Appeal No. UKEAT/0225/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 & 18 May 2015

Before

THE HONOURABLE MRS JUSTICE SIMLER

(SITTING ALONE)

DR O UKEH — APPELLANT

MINISTRY OF DEFENCE — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR DAVID STEPHENSON (of Counsel) Instructed by: Kingston & Richmond Law Centre Siddeley House 50 Canbury Park Road Kingston KT2 6LX
For the Respondent	MS HELEN WOLSTENHOLME (of Counsel) Instructed by: Treasury Solicitors Department One Kemble Street London WC2B 4TS

SUMMARY

RACE DISCRIMINATION

RACE DISCRIMINATION - Inferring discrimination

RACE DISCRIMINATION - Burden of proof

RACE DISCRIMINATION - Comparison

VICTIMISATION DISCRIMINATION - Other forms of discrimination

HARRASSMENT

The Claimant, Nigerian in origin, born in North London and a British citizen, was commissioned in the Army as a medical cadet. Her service in the Army commenced on graduation having read medicine, on 1 July 2008. By 5 August 2009, she qualified as a fully registered medical practitioner and was promoted from the rank of lieutenant, which she held from 5 August 2008, to the rank of captain. Her status until then was on a non-deployed basis. To be admitted to the army as a medical practitioner the Claimant would have to pass both the Sandhurst Professionally Qualified Officer training course and a second training course devoted to the practice of medicine in the Army. On 6 October 2010 she commenced the first training course at Sandhurst. On 13 December 2010 the Tribunal found that she comprehensively failed the first course. She was not permitted to resit the course and, as a consequence was discharged from the Army.

The Claimant contended before the Tribunal that she had in fact passed the course and alleged that she was subjected to a series of detriments and to less favourable treatment because of her race. She contended that she was unjustifiably marked down during assessments, that she was sworn at, and that she was singled out and subjected to a high degree of hostility. She contended that her ultimate discharge from the Army was tainted by unlawful race

discrimination and was an act of unlawful victimisation in addition. These contentions were all rejected by the Tribunal.

On appeal it was argued that the Claimant's many claims were dealt with in isolation from each other and the totality of the evidence was not looked at, nor was a proper comparative exercise conducted. Further, she contended that there were errors of law in the Employment Tribunal's approach to victimisation and harassment. These arguments were rejected:

(a) the Employment Tribunal made proper findings supported by the evidence rejecting the Claimant's case that she was singled out for hostile and unjustifiable treatment. The case was different to **X v Y**;

(b) the Employment Tribunal focused on the "reason why" and accepted the Respondent's explanations as wholly explaining the impugned treatment without reference to her race;

(c) there was no error of law in the approach to the victimisation and harassment claims.

The appeal therefore failed.

THE HONOURABLE MRS JUSTICE SIMLER

1. Dr Ukeh appeals from the Judgment of the Watford Employment Tribunal, chaired by Employment Judge Smail. The Tribunal dismissed all of her claims of unlawful discrimination arising out of her time as a candidate on the Professionally Qualified Officer course at Sandhurst in 2010. The reasons for the Tribunal's Decision are set out in a Judgment with Reasons sent to the parties on 5 February 2014. The appeal is resisted by the Respondent, the Ministry of Defence. I shall in the course of this Judgment refer to the parties as the Claimant and the Respondent, as they were before the Tribunal, for ease of reference.

2. The Claimant is represented on this appeal by David Stephenson of counsel, who did not appear below. The Respondent is represented by Helen Wolstenholme, who did.

3. Following an Appellant-only Preliminary Hearing before HHJ Serota QC on 24 October 2014, the Claimant was given permission to proceed to a Full Hearing in relation to grounds 1 to 8 of her grounds of appeal. Ground 9, which involved a reasons challenge on the basis that the Tribunal's reasoning was not **Meek**-compliant, was not permitted to proceed. HHJ Serota QC made directions and, as a consequence, the Respondent filed an Answer to the appeal and a draft note from counsel as to the discussions which took place before the Employment Tribunal regarding Captain Kennelly's attendance at the hearing. These formed the subject matter of grounds 1 and 5. Counsel for the Claimant before the Tribunal, Mr John Horan, failed to respond to attempts to agree that note prior to the date ordered for failing and, although he was granted an extension of time, failed to meet the extended deadline. An application was accordingly made on behalf of the Respondent for those two grounds of appeal to be struck out. The Claimant in response to that application voluntarily withdrew ground 1 of the appeal and

amended ground 5, and in those circumstances that application was not pursued by the Respondent.

