Case No: A2/2004/1988; A2/2004/1850

Neutral Citation Number: [2005] EWCA Civ 977
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
(THE HON MRS JUSTICE COX)
UKEAT/0952/03/ILB

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday, 29th July 2005

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE JONATHAN PARKER
LORD JUSTICE LLOYD

– –

Between :

ST HELENS MBC	**Appellant**
– and –	
DERBYSHIRE & ORS	**Respondent**

– –

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

– –

MR CHRISTOPHER JEANS QC and MR SIMON GORTON (instructed by St Helens MBC) for the Appellant
MR JOHN HENDY QC and MR DAMIEN BROWN (instructed by Thompsons) for the Respondents

– –

Judgment
As Approved by the Court

Crown Copyright ©

Lord Justice Mummery :

Introduction

1. The setting of this appeal is the sensitive area of alleged "victimisation discrimination" by discrimination" by an employer in the course of litigation brought by employees to enforce their statutory employment rights. In this case equal pay claims against the employer under section 2 of the Equal Pay Act 1970 were pending in the employment tribunal. The bringing of the proceedings by the employees was "a protected act" of each each employee in the sense that employees are entitled to protection not only against abuse of process (as other litigants are), but also, by virtue of provisions in the Sex Discrimination Act 1975, against the infliction of less favourable treatment by reason of a of a protected act.

2. As Lord Nicholls explained in **Shamoon v. Chief Constable of the RUC** [2003] ICR 337 (paragraph 5) protection against victimisation is "an essential ancillary safeguard" for safeguard" for employment rights−

> "..×..Persons who exercise their statutory rights are not to be penalised for doing doing so. Employers and others who retaliate in this way are guilty of discrimination. The victimisation provisions adopt substantially the same structure as the direct discrimination provisions, save only that the proscribed act act is different. In cases of direct discrimination, the proscribed ground is sex, or or whatever. In cases of victimisation the proscribed ground is that the claimant claimant committed one of the "protected acts"; for instance, that the claimant had had brought proceedings under the Act. Subject to this necessary adjustment, the the definition of victimisation calls for a similar "less favourable treatment" comparison. In the case of direct sex discrimination the comparison is between between the treatment afforded to the claimant woman and that afforded to a man. man. In the case of victimisation the comparison is between the treatment afforded to the claimant and the treatment afforded to a person who has not committed a protected act."

3. The application of the provisions protecting employees from victimisation requires the the court to perform a delicate balancing feat: on the one hand, the employer, as a litigant, litigant, is entitled to take reasonable steps to protect his legitimate litigation interests; on on the other hand, the employee is entitled not to be treated less favourably for bringing bringing discrimination proceedings against the employer. Difficulties in application of of the provisions stem from the tensions inherent in the antagonistic litigation situation situation identified by Lord Hoffmann in **Chief Constable of West Yorkshire Police v. v. Khan** [2001] ICR 1065 (a case on the application of the similar victimisation provisions in section 2 of the Race Relations Act 1976 to an employer's refusal of a reference for an employee, whose complaint of race discrimination was pending)−

> "59. ×.once proceedings have been commenced, a new relationship is created between the parties. They are not only employer and employee but also adversaries in litigation. The existence of that adversarial relationship may reasonably cause the employer to behave in a way which treats the employee less

less favourably than someone who has not commenced such proceedings. But the treatment need not be, consciously or unconsciously, a response to the commencement of proceedings. It may simply be a reasonable response to the need to protect the employer's interests as a party to the litigation."

The appeal

4. This appeal is from the order of the Employment Appeal Tribunal (Cox J presiding) on 23 July 2004 ([2004] IRLR 851). It dismissed an appeal by St Helens Metropolitan Borough Council (the Council) from the decision of the employment tribunal (extended reasons sent to the parties on 25 September 2003) upholding complaint by the applicants of victimisation contrary to section 4 of the Sex Discrimination Act 1975 (the 1975Act).

5. Pill LJ granted permission to appeal both the decision of 23 July 2004 and the earlier decision of the Employment Appeal Tribunal (HHJ Ansell presiding) at a preliminary hearing of the appeal on 13 January 2004.

The legislation

6. Section 4 of the 1975 Act is concerned with discrimination by way of victimisation in the area of sex discrimination. It provides−

"(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 or would treat 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 the Equal Pay Act 1970×

or by reason that the discriminator knows the person victimised intends to do any of those things, or suspects the person victimised has done, or intends to do, any of them."

7. Section 6 (2)(b) of the 1975 Act provides that it is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her by, among other things, "subjecting her to any detriment."

The facts

8. 510 female staff employed by Council as catering staff in its school meals service brought equal pay claims against the Council in the autumn of 1998. There was a settlement of the claims with the majority (470) of the staff, who agreed to accept a lump sum to be shared out amongst them. 39 employee applicants (the Applicants) did not join in the settlement. Their claims proceeded to a successful hearing in the employment tribunal.

9. The Applicants' claims for victimisation are founded on the sending of 2 letters by Mr Sanderson, the Council's acting director of environmental protection on 19 January 2001, just 2 months before the hearing of the equal pay claims fixed for 19 March 2001. One letter was sent to all the catering staff, including the Applicants. The other letter was sent directly to each of the Applicants addressed by name. The receipt of the letters by the Applicants led to complaints of victimisation in applications presented by them to the employment tribunal on 1 February 2001. Copies of the letters were attached to the applications. They are copied in full in the schedule to the judgments on this appeal, as they are central to the case and it is difficult to summarise them or even to quote from them selectively without diminishing or distorting their overall impact on the reader.

10. The essence of the complaint is set out under Box 11 of the ET1 forms of the Applicants–

> "The receipt of these letters has caused me considerable distress, concern and upset. I feel that my employers are trying to attack me for bringing my claim, and also to blame me for the consequences if my claim is successful.
>
> I am extremely concerned about relations at work with other members of staff in the light of the letter that has been sent to them. A number of members of staff have accepted offers previously made by my employers, and I fear that this correspondence is calculated to turn those members of staff against me and my fellow workers who are pursuing their equal pay claim.
>
> Furthermore I do not consider it right that I should have been asked to attend a meeting to discuss my claim without even being offered the assistance of my solicitor or Trade Union representative, in the event I did not attend the meeting.
>
> I have also been informed by my solicitor that it is not appropriate for my employers to correspond with me directly about my claim and I do not wish to receive any such further correspondence."

