Appeal No. UKEAT/0366/14/MC

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 13 May 2015
Judgment handed down on 16 June 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

CP REGENTS PARK TWO LTD — APPELLANT

MR G ILYAS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MICHAEL PAULIN (of Counsel) Instructed by: Ellis Whittam Solicitors Woodhouse Church Lane Aldford Chester CH3 6JD
For the Respondent	MR PAUL HAINSWORTH (Representative) Free Representation Unit

SUMMARY

RACE DISCRIMINATION - Direct

Race discrimination - direct (section 13(1) **Equality Act 2010**)

The Employment Tribunal ("the ET") had upheld the Claimant's claims of direct race discrimination in respect of: (1) the manner of his investigation meeting; and (2) the referral of the Claimant to the disciplinary process.

On the Respondent's appeal, allowing the appeal in part:

(1) In respect of the manner of the investigation meeting, the ET had not erred in its approach to comparators: the distinctions relied on by the Respondent were not *material* for the purposes of section 23(1) **Equality Act**. In any event, the ET had been entitled to have regard to those comparators in constructing the hypothetical comparator. Moreover, the ET had not assumed discrimination from the Respondent's unreasonable treatment but had considered whether it had an explanation for the unduly aggressive and inappropriate manner of the investigation meeting and concluded it did not. The ET had been entitled to have regard to the questions asked as to the Claimant's nationality/race as evidencing the reason why the manager had pre-judged the Claimant, which explained the tenor of the investigatory meeting. The conclusions reached were permissible. Appeal dismissed on this point.

(2) When it came to the referral of the Claimant into the disciplinary process, however, the position had (on the ET's findings) changed; any comparison would have to be with another employee who had failed to provide adequate, exculpatory responses to the allegations put to him. The ET's reasoning did not disclose it had properly considered whether the Claimant had been treated less favourably in these circumstances and that rendered the conclusion unsafe. Appeal allowed on this point.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondent, as below. This is the Respondent's appeal against a Judgment of the London Central Employment Tribunal (Employment Judge Henderson, sitting with members, on 14-16 January 2014 and in chambers on 30 January 2014; "the ET"), sent to parties on 6 February 2014. The Claimant appeared before the ET in person but is now represented by Mr Hainsworth, of the Free Representation Unit. The Respondent was and remains represented by Mr Paulin, of counsel. The ET dismissed the Claimant's unfair dismissal claim but partially upheld claims of direct race discrimination as to the manner of an investigation meeting and the decision to refer the Claimant into the disciplinary process, but not the actual decision to dismiss.

2. Considering the matter on the papers, Simler J took the view that the appeal disclosed no reasonable basis to proceed. At a subsequent hearing under Rule 3(10) of the **Employment Appeal Tribunal Rules 1993**, HHJ Shanks was persuaded that the appeal should be permitted to proceed to a Full Hearing, concluding "The ET's reasoning … is undoubtedly muddled and arguably flawed and their conclusion is arguably perverse". Thus the matter comes before me, the appeal being resisted by the Claimant in respect only of the ET's conclusion as to the manner of the investigation meeting.

The Background Facts and the ET's Reasoning

3. The Respondent is the holding company of the Danubius Hotel, Regents Park, London. It employs a racially diverse workforce of some 130 employees plus agency workers.

4. From 20 August 2007, the Respondent employed the Claimant (who is of Pakistani racial/national origin), latterly as receptionist and reception shift leader. On 19 December 2012, the Respondent's assistant financial controller, Mr Ahmed (also of Pakistani national origin) was suspended, having admitted misappropriating company money. He was later dismissed and the ET was told of pending Crown Court proceedings.

5. On 10 January 2013, immediately after meeting with Mr Ahmed, the Respondent held an investigatory meeting with the Claimant. This was conducted by the Respondent's operations manager, Mr Lyle, along with Ms Kirk, reception manager. To avoid possible contamination of the evidence, no prior notice was given. Allowing that it was reasonable to call the meeting without notice, the ET found it was conducted in an unduly aggressive and inappropriate manner; the Claimant was accused several times of lying; of being incredibly naïve and stupid; of colluding with Mr Ahmed and benefiting from company monies. Ms Kirk had also referred to the Claimant's visa application in a manner that was unnecessary, threatening and intimidating. The ET concluded that the accusations of lying demonstrated that Mr Lyle and Ms Kirk had pre-judged the outcome of the investigation and, although not recorded in the Respondent's notes, Mr Lyle had (as he accepted) referred to both Mr Ahmed and the Claimant coming from Pakistan, asking the Claimant whether he had known Mr Ahmed from there (see paragraphs 44 to 46 of the ET's Reasons).