4. On this appeal the Claimant therefore relies on an amended Notice and grounds of appeal addressing grounds 2 to 8 as follows:

(i) ground 2 contends that the Tribunal misapplied the burden of proof provision in section 136 of the **Equality Act 2010** by considering the Claimant's claims in isolation as opposed to looking at the totality of the evidence in order to see whether it was legitimate to infer race discrimination in this case;

(ii) ground 5 contends that the Tribunal again misapplied the burden of proof provision and associated case-law by holding that the Claimant had not established a *prima facie* case of discrimination;

(iii) grounds 3 and 4 taken together contend that the Tribunal failed to apply a proper comparative exercise or to identify the relevant circumstances correctly when concluding or considering her complaint about the decision to fail her on the Professionally Qualified Officer course;

(iv) grounds 6 and 7 taken together contend that on a fair and objective reading of her service complaint of 6 December 2010, that her complaints constituted a protected act within the meaning of section 27 of the **Equality Act 2010** so that the Tribunal erred in law in reaching the contrary conclusion and further erred in dealing with her complaint of victimisation in isolation;

(v) ground 8 concerns harassment and contends that the Tribunal misapplied the principles of law contained in **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336 and the associated case-law by failing to direct itself as to the relevant test

and/or failing to reach any reasoned conclusion in respect of her harassment complaints.

The Facts in Overview

5. I shall deal with specific findings made by the Tribunal in relation to the relevant grounds of appeal as I come to deal with them. In brief summary, the Tribunal held that the Claimant who is Nigerian in origin and black, but born in North London and is a British citizen, was commissioned in the Army as a medical cadet. Her service in the Army commenced when she was due to graduate from Liverpool University having read medicine on 1 July 2008. By 5 August 2009, she qualified as a fully registered medical practitioner and was promoted from the rank of lieutenant, which she held from 5 August 2008, to the rank of captain. Her status until then was on a non-deployed basis.

6. In order to be admitted to the Army as a medical practitioner the Claimant would have to pass both the Sandhurst Professionally Qualified Officer training course and a second training course devoted to the practice of medicine in the Army. On about 6 October 2010 she commenced the first of these two short training courses at Sandhurst. On 13 December 2010 she comprehensively failed the first course. She was not permitted by the Respondent to resit that course and, as a consequence of those two decisions, was discharged from the Army.

7. The Claimant contended before the Tribunal that she had in fact passed the course and alleged that she was subjected to a series of detriments and to less favourable treatment because of her race. She contended that she was unjustifiably marked down during assessments, that she was sworn at, and that she was singled out and subjected to a high degree of hostility. She contended that her ultimate discharge from the Army was tainted by unlawful race

discrimination and was an act of unlawful victimisation in addition. These contentions were all rejected.

Relevant Law

8. There was no dispute before the Tribunal, and nor was there any dispute before me, as to the applicable legal principles. They are all well established. The Tribunal directed itself correctly, albeit briefly, as to the legal test to be applied in each head of claim. It recognised the application of the burden of proof provisions.

9. So far as those are concerned, as Mr Stephenson submitted, there is a two-stage process under the burden of proof provision in section 136 of the **Equality Act 2010**. But that two-stage process is not obligatory. Whereas it may be legitimate to infer that a black person may have been discriminated on grounds of race if she performs as well as a white person but she fails and the white person does not, it is not necessarily legitimate to draw that inference if the evidence establishes that the black person performs badly and that white people who perform equally badly also fail. Where a tribunal accepts as genuine a non-racial explanation for treatment that fully explains the treatment and, on the tribunal's findings, has nothing to do with race, that is an end of the matter. It is not necessary or indeed obligatory in such a case for a tribunal then to go through a two-stage process.