11. Some of the Applicants gave evidence to the employment tribunal about their reactions to the letters, in particular how the letter directly addressed to them individually was seen as an attempt to persuade them to give up their equal pay claims, to accept the offer that had previously been made to them through their union and to offload on to them responsibility for the consequences of their claims succeeding.

12. The position of the Council is that it is a startling proposition that an employer facing, as it was, mass litigation from employees, acted unlawfully towards them by writing careful and rational letters, inviting them to accept settlement offers, which had been accepted by the majority, and pointing out the genuinely perceived and potentially serious consequences for the work force as a whole, if the employees succeeded in the litigation. The purpose of the letters, which were written in respectful terms and acknowledged the right of the Applicants to pursue their claims in the tribunal rather than accept the Council's offer of settlement, was to inform the Applicants of the situation, to get the Applicants to face facts and to take a responsible view of reality. Indeed, the Council contends that it would be failing in its duties as a responsible employer if it did not point out that a proposed course of action would or could lead to a retrenchment of the service

in which they were employed and to redundancies. If they did not take this step they would be liable to be criticised by those who might later be made redundant. Any pressure or discomfort felt by the Applicants as a result of the letters was inherent in mass litigation of this kind and did not amount in law to unlawful victimisation.

Employment tribunal decision

13. The question for the tribunal was whether the sending of the two letters breached sections 4 and 6 of the 1975 Act. The claims were first considered by the employment tribunal in May 2001. By a majority the claims for victimisation were dismissed. The Applicants then appealed successfully to the Employment Appeal Tribunal in November 2002. The appeal was allowed and the matter was remitted to a fresh employment tribunal for re−hearing to consider the questions of less favourable treatment, detriment and the reason for any less favourable treatment.

14. The second employment tribunal upheld the victimisation claims unanimously. The tribunal described the letters as "carefully written", rational in tone and sensible in much of their content. The letters then told each Applicant personally that

> " ×.if their tribunal complaint continued, that might well do serious harm to the service and the employment of themselves and their colleagues. The colleagues were given a similar message, in particular the warning about school meals and the future for jobs."

15. The tribunal found as a fact that the letters caused distress to at least some of the Applicants and incurred for them some odium.

16. The tribunal's reasons for allowing the claims should be quoted in full, as it is difficult to keep separate the different elements built into the single question mentioned in paragraph 13 above. The choice of a comparator, the less favourable treatment, the suffering of detriment and the reason for the less favourable treatment are all interactive aspects of the single question whether the sending of the letters was victimisation of the Applicants.

17. The Council contends that the reasons given by the tribunal contain errors of law on most aspects of the construction of sections 4 and 6 of the 1975 Act, which should lead this court to allow its appeal and to dismiss the claims of the Applicants. I quote from the relevant parts of the extended reasons challenged on this appeal.

> "4. (a) ..
> (b)
> (c) ×.The question is whether the 2 letters amounted to treating the applicants less favourably than a person who has not brought and continued equal pay proceedings.
>
> (d) Did the respondents subject any applicant to a detriment? The answer was the same for all, since they all alleged the same detriment. We found that each

applicant did suffer a detriment. Mr Gorton for the respondents asked pertinently "How can it be victimisation to merely point out what a reasonably held belief of a party is in connexion with the prosecution of a claim?"(he was considering particularly the question of detriment). Here is our answer. The letter of 19 January 2001 contained what was effectively a threat. It spelt out a danger that the applicants might deprive children of school dinners, and that they might cause redundancies among their colleagues. It amounted to an attempt to induce the acquiescence of individuals despite the view of their union. It was more than a matter–of–fact reminder of what might happen if they went on with a complaint. A professional representative can be expected to respond calmly to such a letter. But here was a direct approach to each individual. A letter pointing to the likelihood of dire, unpopular consequences is likely to frighten one not accustomed to legal controversy. It will provoke, not a dispassionate balancing of strengths and weaknesses, but fear and perhaps panic. It is directed against people who were in no position to debate the accuracy of the respondents' pessimistic prognostications. The reaction to such a letter may be, even where there is a well justified belief in the justice of one's case, surrender induced by fear, fear of public odium or the reproaches of colleagues. Such a reaction, although prompted by emotion, is reasonable in the sense that it is a normal, sane human response to the prospect of an unpleasant consequence realistically perceived. Thus the letter was intimidating. The intimidation was such as to affect the applicants but not the others who had settled their complaints (not in the same way at any rate): the respondents treated the applicants less favourably than they treated those others.

(e) Here was a claim by women to be treated equally with men. Were the Tribunal proceedings the occasion of the less favourable treatment? They were. Here is how we reasoned that conclusion. We observed the distinction between, on the one hand, the respondents' right to protect themselves in litigation, and, on the other hand, detrimental treatment as a response to the commencement of proceedings. That distinction is made in [**Khan].** Here, the respondents did not, as they did in **Khan's** case, merely seek to avoid prejudicing their position in the litigation. They wanted the applicants to abandon their claims. They were reacting, if not to the commencement of proceedings, certainly to their continuance: they did not want to abide the event; they wanted to prevent an adjudication. The Tribunal case was not simply the setting for the detriment; its continuance was the efficient cause."

Procedural point.

18. A procedural point was taken on behalf of the Applicants as to the grounds that the Council was entitled to argue its appeal, having regard to the limited grounds on which it had been allowed to argue its appeal in the Employment Appeal Tribunal. It was objected that the Council had resurrected points on this appeal, which it had not been allowed to argue at the full hearing in the Employment Appeal Tribunal. At the preliminary hearing in the Appeal Tribunal the appeal was allowed to proceed to a full hearing only on the comparator and less favourable treatment issues, but not on the ground of perversity or on the point of the reason for sending the letters to the Applicants and to their work colleagues. That preliminary decision was not appealed at the time. At the full hearing in the Appeal Tribunal, it was held that neither of those points could be argued and that the order made at the preliminary hearing should not be varied under a "liberty to apply"

provision in order to allow them to be argued. Pill LJ subsequently granted permission to appeal to this court against the order made at the preliminary hearing. An application has been made by the Council for permission to amend its grounds of appeal.

