter had been allied to the content of the employee’s requests.’ (Lord Nicholls’ emphasis.) In other words, to be liable, the employer’s reason for acting has to be related to the discrimination legislation aspect of the protected act. This approach is wrong because it is actually identifying race, or sex, discrimination, and not victimisation. If, to prove a case of victimisation a claimant has to prove racial discrimination, then section 2 would be redundant. This is confirmed by section 3(1), (an interpretation section) which confines *racial* discrimination to section 1. (The litigant in person in *Cornelius* argued a similar line, cited at 144.) The danger of this judgement is that it may cause tribunals only to find victimisation where there is an intention to victimise, or worse, an intention to discriminate on racial, or other proscribed, grounds.

None of this is to say that intention, or motivation, *per se* should not be a factor. After all, the employer is part of the causal chain, or link between the protected act and the less favourable treatment. What goes through the employer must, presumably, go through his mind. But the real issue is, motivated by what? In *Aziz* (where the claimant was expelled for making secret tape recordings as evidence for claim of racial discrimination) it was held that the defendants were motivated by the breach of trust, even though the tape recordings were part of the protected act. In *Cornelius* and *Khan* the employer was motivated by the *existence* of the proceedings. These cases did not turn on an employer’s clean conscience or benign motive, but the *dividing* (in *Aziz*), or the *distinguishing* (in *Cornelius* and *Khan*), of the protected act.

Thus, an element of motivation *per se* need not curtail the simple causative approach expressed in *Nagarajan* and *James*. So long as the cause of the less favourable treatment is the protected act, taken without division or fine distinctions, motivation is a harmless ingredient. This does not impose a ‘strict liability’ upon defendants, where all that would be required is the less favourable treatment and the protected act. There remains a link between the two. So, for example, an employer, who knows that a worker has brought a complaint of sexual harassment, sacks that worker for an entirely separate incident of theft, would not liable for victimisation.

With respect, in making a fine distinction between the existence and bringing of proceedings and focussing on the ‘honest and reasonable’ employer’s predicament, the House of Lords in *Khan* have strayed from the wording and the purpose of the legislation. This being a House of Lords decision means that now the only remedy for claimants in *Khan*’s position lies in Parliament, or more realistically, European Community law.

**D. European Community Law**

The Equal Treatment Directive (76/207), which covers sex discrimination, does not, except for one specified instance (dismissal as a reaction to bringing a claim, art 7), expressly outlaw victimisation. However, cases falling outside art 7 may succeed under the general ambition of art 6, which provides that member states should ‘introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment...to pursue their claims by judicial process ....’ In *Coote v Granada* (C-185/97) [1998] ALL ER (EC) 865, the European Court of Justice held (at para 24) that art 6 outlawed measures taken by an employer *as a reaction to* proceedings for
discrimination under the Directive.

This formula was codified in the Race Discrimination Directive (2000/43). Article 9 demands that domestic law must ‘protect persons from any adverse treatment or ... consequence as a reaction to a complaint or to legal proceedings ....’.

Whether or not this could help a claimant in Khan’s position depends on the ECJ’s interpretation of the phrase ‘as a reaction to’. To this end, some guidance can be drawn from the ECJ judgement in Coote.

Mrs Coote sued her employer following her dismissal for being pregnant. Subsequently, and after those proceedings were dead, the employer refused to give her a reference and Mrs Coote sued again, this time for victimisation. An industrial tribunal ruled that section 6, SDA extended discrimination only so far as persons employed by the defendant. As Mrs Coote no longer worked for Granada when they refused the reference, she was not protected by the Act. The ECJ, under the Equal Treatment Directive, took a different view, holding that (at para 24): ‘Fear of such measures ... might deter workers who considered themselves the victims of discrimination from pursuing their claims ... and would consequently ... seriously ... jeopardise implementation of the aim pursued by the Directive.’ By alluding to the ‘aim’ of the legislation the ECJ are more concerned with its purpose than technicalities. By contrast, the British courts have doggedly refused to follow Coote in any matter bar that strictly covered by the judgement (ie post-employment victimisation of those bringing proceedings for sex discrimination). (See Rhys-Harper v Relaxation Group [2001] IRLR 460 (sex discrimination post-employment) and D’Souza v Lambeth LB [2001] EWCA Civ 794 (victimisation post-employment under the RRA).

Of course, these cases are not directly relevant to Khan’s. He was refused a reference whilst still employed and whilst proceedings were pending. But they do illustrate the difference in approach. The British courts are concerned with the precise wording of legislation (and of the ECJ judgement in Coote) whilst the ECJ concentrated on the purpose of the legislation. It identified the purpose of the Equal Treatment Directive as achieving the principle of equal treatment by judicial process. To this end, the ECJ reasoned, workers should not fear measures that would deter them from using the legislation. Following Khan any worker using the anti-discrimination legislation can have his or her career frozen, possibly for years, pending proceedings, something that undermines the purpose of the legislation. It would seem that a case materially the same as Khan, where the existing proceedings were for sex discrimination, could succeed in the ECJ. This is, of course, no comfort for Sergeant Khan, whose case is not covered by the Equal Treatment Directive.

4. CONCLUSION

At present the law on victimisation appears to be thus. For establishing less favourable treatment the claimant must be compared with a person who has not done the protected act, even in a partial sense. It is not enough that the claimant was treated differently from that person, but it is sufficient if the claimant perceived, reasonably, that the treatment was less favourable. However, on the ‘causative’ element, an employer may argue that he reacted, reasonably and honestly, to the existence - not the bringing - of proceedings in order to protect his position. And so a claimant may be treated less favourably for the duration of the proceedings. This places a victim of discrimination in a ’Khan’s Fork’. It may be that the employer’s argument will be defeated if the claim includes a section 2(1)(c) protected act, which should cover the existence of proceedings.
An employer may also argue that he reacted to a particular part of the protected act, *eg* a breach of confidence (*Aziz*). It is probable that the ECJ would take a different, purposive, approach and protect the worker in such cases, irrespective of the technicalities. But at present, EC legislation only protects sex discrimination. It will extend to race by June 2003 and religion or belief, and sexual orientation by December 2003. The UK Government has negotiated extensions for age (2006) and disability (2004) discrimination.