10. Mr Stephenson referred to **Hewage v Grampian Health Board** [2012] ICR 1054 where Lord Hope addressed the role of the burden of proof provisions. At paragraph 32 he recognised that:

> **"… They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other. …"**

11. Finally, in **Madarassy v Nomura International** [2007] ICR 867 Mummery LJ held that "could conclude", in the context of the burden of proof provisions, meant that a reasonable Tribunal could properly conclude from all the evidence before it, including the evidence adduced by the complainant in support of the allegations, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. Importantly, at paragraph 56, Mummery LJ held that the bare facts of a difference in status and a difference in treatment are not without more sufficient to amount to a *prima facie* case of unlawful discrimination.

12. Ms Wolstenholme for her part reminded me of the general guidance provided by Elias P (as he then was) in **ASLEF v Brady** [2006] IRLR 576 at paragraph 55. Similar guidance was given by Mummery LJ in **London Borough of Brent v Fuller** [2011] IRLR 414 at paragraph 31 as follows:

> **"… The ET judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an ET decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

In this case the Tribunal heard evidence and submissions over a period of eight days. It considered a bundle running to in excess of 1700 pages. It heard oral evidence and cross-examination of those witnesses from 11 witnesses. It also considered the written evidence of two additional witnesses.

13. It is well established that it is not necessary for a tribunal to make findings of fact on all matters of dispute nor is it necessary for a tribunal to recount all the evidence. I am conscious that I cannot assume, given the wealth of evidence (both oral and documentary) that was

available to this Tribunal, that I have seen or been referred to all the evidence that was canvassed in this particular case.

The Issues before the Tribunal

14. One of the difficulties I have had on this appeal is ascertaining precisely what issues were agreed by the parties as requiring determination. The Tribunal was provided at the beginning of the hearing with what was described as an amended list of issues by the Claimant's counsel. That amended list of issues was agreed and was referred to and recited by the Tribunal at paragraph 2 of the Judgment. The amended list of issues (as recited) identifies the factual incidents relied on by the Claimant. It does not, however, identify precisely which factual incidents were relied on as constituting allegations of direct race discrimination, racial harassment and/or victimisation.

15. Nor was I able to obtain agreement from counsel at the appeal on this question. Ms Wolstenholme submitted that only issues 2.5 and 2.12 were advanced by the Claimant by the end of the case as both racial harassment and direct race discrimination. She submitted that all of the factual matters identified at 2.1 to 2.12 inclusive were relied on as acts of race discrimination and that factual issue 2.10 was relied on as victimisation as well. Mr Stephenson, who is disadvantaged in that he did not appear below, submits on instructions that allegations of racial harassment covered all of the allegations and overlapped completely with the allegations of direct race discrimination.

16. His difficulty, however, is that although that might have been the case at the outset, by the time of closing submissions, Ms Wolstenholme understood the position to be as I have just summarised and that is reflected in her Closing Submissions, which are in the agreed appeal

bundle. The Claimant's counsel's own Closing Note of Submissions identified only one allegation of harassment expressly. That was factual issue 2.12. It is also clear from the notes referred to me by the Respondent's solicitor, who was present at the Tribunal, and from the submissions of Ms Wolstenholme, that there was no challenge to the Respondent's understanding nor did the Claimant's counsel seek to correct it at any time. The Tribunal was therefore left with that understanding and is to be taken as having proceeded on that footing.

17. It is unfortunate that the position was not clarified, as it should have been by both counsel and by the Tribunal. But in these circumstances I proceed on the basis that 2.12 and 2.5 were identified as allegations of harassment but the remaining issues were not. Ultimately it may not matter in light of the factual findings the Tribunal made. But it seems to me that it is not open to the Claimant to challenge as in error of law the Tribunal's failure to deal with other issues as racial harassment in circumstances where her counsel did not ultimately advance them as such at the hearing below.

The Appeal

18. Against that background I turn to consider the individual grounds of appeal.

Ground 2: errors in the approach of the Tribunal in dealing with the Claimant's complaints in isolation when considering what inferences could be drawn from primary findings of fact

19. This ground of appeal concerns the Tribunal's findings in relation to the complaint of direct race discrimination. Mr Stephenson contends that the Tribunal considered each of the factual issues identified at paragraph 2 of the Tribunal's Judgment separately and in a fragmented way. This had the effect, he contends, of diminishing any eloquence that the cumulative effect of the primary facts had on the issue of whether the conduct complained of by

the Claimant was because of her race. He relies on the explanation given by Mummery J (as he then was) in **Qureshi v Victoria University of Manchester** [2001] ICR 863 at 874 to 875, cited with approval by the Court of Appeal in **Rihal v London Borough of Ealing** [2004] IRLR 642. Mr Stephenson also took me to **X v Y** [2013] UKEAT/0322/12 where HHJ Serota QC, at paragraphs 60 to 61, said this:

> **"60. … Discrimination cannot be inferred simply on the basis of differential treatment and difference in ethnicity, something more is required; that it is why concentration on individual issues is unhelpful. If one looks at each complaint in isolation the findings of an Employment Tribunal may be unchallengeable. It is important to take a holistic view of all the relevant facts. In the present case we are not persuaded that the Employment Tribunal did take that approach, the Employment Tribunal should have said so explicitly and explained why the Claimant's ethnicity in circumstances where there had been a significant number of substantial breaches of contracts was not the reason for the less favourable treatment. Simply finding that there had been poor management was insufficient. Poor management itself might be a symptom of discriminatory conduct. Furthermore, the Employment Tribunal looked at the matter if it did look at the matter in the round before it had taken account of the issues that had arisen post termination; they were not brought into the equation. Nor did the Employment Tribunal have any regard to the fact that Ms Ball was not the only person who may have been responsible for discriminatory conduct.**
>
> **61. Looking at all the findings together, had the Employment Tribunal done so, there was clearly ample material to bring the reverse burden of proof into play. The Employment Tribunal clearly could conclude from its findings as the various breaches of contract that there had been a discriminatory intent and therefore there was the need for a cogent explanation from the Respondent together with a careful explanation from the Employment Tribunal as to its reasoning. Simply saying it was all the result of poor management in our view is insufficient."**

20. Those errors and that fragmented approach are said by Mr Stephenson to be precisely what occurred in this case. He maintains that it was the Claimant's case before the Tribunal that she was singled out, that she was subjected to detrimental acts, that she was unjustifiably marked down in respect of her performance, all based on racial considerations, and that Captain Kennelly, who was the main alleged discriminator, was consciously or unconsciously meting out such treatment on the grounds of her race. The Tribunal's failure to stand back and look at the case holistically but instead considering each matter in isolation meant that it failed to consider properly what inferences could be drawn from the cumulative effect of all the relevant facts.

21. It is necessary to consider the whole of the Employment Tribunal's Judgment in order to determine whether there is force in this point. The Tribunal made general findings of fact as to the Claimant's history and her experience on the course at paragraphs 12 to 61 of the Judgment. It found overwhelming evidence of failure on the course by reference to the assessments conducted by a range of different members of directing staff. The Claimant was moved from Captain Kennelly's platoon to Captain Symons' platoon in the hope that this might improve her performance. This occurred about halfway through the course on 15 November. However, her performance remained weak. The Claimant was warned that the exercise on 7 December, known as the "Good Samaritan" exercise, particularly required her to show a marked and sustained progress or an unsatisfactory grading would follow and would lead to consideration of her suitability for future employment in the Army. In the event she did not show marked and sustained progress and the Tribunal made findings at paragraph 47 that she was marked as weak on this exercise by Colour Sergeant Donaldson as follows:

> **"… She was marked "Weak" by CSgt Donaldson in respect of a command exercise that took place on 7 December 2010. The observations on this task were that she did not plan to the conclusion of the task, the scout and the radio operator had more command presence and control of the multiple platoon than the commander, she relied on these individuals throughout and needed to be told to get her map out instead of using the radio operator's. There was no sense of urgency on the ground. She did not achieve her aim of locating the target, she just patrolled down two tracks and made no attempt to search for the target. CSgt Donaldson expressed his belief that she did not fully understand her role or the task and how to carry it out. She did not lead the patrol and all decisions were prompted by other team members. She was described as being very erratic when put under pressure. He listed the areas for improvement as command and control of a multiple platoon, calm down when under stress and fully understand the role tasked before deploying and achieve her aim. The appropriate mark was "Weak" based upon his scorings."**

The Tribunal also referred to other assessments conducted by other members of the directing staff and made relevant findings. They were all consistent with that view.