19. I would grant permission to amend the grounds of appeal, so that this court can hear full argument on all of the points on which it is contended that the employment tribunal erred in law. The jurisdiction of this court depends on there being an error of law in the decision of, or in the proceedings before, the employment tribunal. This court is not bound by the decisions of the Appeal Tribunal, whether made at the preliminary hearing or at the full hearing, although its decisions are, of course, valuable and are accorded respect by this court in deciding whether the employment tribunal erred in law. The preliminary hearing procedure in the Employment Appeal Tribunal is essential for sifting out at an early stage those appeals which do not raise any point of law, in particular perversity challenges which are commonly made, but rarely have any chance of succeeding. Nothing in this judgment is intended to question or limit the powers of the Appeal Tribunal to use the preliminary hearing procedure to limit the grounds of appeal. In this case, however, the point is whether sections 4 and 6(2)(b) of the 1975 Act were correctly construed and applied to the facts found by the tribunal. As has been observed in the authorities, it is sometimes impossible to keep separate the interlinking arguments on the connected issues of choice of comparator, less favourable treatment, detriment and the reason for the treatment.

20. In **Shamoon,** for example, Lord Nicholls said this of the tribunal's attempt to deal sequentially, rather than simultaneously, with the "less favourable treatment" issue and "the reason why" issue–

> "8. No doubt there are cases where it is convenient and helpful to adopt this two step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable issue cannot be resolved without at the same time deciding the reason why issue. The two issues are intertwined."

21. Lord Nicholls went on to say (paragraph 12) that tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the claimant. In these circumstances I question whether it is sensible in most cases of victimisation to limit the grounds of appeal in the Appeal Tribunal or in this court, when the points raised tend, as they do in these provisions, to overlap. Perversity as a ground of appeal is easier to exclude at a preliminary hearing or on an application for permission to appeal than the various interactive aspects of the statutory provisions.

Comparator point.

22. The employment tribunal held that the appropriate comparators were the persons who had not brought or continued equal pay claims. The Council initially took the point that the proper comparator was the person who has not brought proceedings at all (i.e.

non−litigants) rather than fellow litigants (i.e. those who brought proceedings and then settled them). In my judgment, there is no substance in this criticism of the employment tribunal decision. Mr Christopher Jeans QC appearing for the Council was right not to press it at the hearing. The proper comparators are those employees in the Council's catering service who were not making equal pay claims against the Council at the time of the letters. That group includes ex−litigants, namely the employees who have settled their equal pay proceedings against the Council, as well as non−litigants, who had never brought equal pay proceedings against the Council. Although the ex−litigants had brought proceedings, they were no longer in the same position of the Applicants, who had not settled but were still bringing proceedings. Those who had settled were, at the time of the letters, in the same position as those who have never brought proceedings: they were all non−litigants employed in the Council's catering service and were not committing the protected act of bringing equal pay proceedings against the Council. The Applicants were still committing a protected act, that is continuing to bring the equal pay proceedings. In order to decide whether the Applicants were treated less favourably with regard to the letters by reason of that protected act it is common ground that it is necessary to compare their circumstances with those of the employees, who were not bringing the equal pay proceedings.

Victimisation: discussion and conclusions

23. Was the sending of the factually correct letters " less favourable treatment" of the Applicants, by reason of the " protected act" in still bringing equal pay proceedings, than of the employees who were no longer bringing equal pay proceedings? Mr Jeans submitted that the employment tribunal had erred in law in failing to deal at all with the point of "less favourable treatment" of the Applicants. The tribunal had, he said, missed out a vital step in their consideration of the case. The employment tribunal proceeded straight from the choice of comparator in paragraph 4(c) of the extended reasons to the question of detriment in paragraph 4(d).

24. In his skeleton argument Mr Jeans presented his submissions on "less favourable treatment," "detriment" and "by reason that" under distinct headings, as though they were separate issues rather than different aspects of the same point. He accepted, however, that there was some overlap between the points. I find it more convenient and realistic to deal with his points as interactive aspects of the single question whether the sending of the letters was victimisation of the Applicants.

Less favourable treatment point

25. On the aspect of "less favourable treatment" I am not impressed by the Council's argument that none of the Applicants was treated less favourably than either those who had settled their claims or those who had never brought claims. According to the Council the sending of the letters was not "less favourable treatment" of the Applicants, as, even if it was *different* treatment of the Applicants than of their comparators, the Applicants' complaint amounted to nothing more than that they were upset by the writing of letters to them about the litigation. There were no grounds for a complaint about different treatment: it was inevitable in litigation that a claimant would be treated differently from a non−claimant. There is, it was argued, no victimisation in an employer taking a

negotiating stance in the wider context of running his business and discharging his responsibilities to his other employees.

26. The complaint of less favourable treatment and detriment was, the Council submitted, no more that a "sense of unjustified grievance," which was not actionable: **Shamoon v. Chief Constable of the RUC** (above) at paragraph 35. Applying the objective test of what view a reasonable worker would or could have taken of the letters sent direct by the Council in the course of the litigation, there was no material disadvantage to the Applicants. The dislike of pressure from others to settle the claims or of being warned of the consequences of a course of action were not, from an objective point of view, a material disadvantage, so as to constitute less favourable treatment or detriment.

27. In my judgment, the employment tribunal was entitled to conclude that the Applicants were subjected to treatment, which was less favourable and detrimental, and which was not suffered by the comparators in like circumstances. As the Applicants were still bringing their equal pay claims against the Council, they were vulnerable to pressures from the Council to abandon or settle their claims. The pressures could take the form of inducing fear of the consequences of successful claims, as asserted by the Council to them and to their colleagues in the letters. In particular, the pressure was liable to be increased by the concerted action of sending letters, which contained alarming assertions about an increase in the cost of school meals, the closure of the service and loss of jobs, direct to the Applicants individually and by sending letters direct to their colleagues who had settled. The more usual and acceptable means of communication would have been with the Applicants' union or to their solicitors. The receipt of the letters by the Applicants in the period immediately leading up to the hearing and the consequent distress of the Applicants is capable in law of amounting to less favourable treatment of and detriment to the Applicants. As employees of the Council they were entitled to protection from less favourable treatment and detriment while they were doing a protected act in continuing to bring the equal pay proceedings against the Council.