6. As the ET noted, five financial transactions were put to the Claimant for his comments and explanation, with the focus being on four transactions relating to one guest; a contact of Mr Ahmed (paragraphs 12 to 14). The ET made findings as to the inadequacy of the Claimant's responses (paragraph 20) and noted his comment during the meeting that he

had trusted Mr Ahmed who was "like a brother to him" (paragraph 20(d)) and had not suspected that he had done anything wrong.

7. The Respondent interviewed other reception staff regarding these matters but did not ask whether they had previously known Mr Ahmed. Mr Lyle's explanation for this difference in questioning was two-fold: "they had not carried out similar transactions and … because they were not from Pakistan so there was no reason to ask them" (paragraph 19).

8. It was also only the Claimant who was then referred for disciplinary proceedings. He argued at the ET that others had also been involved in similar transactions, so should have been dealt with in a similar manner. The ET recorded, however, Mr Lyle's evidence as to why the transactions had not been of the same nature (paragraph 23).

9. Thereafter, the Claimant attended a disciplinary hearing conducted by Ms Nykiel, the Respondent's human resources and training manager. She re-investigated all the transactions with the Claimant and explored his connection with Mr Ahmed in a neutral way, without reference to race or nationality. Ms Nykiel concluded that two of the allegations were made out - relating to inaccurate or fraudulent recording and making false entries in written records - but did not find another allegation of fraud established and found no evidence that his country of origin had any bearing on matters (paragraph 38). Given her findings adverse to the Claimant, Ms Nykiel determined he should be summarily dismissed. The Claimant appealed against that decision but was unsuccessful.

10. The ET found the Claimant had suffered less favourable treatment as regards the manner of the investigation meeting and that this was because of his race. It reasoned:

> **"46. … The nature of Mr Lyle's questions to the Claimant led the Tribunal to conclude that his view of the connection between the Claimant and Mr Ahmed (whether consciously or unconsciously) was linked to their shared nationality and/or race. Therefore, the nature of the investigatory meeting was directly discriminatory because of the Claimant's nationality and/or race. The Respondent did not supply any other explanation for the nature of this questioning. Mr Lyle explained why he had sought to establish a connection between Mr Ahmed and the Claimant but this must be distinguished from the way in which he went about doing this (which forms the basis of the direct discrimination) for which no explanation has been provided."**

11. The ET also held the referral of the Claimant to the disciplinary process to be less favourable treatment - none of the other receptionists were so referred - that was, given the focus on the Claimant's and Mr Ahmed's shared nationality - because of his nationality and/or race; specifically:

> **"47. … bearing in mind the Tribunal's findings on the nature of the Claimant's investigatory meeting and that Mr Lyle (whether consciously or not) had formed the view that the Claimant had carried out fraudulent transactions, which he (Mr Lyle) based on the Claimant's and Mr Ahmed's shared nationality and/or race, the Tribunal concludes that the Claimant's referral to the disciplinary process was because of his race and/or nationality.**
>
> **48. As regards any explanation by the Respondent: while Mr Lyle did explain some distinctions between the Claimant's behaviour and those of the other receptionists … the Tribunal notes Mr Lyle's closing comments at the investigatory meeting … "you have clearly been working with NA [Mr Ahmed] for a long time and helping him to steal this money … I do not for a minute believe that you did not know what was going on … We are going to suspend you …". These comments demonstrate that it was the suspected link with Mr Ahmed, which was their shared race/nationality, which was the reason for the Claimant's referral by Mr Lyle. This potential link was never explored with the other receptionists. The Tribunal, therefore, finds that the referral to the disciplinary process was direct discrimination because of the Claimant's race."**

12. On the other hand, the ET did not find that the decisions to dismiss the Claimant or his appeal were tainted by race/nationality. Equally, the ET rejected the Claimant's claim that his dismissal had been unfair. The ET distinguished between the conduct of the investigatory meeting and the information obtained as a result; the latter being "sufficient and thorough" such that "it was reasonable for Ms Nykiel to rely on [it]" (paragraph 55).