22. The Tribunal then referred to peer reviews which formed part of the assessment process. After the second exercise on the course, anonymous peer review was conducted. At paragraphs 48 and 49 the Tribunal found that members of the platoon were asked to give anonymous

written reviews answering three questions: first, who would you most like to work with in the platoon and why? Second, who would you least like to work with in the platoon and why? And third, who is the most competent in the platoon at command/military skills and why? The Tribunal found that the Claimant's name was mentioned on many occasions by platoon members in relation to the second question as to whom they would least like to work with. There were comments of platoon members, who mentioned the Claimant's name. The Tribunal bore in mind that the platoon members were qualified professional people seeking to join the Army at a senior rank by reason of their professions. They were all qualified in their own professional backgrounds. The Tribunal found that their observations accordingly carried weight.

23. The Tribunal then set out some of the anonymous written feedback, much of which identified weaknesses in the Claimant's performance as the reason for identifying her in response to question 2. Comments recorded include "Seems incapable of taking advice from other people", "Although she is a pleasant person she evidently struggles with much of what we are learning", "Due to a lack of fitness and an improper attitude", "Poor time management", "Doesn't always listen to full instruction. Could try listening more", "Slow learner, little enthusiasm to learn new skills", "Lack of understanding and poor basic skills", "Unreliable, creates extra work for others within the team as we always have to find her, check up on her", "Least competent" and finally:

> **"Generally there's no-one in the platoon that I'd not like to work or least like to work with. I do have concerns of going on the live firing range with Obe Ukeh. I do not have issues working with Obe normally and I feel she is generally putting in more effort but she seems to have difficulty grasping rifle drill basics."**

24. At paragraph 51 the Tribunal also referred to the witness statements of colleagues that were given in relation to the service complaint investigation conducted during the course of her

time on the course. There were 20 such statements. The Tribunal dealt with some of these at paragraphs 52 to 59. It referred to the one provided by Dr Wartenberg at paragraph 65.10. Mr Stephenson criticises the Tribunal for its selective reference to Dr Wartenberg's witness statement. He referred me particularly to passages in that statement that strongly supported, he submitted, the Claimant's case, describing her relationship with Captain Kennelly as strained from the very beginning. He concedes, however, that all of the points made by Dr Wartenberg in the Claimant's favour were contradicted by all of the other evidence both oral and written referred to by the Tribunal. Moreover he recognised that there are core passages in Dr Wartenberg's statement that are consistent with that other evidence. Nevertheless he submits it was incumbent on the Tribunal because Captain Wartenberg's statement was, as he described it, the "Achilles heel" in the Respondent's case, to address that statement and to consider in particular Captain Kennelly's early reaction to the Claimant and why the two black officers on this course were subjected to such a degree of hostility.

25. I do not accept those submissions. First, as I have already said, it is not necessary for a Tribunal to recount all of the evidence, nor is it necessary to make findings on all matters of dispute. Dr Wartenberg's witness statement was one of many written witness statements provided to the service complaint investigation. Much of what she said is consistent with other statements, and where there was inconsistency, her statement stood alone. It is clear that the Tribunal read it. It was referred to expressly. The Tribunal made findings on all material matters and, by implication, did not accept her witness statement where it conflicted with the overwhelming preponderance of the other evidence in the case.

26. Having dealt with the oral evidence it heard and the written witness statements provided to the service complaint investigation, the Tribunal found at paragraph 61 as follows:

> **"The tribunal is clear that this was a comprehensive fail of the course. The tribunal does not understand how the Claimant could reasonably say to them that she passed the course. That is evidence of a fundamental lack of insight on her part. The force of the Claimant's case, if there is any, is in relation to the question as to whether she should have been allowed to re-sit. It is not on whether she should have been treated as having passed this course."**

27. In relation to the 12 specific issues identified at paragraph 2, the Tribunal's findings of fact and conclusions are set out at paragraph 63 onwards. They can be summarised as follows:

(1) In relation to the Claimant's claim that she failed the sit-up test because she was suffering from abdominal pains caused by menstruation and was reprimanded as a consequence by Captain Kennelly, the Tribunal found that the Claimant did fail the sit-up test. It found that the pass mark for that test was 50 sit-ups whereas the Claimant did 42 only (see paragraph 24). The Tribunal held that the position of female officers in the Army is that menstruation of itself is not treated as an exception for a woman not to perform to the same standard as a man (see paragraph 63). The Tribunal found that Captain Kennelly reprimanded the Claimant as being weak and shouted at her for not trying hard enough because she was failing the basic fitness test. The Tribunal found that he would have done the same for a white woman in the same situation because the white cadet in the same situation would have been failing the test.