The detriment point

28. "Detriment" is not limited to physical or economic consequences of less favourable treatment. The tribunal was entitled to conclude that the "direct approach" to the Applicants adopted by the Council in sending the letters to them close to the hearing provoked a reaction in them (as distinct from the reaction which would have been produced in their professional advisers) of fear, threat and intimidation and that their reaction was, in all the circumstances, a reasonable one.

29. This result does not inhibit the effective conduct of the Council's defence of the equal pay claims and the legitimate exercise of their litigation rights. It would not, in my view, have been a breach of sections 4 and 6 of the 1975 Act for the Council to send the letters to the Applicants' union or to their solicitors. Indeed, that is what one would normally have expected the Council to do instead of making direct approaches of that kind to the Applicants personally. It is true that similar points had probably already been made to the union in negotiations, that the union was supporting the equal pay claims and that the union was itself in a somewhat ambiguous position after the majority of the employees

represented by it had settled while others were still fighting on. Those factors do not, however, diminish the impact that the letters written personally to the Applicants at that time would be likely to have on them.

"By reason that"point

30. The remaining aspect of victimisation is whether the letters were sent "by reason that" the Applicants brought equal pay proceedings against the Council. On this point, which is a difficult one, I have the misfortune to differ from Jonathan Parker and Lloyd LJJ. In their judgments, which I have read in draft, they correctly cite **Khan** on this point**.** The House of Lords drew a distinction in **Khan** between the less favourable treatment of an employee which was attributable, on the one hand, to the existence of the equal pay proceedings and, on the other hand, to the bringing of the proceedings. It recognised that, as a matter of construction of the victimisation provisions, an employer is entitled to act honestly and reasonably in the defence of equal pay proceedings without being exposed to liability for victimisation of the claimant employee.

31. I agree that in this case the act of the Council, which is alleged to constitute victimisation, is directly related to the equal pay proceedings. The Council wanted the Applicants to agree to a compromise of the proceedings. The Council was entitled to protect its position in the proceedings by taking reasonable steps to achieve a settlement of the equal pay claims continuing against it.

32. I do not agree, however, that there was an error of law on the "reason" point in the decision of the employment tribunal, in particular paragraph 4(e) of the extended reasons quoted in paragraph 17 above. The extended reasons should be read as a whole. As already indicated, the findings of fact and the reasons given separately under the various aspects of victimisation are all interconnected. Further, an appellate court should not be over–critical in its treatment of the reasons given by the employment tribunal. The question is whether, on a fair and reasonable reading of the reasons as a whole, they contain an error of law.

33. The Council contends that the employment tribunal erred in wrongly equating "reason" with "cause." As Lord Nicholls pointed out in **Khan** (see above at paragraph 29) the exercise set by the expression "by reason that" was not the same as a legal conclusion on causation. It was a different exercise, which involved considering a subjective question as to the reason why the discriminator acted as he did. I would add that that is a question of fact for the employment tribunal.

34. The tribunal, it was also contended, wrongly applied a causation approach ("efficient cause") in asking whether the writing of the letters was caused by or was the occasion of the Applicants' equal pay proceedings. It failed to address the fundamental question whether the reason for sending the letters was that proceedings had been brought *under the 1970 Act* or whether the Council would have acted in the same way in proceedings not brought under the 1970 Act, for example, mass contractual claims, which would not be covered by section 4 of the 1975 Act. See paragraph 30 of the speech of Lord Nicholls

in **Khan.** The reason for the less favourable treatment must relate to the fact that the proceedings had been brought by the employees *under the Equal Pay Act 1970* . That requirement would not be satisfied if the reaction of the employer in sending the letters would have been the same in the case of proceedings not brought under that Act.

35. The Council contends that the bringing of the proceedings under the Equal Pay Act was not the reason for (or the cause of) sending the letters. Its reason for sending the letters was concern about the effects of the success of the proceedings on the future of the school meals service, the financial difficulties to be faced and the protection of their litigation position in the existing proceedings.

36. I agree that the Council's entitlement to take reasonable steps to protect its position in the litigation, such as by seeking to settle the Applicants' equal pay claims without rendering itself liable for victimisation, included pointing out the consequences of continuing the proceedings. The Council's arguments on this point do not, however, take proper account of the way the Council treated the Applicants in its attempt to achieve a settlement.

37. In my judgment, it was relevant for the tribunal, when making its findings of fact about the Council's reason for sending the letters, to take into account all the circumstances, as well as the contents, of the letters. The circumstances included the timing of the letters and the respective situation of the Council and the recipients of the letters at that time. The tribunal cited **Khan** on the reason point. It was aware of the important distinction drawn in it.

38. The tribunal's findings on the reason for sending the letters are clear. Even though the Applicants had legal representation, the Council sent the letters direct to each individual Applicant. The letters seeking a settlement were coupled with letters sent to the Applicants' colleagues who had already settled. There was no need for the Council to communicate with them for settlement purposes. All the letters were sent shortly before the hearing. The Council's object was to get the Applicants' agreement , despite the view of their union, not to go on with the equal pay case they had brought against the Council and which their colleagues making similar equal pay claims had already settled. The tribunal concluded that the letters had an intimidating effect on those bringing the equal pay claims who had not settled. Such letters would not have had that effect on a claimant who had settled. The letters also had a different effect on the individual Applicants than they would have had on the legal representatives of the Applicants.

39. The critical point is that, in determining the Council's reason for sending the letters, the tribunal looked beyond the contents of the letters to all the surrounding circumstances. It was entitled to do so and to conclude from all the circumstances that the Council's reason for sending the letters was that the Applicants had brought (and were still bringing) the equal pay proceedings against them. For that purpose the Council used means aimed at persuading the Applicants to abandon the equal pay proceedings rather than have them tried by the tribunal. Settlements are, of course, intended to avoid adjudication. But the objection is not to the Council seeking a settlement of the proceedings brought by the Applicants. It is to the particular means by which it sought to achieve the settlement. It is

reasonably clear from the extended reasons, when read as a whole, that the tribunal did not regard the Council's treatment of the Applicants as a reasonable means of protecting its interests in the litigation. The Council could have protected its legitimate interests in the conduct of its defence to the litigation by seeking to achieve a settlement with those bringing proceedings against them by other means that were reasonable, such as negotiations with the Applicants' union or their legal representatives. The Council went further than was reasonable as a means of protecting its interests in the existing litigation and the reason for it doing so was, the tribunal found, that the Applicants had brought the equal pay claims against the Council and were continuing to bring them.