The Appeal

13. By its appeal, the Respondent takes issue with the ET's findings of direct race discrimination on the following six grounds:

(1) The ET erred in its approach to the question of comparators.

(2) The ET further erred in its application of the burden of proof.

(3) The ET erred in law by effectively holding that an employer was precluded, on **Equality Act 2010** grounds, from asking employees about shared national origins.

(4) The ET committed a category mistake, assuming migrant worker status was automatically co-extensive with race and/or nationality.

(5) The ET erred in its approach to the question of the reasonableness.

(6) The ET's conclusions were perverse.

14. By his revised Respondent's Answer, the Claimant resists the appeal in respect of the ET's finding that the manner of the investigatory meeting amounted to less favourable treatment because of race but makes no positive case in support of the finding of discrimination in the referral into the disciplinary process.

Submissions

The Respondent's Case

15. The ET first fell into error by wrongly considering the relevant comparators to be the receptionists, also interviewed during the investigation into Mr Ahmed's conduct; that is, actual comparators who were not from Pakistan. These were the wrong comparators as they had innocent, verifiable explanations for any transactions discussed, there was no evidence that they had facilitated a fraud by Mr Ahmed; the only person implicated in the investigation into Mr Ahmed's alleged fraudulent activities was the Claimant. The correct comparator would be a hypothetical comparator, of different nationality to the Claimant, similarly implicated in fraudulent activities carried out by someone of their own nationality. If they

would have been treated in the same way as the Claimant, it was not the Claimant's nationality/race that was the reason for the less favourable treatment.

16. Turning next to the points raised by its second and fifth grounds of appeal, the Respondent argued that the ET had erred in its approach to the burden of proof and the question of reasonableness. If the ET considered the Claimant had raised a *prima facie* case then the question was whether it accepted the Respondent's alternative explanation; here, that the Claimant had been asked whether he had known Mr Ahmed from Pakistan to see if there was any previous friendship or connection between them. The ET needed to make a finding whether the question about the Claimant's and Mr Ahmed's shared nationality was asked because the Respondent was making an assumption on that basis or because the Respondent was trying to explore possible links to explain their joint involvement in the transactions in issue. To the extent that it turned its mind to this, the ET apparently accepted Mr Lyle's evidence in his witness statement, as follows:

> **"35. The only reference I ever made to him being of Pakistani origin is when I asked whether he knew Mr Naseer Ahmed from Pakistan. This is in no way racist and does not discriminate against him in any way or form. I was simply establishing whether they were related or had been friends prior to moving to the United Kingdom.**
>
> **36. I also asked [the Claimant] if he had worked at Tesco where Nasser Ahmed, had been working. … I also asked [the Claimant] if he had secured the job at Danubius Hotel through Mr Ahmed …"**

That evidence could only support the latter interpretation.

17. The ET first needed to identify Mr Lyle's alternative explanation, then consider what was actually in his mind when he asked the questions in issue. Here the ET assumed a link between the way the Claimant was treated and his race or nationality, thereby falling into the error identified in **Bahl v Law Society** [2004] IRLR 799 of failing to see there might be other explanations for what the ET felt to be unreasonable conduct, albeit those reasons were

apparent on the ET's own findings. This point arose both in respect of the conduct of the investigatory meeting (the Claimant's failure to provide explanations for his involvement in the transactions) and as to why he was referred to the disciplinary process (the weight of evidence against him as compared to the others interviewed).

18. The Respondent contended (third ground of appeal) that the implication of the ET's approach was to create a novel legal test to the effect that the **Equality Act** precluded an employer asking if employees had known each other in their shared country of origin.

19. By its fourth ground of appeal, the Respondent took issue with the ET's approach to the questions asked of the Claimant about his visa application. This was a category mistake, similar to that deprecated by the Court of Appeal in **Onu v Akwiwu and anor** [2014] EWCA Civ 279. There was no exact correspondence between the protected characteristic (race/ nationality) and the Claimant's immigration status and visa application.