(2) In relation to the claim that, when she reported that she could not perform the swim test because of menstruation, she was asked whether she could swim and was told to wear a tampon, the Tribunal accepted that this incident occurred, and at paragraph 64 that Captain Symons, who was responsible, said that she had not heard menstruation used as an excuse in this way since her school days. The Claimant was told to wear a tampon by Captain Symons in an attempt to allay any concern in relation to leakage in the swimming pool and found that the same would have been said to a white female officer seeking to avoid or postpone the swim test on the basis of menstruation in those circumstances.

(3) In relation to the claim that the Claimant was sworn at and mocked by Captain Kennelly and ostracised more generally by the class, the Tribunal dealt with this at paragraph 65.1. It found that there was an abundance of evidence that Captain Kennelly swore as a matter of routine. It found that there was no support or corroboration for the view that the Claimant was sworn at in a manner or intensity different from any of her white colleagues. Insofar as the Claimant was challenged, the Tribunal found that this related to her poor performance. The Tribunal found that her feeling of being ostracised from the class was supported by observations of her peer group that they felt that they were carrying her by reason of her inadequate performance. Accordingly the treatment she received from instructors and fellow cadets was down to her performance and was not because of or on grounds of her race or colour as she had alleged.

The Tribunal made further findings at paragraph 65.2 to 65.14 about swearing more generally, concluding that Captain Kennelly swore for motivational reasons but that the Claimant was not singled out in any sense.

(4) In relation to the claim that she was unfairly reprimanded when giving a "one-up intent", the Tribunal was very unimpressed by the Claimant's evidence on this issue. It found that, if she was picked up in this regard, it was because she had done it incorrectly and made an error in that part of the orders process for which she was responsible (see paragraph 66).

(5) In relation to the "bag of shit" matter, the Tribunal made findings at paragraph 67.1 to 67.16 on this issue. It found that this was a "commonly used" expression, used in widespread fashion in the Army to refer to someone whose appearance was scruffy and who was not properly turned out. The Tribunal found that there was overwhelming evidence in relation to

use of this expression and that the Claimant was not singled out for use of the expression and that it had no racial connotations at all (see paragraph 67.16).

So far as issue 2.12, which concerned the use of this expression during the exercise "Lower Lake", when the Claimant said she was taken into the woods, the Tribunal held that, if the expression was used during this exercise, it was a reference to the manner in which she was turned out and was not in any sense racial.

(6) In relation to the comment or question alleged to have been asked by Captain Kennelly whether she was born in Africa, the Tribunal made findings of fact in this regard at paragraph 69. At paragraph 69.1 the Tribunal dealt with the way in which this matter was reported by the Claimant. It found that it was mentioned by the Claimant in her first informal complaint at the 6 December 2010 in the following terms:

> **"… Capt Kennelly asked her what exactly she was doing in the military and that she had no business being in the military. He proceeded to tell her that he worked hard to get his rank and:**
>
> > **"did I think I could just come in and get the rank? He went on to ask whether I was born in Africa." "**

The statement is followed by a statement by the Claimant to the effect that the significance of this question was unknown. As a consequence of that informal complaint the Claimant was asked to write letters of complaint to those about whom she was complaining. In her letter to Captain Kennelly she did not mention that matter at all, though she identified a range of other incidents and other matters about which she was complaining. It is no doubt for that reason that Captain Kennelly did not respond to that matter in his letter of response.

In her ET1 at page 71 the point is referred to, but it is connected with the Claimant struggling with map reading. In her amended Particulars the Claimant connects the question to the

reference to the "Good Somalian" comment. When she gave evidence to the Tribunal, the Claimant was challenged in cross-examination on the basis that the comment or question was never said and that, even if it was, it was not offensive. Her response to the latter point was that it was offensive because it meant that Captain Kennelly had not read her application form, which showed clearly that she was born in the UK.

Colour Sergeant Jones, who was understood to have been present at the time that the question was alleged to have been asked, gave evidence. He denied that the question was asked at all. Finally Captain Kennelly did not give evidence but dealt generally with the allegations made against him and put forward a general denial. He did not deal with any of these incidents in detail and did not deal with this point in detail either.