Result

40. In my judgment, there was no error of law in the tribunal's decision on the "reason" point or on any other point. I would dismiss the appeal

Lord Justice Jonathan Parker:

41. I agree that the Council should have permission to amend its Appellant's Notice, for the reasons given by Mummery LJ. On the substance of the appeal, however, I have the misfortune to differ from my Lord, whose judgment I have had the advantage of reading in draft. I would allow this appeal.

42. The Council will be guilty of discrimination by way of victimisation under section 4 of the Sex Discrimination Act 1975 ("the 1975 Act") if '*in any circumstances relevant for the purposes of any provision of*' the 1975 Act it treated the respondents '*less favourably*' than in those circumstances it would treat '*other persons*'; and it did so '*by reason that [the respondents have] × brought proceedings against [the Council] × under × the Equal Pay Act 1970*'.

43. Essentially, there is a single issue, viz: Did the respondents, on the proscribed ground, receive less favourable treatment than others? (see per Lord Nicholls in *Shamoon* (paragraph 8)). However, since section 4 comprises a number of elements (albeit they are to a significant extent interlinking), in addressing that single issue some degree of separate analysis of those elements seems to me to be inevitable.

'other persons'

44. For my part, I would have thought it arguable that the appropriate comparators in the circumstances of the instant case (in so far as relevant for the purposes of the 1975 Act) were employees who had not brought such proceedings (i.e. excluding former litigants who had settled their claims). However, before us, Mr Jeans QC did not challenge the Employment Tribunal's identification of such '*other persons*' (the comparators) in paragraph 4(c) of its Decision as persons:

> "× who had not brought *and continued* equal pay proceedings". (My emphasis)

45. I am accordingly content to proceed on that basis.

'less favourably'

46. I agree with Mummery LJ (see paragraphs 27 and 28 above) that the Employment Tribunal's findings as to detriment (in paragraph 4(d) of its Decision) were findings which it was entitled to make, and which are unchallengeable in this court.

'by reason that [the respondents have] brought proceedings×'

47. This, in my judgment, is where the problem arises.

48. In *Cornelius v. University College of Swansea [1987] IRLR 141* and *Khan* this court and the House of Lords respectively recognised a distinction between the *commencement* of proceedings and the *continuance* of proceedings, once commenced (i.e. the fact that the parties are not only employer and employee but also adversaries in litigation: see per Lord Hoffmann in *Khan* at paragraph 59). In *Khan* the House of Lords recognised that in the context of that "adversarial relationship" (see *ibid.*), an employer has a degree of latitude in treating an employee in a way which might, absent that relationship, amount to discrimination by way of victimisation. As Lord Nicholls said in *Khan* (paragraph 31):

> "× Employers, acting honestly and reasonably, ought to be able to take steps to preserve their position in pending discrimination proceedings without laying themselves open to a charge of victimisation. This accords with the spirit and purpose of the Act. Moreover, the statute accommodates this approach without any straining of language. An employer who conducts himself in this way is not doing so because of the fact that the complainant has brought discrimination proceedings. He is doing so because, currently and temporarily, he needs to take steps to preserve his position in the outstanding proceedings. Protected act (a) [in the instant case, the bringing of proceedings under the 1970 Act] × cannot have been intended to prejudice an employer's proper conduct of his defence, so long as he acts honestly and reasonably. Acting within this limit, he cannot be regarded as discriminating by way of victimisation against the employee who brought the proceedings."

49. In *Cornelius* and in *Khan* , the treatment complained of was motivated solely by the employer's desire to protect its position in the pending proceedings. In each case the employer honestly and reasonably feared that if it were to accede to the employee's request it would prejudice its defence of the proceedings. However, I can for my part see no reason in principle why the latitude to be extended to an employer in the context of the adversarial relationship between employer and employee resulting from pending proceedings should not include honest and reasonable attempts on the employer's part to compromise the proceedings. That too seems to me to be in full accord with the spirit and purpose of the 1975 Act. I accordingly agree with Lloyd LJ (paragraph 75 below)

that the mere fact that the employer's objective is to compromise the proceedings is not sufficient to render his conduct in pursuit of that objective discriminatory.

50. The Employment Tribunal addressed the '*by reason that* × ' point in paragraph 4(e) of its Decision, to which I now turn.

51. In paragraph 4(e) the Employment Tribunal distinguished *Khan* on the footing that whereas in *Khan* the employers were "merely seeking to avoid prejudicing their position in the litigation", in the instant case the Council "wanted the applicants to abandon their claims". However, that is not in my judgment a relevant distinction. In the first place, any defendant in hostile proceedings will be likely to want the claimant to abandon his claim (and there can be little doubt that the defendants in *Cornelius* and *Khan* wanted that). Secondly, as I have already concluded, an attempt by a defendant employer to compromise pending proceedings brought against it by an employee does not (in my judgment) necessarily amount to discrimination by way of victimisation of the claimant employee. I accordingly agree with Lloyd LJ that in this respect the Employment Tribunal erred in law.

52. The Employment Tribunal continued (in paragraph 4(e):

> "They were reacting, if not to the commencement of proceedings, *certainly to their continuance* : they did not want to abide the event; they wanted to prevent an adjudication. The Tribunal case was not simply the setting for the detriment: *its continuance was the efficient cause* ." (My emphasis)

53. In my judgment, in its references in that passage to the *continuance* of the proceedings the Employment Tribunal made a further error of law in that it overlooked the distinction drawn in *Cornelius* and *Khan* , to which I referred earlier, between the commencement of proceedings and the continuance of proceedings, once commenced.

54. I therefore agree with Lloyd LJ that, applying *Khan* , the question at issue is whether the conduct complained of falls within the description of an honest and reasonable attempt by the Council to compromise the proceedings.

55. I confess to finding some difficulty in reconciling the objective test of 'honest and reasonable' (which, as Lloyd LJ points out, is nowhere to be found in terms in the legislation) with the requirement for subjective intention or motive which (as the House of Lords held in *Khan* : see per Lord Nicholls at paragraph 29) is implicit in the statutory expression '*by reason that* × '. Possibly the reconciliation lies in the fact that if the employer's attempt to compromise the proceedings is not (objectively) 'honest and reasonable', it will be that much easier to draw the inference that the employer's real reason for treating the employee less favourably was not the continuance of the proceedings but their commencement. However that may be, *Khan* establishes the existence of an 'honest and reasonable' test, and (for reasons given earlier) that test is in my judgment applicable to attempts to compromise pending proceedings as it is to acts

done by the employer with a view to protecting its position as defendant in the proceedings.