20. Finally, the Respondent contended the ET's conclusion was perverse. Having found Mr Lyle had drawn an evidence-based distinction between the Claimant's conduct and that of his colleagues (who all had innocent explanations for transactions in which they were involved), it was perverse to then conclude that the Respondent had not made good its alternative explanation for its treatment of the Claimant at the investigatory meeting and for the decision to refer him into the disciplinary process.

The Claimant's Case

21. On the question of comparators, the emphasis should be on the "reason why" question rather than an overly complex construction of a hypothetical comparator. Further, the

assessment permitted the use of an evidential comparator, which might not be the same as a statutory comparator meeting the requirements of section 23(1) **Equality Act**. See **Shamoon v Chief Constable for the RUC** [2003] UKHL 11, [2003] ICR 337. Generally, an appellate tribunal should hesitate before interfering with the decision of the tribunal of fact on a matter of this kind (per Lord Hope in **Shamoon** at paragraph 59).

22. It was unnecessary to construct a hypothetical comparator; the circumstances of the actual comparators - the other receptionists - were not materially different to those of the Claimant. The differences relied on by the Respondent were not apparent at the investigatory interview; only after its conclusion. In any event, the ET was entitled to treat the other receptionists as evidential comparators. Moreover, correctly focusing on the *reason why*, there was sufficient basis for the conclusion that the reason for the Claimant's treatment was because of his and Mr Ahmed's shared race/nationality.

23. Turning to the burden of proof and reasonableness. It was wrong to say the ET could only draw an inference of discrimination in the absence of *any* explanation; it could also do so where the explanation proved was inadequate or unsatisfactory, see **Bahl**, approving Neill LJ in **King v Great Britain-China Centre** [1992] ICR 516, at 528-9:

> **"… If no explanation is then put forward or if the tribunal considers the explanation to be inadequate or unsatisfactory it will be legitimate for the tribunal to infer that the discrimination was on racial grounds …"**

24. The treatment in issue in this case was the offensive, inappropriate questioning and the unnecessary and intimidating questions about the visa application. The ET had not accepted the Respondent's explanation for this treatment. If the Respondent had wanted to establish whether there was a previous connection or friendship between the Claimant and Mr Ahmed, that question could have been asked in neutral terms, as the ET noted was done by

Ms Nykiel, in the subsequent disciplinary hearing (paragraph 32). None of the other comparators (whether statutory or evidential) were asked about previous links with Mr Ahmed because none was from Pakistan. The Respondent sought to rely on other aspects of the evidence as demonstrating why Mr Lyle had not believed the Claimant but that was not its explanation to the ET as to why the Claimant had been treated the way he was.

25. The ET concluded that the questions were put to the Claimant at the investigatory meeting in the way that they were because the Respondent assumed that, as the Claimant was of the same race/nationality as Mr Ahmed, he must be associated with him and similarly guilty of wrongdoing. On the evidence, that was a conclusion open to the ET.

26. In response to the third ground of appeal, Mr Hainsworth observed that the ET's conclusion was not solely based on the fact that the Respondent asked about the Claimant's and Mr Ahmed's shared race/nationality. It had first looked at the unduly aggressive and inappropriate line and manner of questioning and then the references to shared race/national origins. It had not assumed discrimination because the Respondent asked if the Claimant knew Mr Ahmed from Pakistan. The conclusion was context specific; it did not suggest that such a line of questioning was, of itself, prohibited.

27. As for the suggestion (fourth ground of appeal) that the ET erred in its approach to the questions about the visa application, there was no category mistake: the reference to the Claimant's visa application was not made in a neutral way but in an "intimidating manner", during the course of a meeting at which the Claimant had been "accused several times of lying" (paragraph 45) and questions asked about his and Mr Ahmed's shared race/nationality.

It was the unnecessary and inappropriate reference made in that context that led the ET to conclude that this engaged the protected characteristic.

28. On the question of perversity, the Respondent's submission relied on its contention that "it appears [the ET] accepted Mr Lyle's evidence as to the non-discriminatory reasons for the treatment" (fifth ground of appeal). It did not, see paragraph 46 where the ET stated:

> **"… Mr Lyle explained why he had sought to establish a connection between Mr Ahmed and the Claimant but this must be distinguished from the way in which he went about doing this (which forms the basis of the direct discrimination) for which no explanation has been provided."**

The Respondent in Reply

29. On the identification of comparators, it was clear the other receptionists' circumstances were materially different to those of the Claimant: (i) none were a supervisor; (ii) none of them were implicated in fraudulent transactions; (iii) none gave inconsistent answers.