56. The Employment Tribunal having concluded (in paragraph 4(e)) that an attempt to compromise the proceedings fell outside the latitude allowed to an employer engaged in continuing litigation brought against it by an employee (as established by *Khan*), it was unnecessary for it to address in terms the question whether the conduct complained of was an honest and reasonable attempt by the Council to compromise the proceedings, and it did not do so. On the other hand, in paragraph 4(d) it made a number of findings on the issue of detriment, including a finding that the conduct complained of:

> "× amounted to an attempt to induce the acquiescence of individuals despite the view of their union".

57. The question therefore arises whether those findings can or should be treated as findings that in conducting itself in the manner complained of the Council did not act honestly and reasonably.

58. In my judgment, however, it would be unjust to the Council to seek to correct the Employment Tribunal's errors of law by (in effect) recasting its findings in that way. In the first place there can in my judgment be no question of implying any finding of dishonesty on the part of the Council, so the only question could be whether the Employment Tribunal could be said to have found, implicitly, that the Council acted unreasonably. As to that, in the light of its comments about the letters in paragraph 3(c) of its Decision I am unable to conclude that it made any such implicit finding. In particular, I can see nothing necessarily unreasonable in attempting to persuade the respondents to agree to the compromise "despite the view of their union".

59. For those reasons, I would allow this appeal and remit the case to the Employment Tribunal. I would wish to hear counsel as to the precise form of order.

Lord Justice Lloyd:

60. I do not need to set out the facts or the legislation relevant to this case, which are referred to in the judgment of my Lord, Lord Justice Mummery.

61. I agree with him that permission should be given to amend the Appellant's Notice, for the reasons he gives.

62. On behalf of the Appellant Council, Mr Jeans Q.C. protests at the proposition that it should be unlawful for an employer, facing litigation from a group of employees, to send them letters, written with care and rational in tone, by which they are invited to accept settlement offers that other employees have already accepted, and pointing out genuinely

perceived and potentially serious consequences for the workforce as a whole if the litigation is successfully pursued.

63. In *Cornelius* and in *Khan* this court and the House of Lords respectively held that it was open to an employer, against whom proceedings of a protected kind were pending, to take reasonable steps to protect its position in that litigation, without infringing the victimisation provisions. In those cases the conduct at issue did not relate directly to the course of the proceedings.

64. In the present case the Employment Tribunal distinguished *Khan* , saying in paragraph 4(e) of their extended reasons:

> "Here the Respondents did not, as they did in *Khan's* case, merely seek to avoid prejudicing their position in the litigation. They wanted the applicants to abandon their claims. They were reacting, if not to the commencement of the proceedings, certainly to their continuance: they did not want to abide by the event; they wanted to prevent an adjudication."

65. If it is right that an employer facing equal pay proceedings may not take steps to try to persuade the applicant employees to settle the claim without infringing the victimisation provisions, then the ability of employers to take reasonable steps to protect themselves in litigation is much attenuated as compared to what it would be in other, non−protected litigation.

66. The point which has been called the "honest and reasonable employer" defence is not found in the legislation itself. It has to be identified by the proper interpretation of the relevant provisions: who is the right comparator, whether the employee received less favourable treatment than the comparator would have done, whether the employee suffered detriment as a result, and whether that treatment was "by reason that" the employee had brought protected proceedings.

67. It might have been suggested that one way of allowing an employer to behave in a normal and reasonable way in litigation would be to take as comparator a hypothetical employee or class of employees who had brought proceedings against the employer, but not of a protected nature. In that way one could compare the way in which the employer acted in self−defence in the actual proceedings with how it would have behaved in other non−protected proceedings. To seek to compare an employer's conduct of litigation with the way it would have acted in relation to someone who had not brought proceedings against it might seem rather artificial.

68. However, Mr Jeans does not argue for a comparator of that kind. He does not contest the comparator relied on by the Respondents and identified on the first occasion that this case came before the Employment Appeal Tribunal (HH Judge Clark presiding), namely persons who had not brought and continued equal pay proceedings. That is consistent

with the House of Lords decision in *Khan* , in particular with Lord Nicholls' speech at paragraph 27, Lord Hoffmann's at paragraph 48, and Lord Scott's at paragraphs 72 and 73.

69. The legitimate scope for the employer to take reasonable steps to defend itself in the proceedings must therefore be found elsewhere in the legislation rather than by the identification of the comparators. The issues of less favourable treatment, detriment and whether the employee was so treated "by reason that" she had brought the protected proceedings, are inter–connected. In *Khan* , Lord Nicholls, Lord Hoffmann (with both of whom Lord Hutton agreed) and Lord Scott dealt with the relevance of the proceedings under the heading of "by reason that". Lord Mackay dealt with it both under that heading and as a basis for saying that there had not been less favourable treatment: see paragraphs 44 and 45. While it would be wrong to be over–analytical about the elements of the statutory wrong, it seems clear from the speeches in *Khan* that the legitimate scope for the employer to defend its position in litigation is to be found when considering whether the less favourable treatment was "by reason that" the employee had brought the protected proceedings.

70. In *Khan* the act in question, refusing to provide a reference while the race discrimination claim was pending, was influenced by the existence of the proceedings, but had nothing to do directly with the conduct of the proceedings. Similarly in *Cornelius* the act complained of was refusing to consider a transfer to another post while an appeal by the employee against the dismissal of her sex discrimination proceedings by the Industrial Tribunal was pending.

71. Here the act in question is directly to do with the proceedings. The Council was acting as a litigant, seeking to persuade the outstanding 40 applicants to settle their claims. The test proposed by Lord Hoffmann in *Khan* at paragraph 60, of a comparison with the position after the proceedings had been concluded, necessarily cannot be applied to a case such as this. But both Lord Nicholls, at paragraph 31, and Lord Hoffmann, at paragraph 59, recognise (as must be right) that the section cannot "prejudice an employer's proper conduct of his defence, so long as he acts honestly and reasonably" (see paragraph 31).