30. As to the manner of the investigatory meeting, the ET found as a fact (paragraph 54) that the Claimant had not been intimidated. It was not incumbent upon an employer to ask questions neutrally; merely asking a question did not establish discrimination; there had to be a link between what was in the Respondent's mind and the conduct. There was not the necessary correspondence (per **Onu**) here.

31. As for the explanation, the ET was obliged to assess Mr Lyle's incredulity in response to the Claimant's answers. The ET referred to Mr Lyle's witness statement but would have needed to go further and specifically reject his evidence as to the manner of the meeting.

Relevant Legal Principles

32. The relevant statutory provisions are found within the **Equality Act 2010**. Direct discrimination is defined by section 13(1) as follows:

> **"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**

33. Here, the relevant protected characteristic was the Claimant's "race/nationality". It is accepted this amounts to a protected characteristic; section 9 of the **Equality Act 2010**.

34. A comparison for the purposes of section 13(1) requires there to be no material difference between the circumstances relating to the cases of the complainant and his comparator (section 23(1) **Equality Act**). That said (where a Claimant cannot point to an actual comparator meeting this requirement) in constructing a hypothetical comparator, an ET may draw on non-identical but not wholly dissimilar cases: what is sometimes referred to as an evidential rather than a statutory comparator, see **Chief Constable of West Yorkshire v Vento** [2001] IRLR 124 EAT per Lindsay J at paragraph 7; and **Shamoon** per Lord Scott at paragraph 109 and per Lord Hutton at paragraphs 81 to 82 (approving the **Vento** approach).

35. Section 13(1) requires not just consideration of the comparison - the *less favourable treatment* - but also as to the reason for that treatment; whether it was because of the relevant proscribed ground. In some cases, it will be appropriate to consider these two questions separately and in stages; in others, the questions will be intertwined: the less favourable treatment issue cannot be resolved without deciding the reason why issue. As was observed by Lord Nicholls in **Shamoon** (see paragraph 11):

> **"… employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? … If the former, there will … usually be no difficulty in deciding whether**

the treatment, afforded to the claimant on the proscribed ground, was less favourable then was or would have been afforded to others."

36. Recognising the difficulties facing those who seek to bring complaints of unlawful discrimination, specific provision is made for what has been described as a shifting burden of proof, see section 136 **Equality Act**, which (relevantly) provides:

> **"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

37. In concluding that there has been *direct* discrimination (as compared to indirect discrimination), there must, however, be an exact correspondence between the criterion used to discriminate (the actual ground of discrimination) and the protected characteristic in issue, see per Underhill LJ in **Onu v Akwiwu and anor** [2014] EWCA Civ 279, at paragraph 49, drawing on the guidance of the Supreme Court in **Patmalneice v SoS for Work and Pensions** [2011] UKSC 11, [2011] 1 WLR 783, and thereby rejecting an argument that an intimate association between immigration status and nationality might suffice.

38. Moreover, an ET should not assume a finding of unlawful discrimination from a finding that an employer acted unreasonably; there may be other explanations (if only simply human error), see **Bahl v Law Society** [2004] IRLR 799 CA. More is required than simply a finding of less favourable treatment and a difference in the relevant protected characteristic (see, e.g. **Glasgow City Council v Zafar** [1998] ICR 120 HL and **Laing v Manchester City Council** [2006] ICR 1519 EAT per Elias J (as he then was)). Where there is a comparator, the 'something more' might be established in circumstances where there is no explanation for the unreasonable treatment of the complainant as compared to that comparator; see per Sedley LJ in **Anya v University of Oxford** [2001] ICR 847 CA, and the discussion of those

dicta in **Bahl**, per Maurice Kay LJ, observing (paragraph 101) that the inference of discrimination would not then arise from the unreasonable treatment but from the absence of explanation.

Discussion and conclusions

39. The oral submissions made in support of the appeal have largely not distinguished between the two acts of discrimination found by the ET. Assessing the merits of the arguments requires, however, separate consideration of each: (1) the manner of the investigation meeting; and (2) the referral of the Claimant to the disciplinary process (albeit that the Claimant does not seek to put forward a positive case in support of this finding).