72. Lord Hoffmann distinguishes between a response to the commencement of proceedings which infringes the section, on the one hand, and "a reasonable response to the need to protect the employer's interests as a party to the litigation", on the other. This distinction is not easy to apply where the conduct does relate directly to the litigation, and can therefore readily be described as being undertaken by reason that the employee has brought the protected proceedings. It may be that, in such a case, which this one is, the further question has to be posed, whether the employer would have acted similarly if the employee had brought proceedings which are not protected, but which are in other ways comparable.

73. Equal pay proceedings are particularly serious for employers because of their impact on the terms of employment of other employees, and their retrospective effect. It is not easy to think of other proceedings by employees which could be so far–reaching, but Mr Jeans suggested there could be contractual claims relying on contractual terms said to apply to

a large class of employees, for example a claim to be entitled to a bonus as a matter of contract, rather than, as here, under the equal pay legislation, which would be in some ways comparable to an equal pay claim.

74. The "by reason that" test can be applied, in such a case, by asking how the employer would have behaved in a comparable situation faced with proceedings which are not protected. That focuses attention on the question whether the employee has been treated as she has by reason that she has brought proceedings under the Equal Pay Act. That does not fit well with the last sentence of paragraph 60 of Lord Hoffmann's speech in *Khan* , which suggests that the employer cannot escape liability by showing that he would have behaved in the same way towards an employee who brought non−protected proceedings. But if this is not a relevant test, I find it difficult to see how the employer is able to take reasonable steps in opposing the litigation without infringing section 4, which Lord Hoffmann and Lord Nicholls agree that the employer can do. Conversely, it is not altogether clear how this approach can validate only conduct on the part of the employer which is reasonable, if the employer would have behaved in an unreasonable manner in the defence of non−protected claims (compare Lord Scott in *Khan* at paragraph 72). But the speeches in *Khan* recognise an ability of the employer to act honestly and reasonably in resisting the equal pay proceedings, and to do so with impunity as regards a victimisation claim. While I have some difficulty in seeing how this is to be reconciled with the terms of the legislation, it also seems to me that it would be absurd if employers were not able to act in this way, and this is therefore the test by which the Council's conduct in this case should be judged.

75. In my judgment the Employment Tribunal was wrong in law in the passage quoted at paragraph above to hold that it is not open to an employer to try to persuade one or more employees who have brought equal pay proceedings against it to settle those proceedings, so as to avoid an adjudication altogether. The fact that this is the employer's objective cannot, by itself, take the conduct outside the scope of the freedom permitted to the employer to conduct its defence to the proceedings in an honest and reasonable manner.

76. I agree with my Lord, Lord Justice Mummery that, despite some inappropriate language in paragraph 4(e), such as "occasion" and "efficient cause", the Employment Tribunal did ask itself the right question, namely what was the Council's motive for sending the letters, and answered it in a way open to them, by holding that the motive was to persuade the applicants to settle their claims. I do not accept that this answer shows that the Council did thereby discriminate against the applicants, in breach of section 4 of the Sex Discrimination Act 1975, because it is conduct which is at least capable of falling within the scope of the principle recognised in *Khan.*

77. For reasons mentioned by my Lord, Lord Justice Mummery, this point was not dealt with by the Employment Appeal Tribunal presided over by Mrs Justice Cox. It had been considered and rejected at the preliminary hearing, by the Employment Appeal Tribunal presided over by HH Judge Ansell. In their reasons, at paragraph 10, they quoted from paragraph 4(e) of the Employment Tribunal's extended reasons, and said:

> "It seems to us that the Tribunal were saying there that these were
> not the actions of an honest and reasonable employer conducting

as it were a workplace dispute and we can see no cause to complain of the Employment Tribunal's approach in that matter."

78. By approving the Employment Tribunal's observations, that passage implies that it is not open to an employer to seek to persuade an employee to settle her claim. I do not think it can fairly be read as saying that, though it is open to an employer to try to achieve a settlement in an honest and reasonable manner (contrary to the Employment Tribunal's view) nevertheless this employer's acts did not qualify as reasonable. Accordingly, hesitant as I am to differ from one specialist tribunal endorsed by another on appeal, on reflection I do not consider that the Employment Appeal Tribunal's conclusion alters the position which is that the Employment Tribunal misdirected itself in law on a crucial aspect of the case.

79. If it be right, as *Khan* shows, that an employer does not infringe the provisions of section 4 by the honest and reasonable conduct of its defence to the protected proceedings, it must follow that there are circumstances in which, even though the employee applicant has been treated less favourably than relevant others, and has thereby suffered a detriment, she cannot establish that she is the victim of discrimination in this respect. It is therefore not sufficient, in the present case, to demonstrate less favourable treatment and detriment, as I accept that the respondents have demonstrated.

80. The Employment Tribunal having misdirected themselves in law, in considering that it was not open to the Council to seek to persuade the applicants to compromise their claims, the next question is whether that error did or did not make a difference to the result. If their other findings and conclusions show that they would have reached the same conclusion even if they had not misdirected themselves in law, then it would not be right to allow the appeal and remit the case for yet a further hearing in the Employment Tribunal.

81. The Employment Tribunal set out its reasons carefully in relation to the different elements in the case. No doubt the factors which went to show less favourable treatment and detriment are relevant to the distinct question whether the employer was acting honestly and reasonably. But the Employment Tribunal does not refer to those matters in answering that question. I dare say that, if they had directed themselves correctly that the fact that the employer is seeking to secure a compromise, or in their words "to prevent an adjudication", does not by itself mean that the employer is not acting honestly and reasonably so as to be within the principle recognised in *Khan* , they would have had regard to some of the same matters in answering the distinct question. But it does not seem to me that it is right for this court to come to the conclusion that there could be only one possible answer to that question.

82. Accordingly, in my judgment the appeal ought to be allowed and the case remitted to the Employment Tribunal to be determined afresh.

Schedule

St.Helens
Metropolitan Borough Council

Environmental Protection Department
Wesley House, Corporation Street, St.Helens, Merseyside WA10 1HF
P. Sanderson, B.Sc. (Hons), M.B.A., C.Eng., M.I.C.E., M.I.H.T., ***Acting Director***
Telephone (01744) 456000 **Facsimile (01744) 24055** **Web Site: www.sthelens.gov.uk**

Our ref.: PS/CLW
Your ref.:Your ref.

Mr. P. Sanderson is dealing with this matter
Direct Line: 07144 456383
E–mail: PaulSanderson@Sthelens.gov.uk

19 January 2001

To: All Catering Employees

Dear Colleague,

Equal Pay

In 1998 a number of claims were lodged with the Employment Tribunal by Catering staff. The claims related to a wish to achieve equality within the pay structure, when compared against male employees earning bonus in other areas of the Council. When the Trades Unions lodged those claims on behalf of the staff concerned, it was at the time when the Catering Contract was in danger of being transferred to an external contractor. It was allegedly a tactical move by the Trades Unions to try and avoid this transfer to retain jobs within the Council. **At meetings with Council representatives (both Officers and Members), the Trades Unions stated that they**

would not seek to proceed with the claims if the jobs remained with the Council − in recognition of the potential consequences.

As a result of a number of factors, the Catering Contract did not transfer and staff remained employed by the Council. When this happened, the Council immediately entered into discussions with the Trades Unions regarding the claims. This was important as the impact of the claims continuing to Tribunal and being successful would result in costs which could not be borne by the Council or service users.

The Council has always acknowledged the right for individuals to seek equality with other groups. Indeed, the Council has signified its commitment to erode any inequalities by embracing the Single Status Agreement and putting money forward to undertake evaluation of jobs using the National Job Evaluation Scheme agreed jointly with the Trades Unions. The Council also put forward in excess of £1m to reduce the hourly week of Catering and other employees, again as part of the moves towards single status. Whilst there is a legal route to challenging any potential inequality, this does not take account of broader employment issues in terms of costs and ability to continue to run the service.

Following the discussions and in recognition of:−

(a) the potential consequences of a Tribunal decision against the Council; and
(b) the Council's commitment to eradicate any inequalities by other accepted means;

the majority of the claims were settled outside of the Tribunal. In fact, 470 individual employee claims were settled, involving a significant amount of money (over £1M) being paid by the Council. However, 40 claims (39 represented by the GMB trade union) remain lodged with the Employment Tribunal.

It is because of the 40 outstanding claims and the current position that I find it necessary to write to all staff within the Catering Service advising of the serious situation we are likely to face over the coming months. This is regrettable given the co−operation and hard work from many staff in dealing with this in a manner which would help to avoid any negative impact.

Despite extensive discussions with local and regional representatives of the GMB Trade Union, during which the severity of impact of the claims being successful in the Tribunal has been highlighted, it has not been possible to arrive at a position whereby they will support and recommend settlement outside of the Tribunal. It is quite clear from the discussions that the Trades Union support the legal route to addressing issues of potential inequality, irrespective of the resulting consequences. As a Tribunal date has been set for 19 March to hear the claims and with no indication of a change in the Trades Union's position, then I must spell out to all staff the likely outcome.

The Council will attempt to defend its position in the Tribunal. However, if we are not successful and have a ruling against us then the potential increased costs to the Catering Service will be in the region of £1.5M for 2001/2002 and £1M in every year after that. Most importantly this will mean that the cost of a School Meal will rise to almost £1.60 per day.

The above costs will make provision of the service wholly unviable. In such circumstances the Council will be forced to consider ceasing the provision of the Service other than to those who

are entitled to receive it by law i.e. free school meal provision. Only a very small proportion of the existing work force would be required for this.

Regrettably, although many of you have chosen to work with the Council to address the issues of equality outside of the Tribunal by way of Single Status/Job Evaluation process, the continuance of the current claims and a ruling against the Council will have a severe impact on all staff.

The original terms of offer remain available to the remaining 40 individuals, which is on the same basis accepted by the majority of the work force. Furthermore, since that offer was put forward, the Council has taken further positive steps to seek to address the areas of possible inequality by:−

(a) approving a strategy for withdrawal of bonus from those employees employed under former manual conditions; and

(b) endorsing the commencement of the pilot of the National Job Evaluation Scheme and allocating £100,000 to this process.

In sending this communication, the Council full acknowledges and respects the right of individuals to pursue employment matters via the Courts or Tribunals, and others should respect this also. However, it is also important to ensure that all affected staff are fully aware of the longer term employment consequences and the ability to pursue the above alternative ways of achieving the same objective.

I will be writing separately to those individuals with claims outstanding and will continue to impress upon representatives of GMB and other affected Trades Unions the severity of the situation we are likely to face.

All staff will be kept fully informed as the matter develops. However, if there are any specific queries you may have, please raise them with your Managers who are fully aware of the situation.

Yours sincerely,
Paul Sanderson,
Acting Director of Environmental Protection

St.Helens
Metropolitan Borough Council

Environmental Protection Department

Wesley House, Corporation Street, St.Helens, Merseyside WA10 1HF

P. Sanderson, B.Sc. (Hons), M.B.A., C.Eng., M.I.C.E., M.I.H.T., *Acting Director*

Telephone (01744) 456000 **Facsimile (01744) 24055** **Web Site: www.sthelens.gov.uk**

Our ref.: PS/CLW
Your ref.:Your ref.

Mr. P. Sanderson is dealing with this matter
Direct Line: 07144 456383
E–mail: PaulSanderson@Sthelens.gov.uk

19 January 2001

Dear

<u>Equal Pay Claim</u>

I am writing to you as an employee with an outstanding claim in the Employment Tribunal relating to the above. I have also written in general terms to the whole catering work force and you should have also received a copy of that letter.

In December 1999 an offer was put to you in respect of your claim, which you rejected. I fully appreciate that it is well within your rights to make this decision and pursue your claim through the Employment Tribunal. However, when that offer was put to you, and to others who accepted, the Council highlighted the reason for the offer and consequences of the possible outcome should the claims be successful in the Tribunal.

I am greatly concerned about the likely outcome of this matter as stated in the letter to catering staff. The Council have received no indication from your trades union that they would support any steps to address equality issues by means other than those which would have an immediate consequential increase in pay rates. As outlined at length, the service cannot withstand such a cost.

The original offer of settlement remains open to you and I would urge you to consider this, together with the information provided in this and my other letter regarding our commitment to achieving equality by other means, aimed at preserving the service and jobs.

I cannot over state the impact that the current course of action will have on the service and everyone employed within it.

In the event that you may wish to discuss the situation further, I would invite you to attend a meeting at **2.30pm on Wednesday 24th January at the Town Hall.**

Yours faithfully,
Acting Director of Environmental Protection.