(1) The manner of the investigation meeting of 10 January 2013

40. Asking first what facts the ET found to have been established by the Claimant such that it could decide that the Respondent contravened section 13(1) of the **Equality Act**, I remind myself that more is required than a mere finding of less favourable treatment and a difference of race (**Zafar**; **Laing**) and, further, that an employer's unreasonable behaviour alone will not be determinative of the question (**Bahl**). Here the treatment the ET found to have been established was the "unduly aggressive and inappropriate" line and manner of questioning of the Claimant in the investigatory meeting (paragraph 44). For convenience I will refer to this as "unreasonable" behaviour or conduct on the part of the Respondent as this is the terminology more commonly used in the case-law, although arguably the findings adverse to Respondent suggest a higher level of culpability than simple unreasonableness, specifically:

> **"The Claimant was accused several times of lying and of being incredibly naive and stupid and was accused of being in collusion with Mr Ahmed and of benefiting from company monies. Ms Kirk also referred to the Claimant's visa application, again in an intimidating manner …" (paragraph 45)**

41. The ET found the general tenor of the investigatory meeting constituted less favourable treatment of the Claimant (paragraph 46). On its face, that must be a conclusion open to the ET, given it had found that the tenor of the meeting was "unduly aggressive and inappropriate" and indicated that Mr Lyle and Ms Kirk had prejudged the investigation outcome, having already formed a view of the Claimant's guilt (paragraphs 17 and 44 to 46).

42. The ET did not, however, fall into the error of assuming that this - what might be described as unreasonable conduct - was sufficient, of itself, to establish a *prima facie* case of discrimination. It further considered the treatment of those relied on as comparators - the other receptionists also questioned at the investigation stage - and found that the line of questioning was different, having not included any attempt to explore whether they had any prior connection with Mr Ahmed. This was significant because the ET found that the Respondent's pre-judgment in the case of the Claimant derived from the fact that Mr Lyle "had clearly formed the view that the Claimant had acted fraudulently and in collusion with Mr Ahmed and had most likely benefited personally from such a connection" (paragraph 46).

43. Did the ET impermissibly have regard to the treatment of the other receptionists when there were material differences between their circumstances and those of the Claimant? Judgments as to the correctness of such a comparison will generally be a matter for the first instance tribunal but the Respondent urges that in this case the ET committed an error of law in not finding that the comparators' circumstances were materially different in the following respects: (i) none were a supervisor; (ii) none had been implicated in fraudulent transactions; (iii) none gave inconsistent answers. These were, indeed, differences between the Claimant and the other receptionists but were they *material*? In particular, were they material

differences at the outset of the investigatory meeting; the point at which - on the ET's findings - the pre-judgment took place?

44. The first point relied on can be disposed of fairly quickly. The ET did not find that the Claimant's comparative seniority had any relevance to the decision to interview him on 10 January 2013, let alone to the decision as to how that interview should be conducted. It might have been a difference between the Claimant and the other receptionists but there is no basis for concluding that it was material.

45. As for whether there was a difference in the respective involvement of the Claimant and the other receptionists in "fraudulent transactions", the ET does not record this as a specific distinction at the outset of the investigation, merely that "following admissions by Mr Ahmed, all the reception staff had been investigated" (paragraph 22). It is right to note that part of Mr Lyle's explanation for not asking others whether they had previously known Mr Ahmed was that they had not carried out similar transactions (paragraph 19) but the ET did not find that this went to his reason for the manner of his questioning of the Claimant (paragraph 46). On the basis of the ET's findings, therefore, it was not a material difference.

46. As for the unsatisfactory nature of the Claimant's answers, whilst, on the ET's findings, this became a material difference between the Claimant and the other receptionists (see below in respect of the decision to refer the Claimant into the disciplinary process), I agree with Mr Hainsworth, the ET's findings do not suggest that it was a material difference at the outset of the investigation meeting; the point of pre-judgment.

47. Even if I was wrong on this point, this would not be determinative of the appeal. If there is no actual comparator for section 23(1) **Equality Act** purposes, the question arises as to how the hypothetical comparator would have been treated in like circumstances. In constructing the hypothetical comparator, it remains open to the ET to have regard to the cases of others, even if only as 'evidential' rather than 'statutory' comparators (**Shamoon**; **Vento**). Equally, in carrying out this exercise, however, the ET may be entitled to focus on *the reason why* the Claimant was treated the way he was (again, see **Shamoon**).

48. Paragraph 46 of the ET's reasoning proceeds on this basis: the tenor of the Claimant's investigatory meeting derived from the fact that Mr Lyle and Ms Kirk had pre-judged its outcome; that, in turn, was due to the fact that Mr Lyle had already formed the view that the Claimant had acted in collusion with Mr Ahmed and the nature of the questions asked showed that view of the link between them related to their shared national/racial origins. Questions about a prior link with Mr Ahmed were not asked of others (the other receptionists) because they did not share the same nationality/race; they were not Pakistani. Even if there was some reason for exploring a connection between the Claimant and Mr Ahmed that did not arise in the case of others, this did not explain the manner of the questioning of the Claimant; there was no explanation for that.

49. The Respondent contends this discloses a further error: the ET wrongly assumed the **Equality Act** prohibits the asking of questions relating to shared race/nationality and thus the asking of questions as to the Claimant's Pakistani background established unlawful race discrimination. I do not read the ET's reasoning as engaging in such a simplistic exercise. The issue was not the question about the Claimant's Pakistani origin but the general tenor of the questioning, arising from the pre-judgment of the Claimant's guilt, and why that had

taken place. The answer, the ET found, was disclosed by the fact that the questions had related to the Claimant's Pakistani background; by the absence of any exploration of previous links with Mr Ahmed (whether due to some shared geographical link or otherwise) with any other receptionist facing an investigatory interview and by the absence of any other explanation for the tenor of the interview with the Claimant.

50. Mr Paulin suggests that if the relevant nationality of Mr Ahmed and the Claimant was changed - e.g. to Austrian rather than Pakistani - the error in the reasoning is exposed: there was no reason to think such an employee would have been treated differently, thus it was not open to the ET to conclude the treatment was because of the Claimant's particular race or nationality. In my judgment, that argument is flawed on a number of levels. First, if the explanation for the unreasonable treatment of the employee remains solely that of their race (albeit not the same race as this Claimant), I am not sure why that could not make good their complaint. In any event, the ET found the tenor of the meeting arose from the complicity assumed because of the shared nationality/race of the Claimant and Mr Ahmed (paragraph 46). Had Mr Lyle genuinely been interested in exploring background links with Mr Ahmed, he could have asked questions designed to obtain such information from other employees but did not (paragraph 45). Others might have had various links with Mr Ahmed (educational; geographic; social; familial etc.); it was not the exploration of background links that was objectionable but the assumption that there was, and would be, such a link because of shared nationality/race.

51. Similarly, the objection to the reference to the visa application is founded upon an overly simplistic characterisation of the reasoning. The ET did not jump from a finding that the Claimant was asked about his visa application to a finding of unlawful race

discrimination; it did not make such a categorisation error. The ET found that the reference to the visa application was "inappropriate and unnecessary" (paragraph 46), the comments "were threatening and intimidating" and "suggested that [Ms Kirk] too had pre-judged the Claimant's conduct" (paragraph 17.4). Whether or not the intimidating nature of the questions impacted upon the Claimant's answers (the ET found it did not, paragraph 54), this was part of the conduct - evidence of the pre-judgment infecting the tenor of the meeting - that the ET considered required explanation. It was entitled to do so.

52. I return to the broader issue as to whether the ET erred in its approach to the burden of proof. Whether the ET is taken to have approached this as a case of actual comparison (paragraph 45) or as one of a hypothetical comparison (the approach that seems to inform paragraph 46), it is apparent that it did not assume that a finding of less favourable treatment and a difference of race was sufficient. It went on to consider the explanation provided by the Respondent - the reason why - something to which it was entitled to have regard (**Shamoon**). In part, that reason was stated to be the Claimant's race/nationality: it was because he was from Pakistan (paragraphs 19 and 45). To the extent that Mr Lyle sought to provide further explanation - the fact that other receptionists had not carried out similar transactions to those being put to the Claimant - the ET did not accept that went to the point it had to determine; it did not explain why Mr Lyle (and Ms Kirk) went about trying to establish what they had already concluded to be the case (the collusion between the Claimant and Mr Ahmed) in the way that they did (paragraph 46).

53. Was that conclusion perverse? To succeed on this basis, the Respondent must meet a high test (**Yeboah v Crofton** [2002] IRLR 634 CA). The Respondent does not say the conclusion was without any evidential foundation but contends the ET ought to have

preferred other aspects of its evidence, including Mr Lyle's more general observations as to the conduct and tenor of the investigation meeting (the refreshments, comfort breaks and so on). All that was before the ET, along with the Respondent's notes of the meeting, and the evidence from the Claimant and Mr Lyle. Given the evidence, the ET reached a permissible conclusion as to the manner of the meeting. Having done so, it was entitled to ask why the meeting had been conducted in the way it found it had. It concluded that the Respondent had failed to provide an explanation other than race/nationality. That was a permissible conclusion for the ET; it is not one with which the EAT can interfere.

(2) The referral of the Claimant into the disciplinary process

54. The ET concluded that the referral was itself an act of less favourable treatment in that it involved solely the Claimant and none of the other receptionists (paragraph 47). As the ET found, however, the Claimant failed to provide adequate responses to the various matters put to him during the investigation meeting (paragraph 20), whereas there were explanations for the transactions involving other reception staff (paragraph 23). On those findings of fact, therefore, by the end of the investigation meeting there was a material difference between the Claimant and the other reception staff. It might not have explained why he had been questioned in the manner he was, but his failure to adequately respond to the allegations put to him was not a result of the way in which the interview had been carried out; see the ET's conclusion (under the heading of Unfair Dismissal) at paragraph 54:

> **"… even though the Tribunal's finding is that the conduct of the meeting was intimidatory and linked to the Claimant's race or nationality, the Tribunal does not find that the Claimant was intimidated into making statements about the alleged transactions which he would not otherwise have made. …"**

And, further at paragraph 55:

> **"… The Tribunal have found that the manner of the investigatory meeting amounted to direct race discrimination. However, the Tribunal distinguishes between the way in which the meeting was conducted and the information obtained from that meeting. …"**

55. At the point at which the relevant decision was taken to refer the Claimant into the disciplinary process, the comparison would, therefore, have to be with another employee who had failed to provide adequate, exculpatory responses to the allegations put to him. I am persuaded by the Respondent that the ET lost sight of this fact when assessing whether this decision amounted to an act of race discrimination.

56. Whilst many cases will be answered simply by asking the reason why, that will not be true of all. I have considered whether, nevertheless, focusing on that question (per **Shamoon**), the ET's conclusion might still stand. It was concerned that the pre-judgment of the Claimant's guilt meant the decision to refer him into the disciplinary process was a foregone conclusion (paragraph 47) and that Mr Lyle's decision-taking was still informed by what he saw to be the link between the Claimant and Mr Ahmed (paragraph 48). In my judgment, however, the difficulty is that this *was* a case where the question of the comparison - the less favourable treatment - could not be assumed to be intertwined with what might have seemed to be the reason for that treatment. If, in truth, any employee (regardless of any sharing of nationality or race with Mr Ahmed) would have been referred into the disciplinary process after failing to adequately respond to the questions asked at the investigation interview, what was the less favourable treatment?

57. The answer might be that the absence of any genuine reflection before deciding to refer the employee into the disciplinary process was itself less favourable but that does not seem to be what the ET had in mind. I cannot be sure the ET turned its mind to the question *how* the Claimant was treated less favourably after failing to provide answers to the matters put (albeit this was not because he was intimidated by the manner in which they were put, paragraphs 54 and 55). Unlike the manner of questioning throughout the interview - unduly

aggressive and inappropriate - the explanation of the referral of the Claimant into the disciplinary process was apparent from the ET's findings as to the legitimacy of the ultimate decision to dismiss.

58. In these circumstances, I am persuaded that the ET's conclusion on this point cannot stand. The question then arises as to what order I should make on disposal. Before making a final decision on this point, it is appropriate to allow the parties to address me on the question. In the first instance, this can be done in writing; a further oral hearing would only be necessary if the point is not capable of resolution on the papers. I therefore direct that, within 21 days of the handing down of this Judgment, the parties are to exchange and lodge written submissions on the question of disposal.