Against that summary of the evidence, and in light of the Tribunal's findings at paragraph 69, it seems to me that a fair reading of the Tribunal's conclusions is that the Tribunal was not satisfied that this question was asked because the evidence about it was insufficiently cogent. It went on to hold that, even if it was asked, the evidence was insufficiently cogent to conclude that it was race-tainted or that there was a racial connotation.

(7) In relation to the "Good Somalian" comment the Tribunal found that that expression was not used by Captain Kennelly (see paragraph 70) and the Claimant's evidence was rejected as necessarily incorrect.

(8) In relation to the complaint about being accused of wearing perfume, the Tribunal found (and it was accepted by the Claimant) that she had used scented wipes whilst on exercise and that was why Colour Sergeant Jones and Captain Kennelly suspected, rightly or wrongly, that

she was wearing perfume. That was contrary to the rules. The Tribunal found that she was challenged for breaking that rule in exactly the same way as a white person who had used scented wipes and was suspected of having used perfume would have been (see paragraph 71).

(9) In relation to the claim that she was not given a report about her to read before a hearing relating to the allegation of negligent discharge, the Tribunal found this accorded with procedure because the Platoon Commander's report is not shown to a cadet before it being read out before the College Commander. The Tribunal found that the comparator Millwood was also not shown the contents of the report before the summary hearing, though she was given both reports in sealed envelopes to carry to that hearing. The Tribunal held that the Claimant's treatment in relation to the negligent discharge and the receipt of reports was therefore exactly the same as that of Captain Milwood. Moreover it found that they received exactly the same penalty for that offence (see paragraph 72.1).

(10) In relation to the claims that the rules of a night navigation exercise were applied differently to her, the Tribunal did not accept that. Rather, the Tribunal found that the Claimant had misunderstood the rules of the night navigation exercise. The Tribunal observed that the Claimant failed to pass any navigation exercise throughout her time on the course (see paragraph 73.2).

(11) In relation to the Claimant's claim that she was maliciously allocated to or unfairly treated during the PRACTAC assessment, the Tribunal found that cadets were allocated to assessors in a group on an alphabetical basis. The Claimant was allocated by reference to the surname she had used on her application form. There was, therefore, no malicious allocation. Further, the Claimant failed the orders section on the course because, in Colour Sergeant

Jones's assessment, soldiers would not properly understand what they were being told when given her orders (see paragraph 74.4). She also failed the estimate phase.

The Tribunal accepted that the Claimant was probably questioned for longer in the estimate section of the assessment. This was, as far as I can see, the only incidents where the Tribunal found that there was differential treatment as between the Claimant and others. The Tribunal proceeded to ask the reason why she was treated differently in relation to the length of her questioning. It found this to be the case because Captain Kennelly was trying to get sufficient information from her in order for her to pass the assessment. That finding, dealt with at paragraph 74, is separately criticised on this appeal as based on speculation on the part of the Respondent's counsel as to the reason for the length of questioning of the Claimant on this occasion. Although it is right that counsel's submissions are referred to by the Tribunal rather than the evidence, I am satisfied that those submissions were consistent with the letter of response that was produced before the Tribunal and that I have been provided with given by Captain Kennelly to this complaint. Accordingly, it seems to me that there was evidence available to the Tribunal as to why the Claimant was subjected to longer questioning in the estimate section of the assessment that the Tribunal was entitled to accept, and that the Tribunal did accept that explanation as affording a complete and innocent explanation for that differential treatment.

(12) In relation to the Claimant's claim that her personnel file was inappropriately withheld from her for a few days, the Tribunal found that this was because release of the file would have to go through the chain of command and that Colour Sergeant Jones was merely trying to ensure that the proper process was followed. In other words, given that Colour Sergeant Jones

was simply following normal established procedure in relation to release of files, there was no different or less favourable treatment (see paragraph 75).

(13) In relation to issue 10 and the Claimant's claim that she failed the course on grounds of her race or because she had made a protected disclosure, the Tribunal found (as already referred to) that the Claimant comprehensively failed the course because of her poor performance and that this was also the main reason she was not offered a resit. At paragraph 76.23 the Tribunal dealt with the review board chaired by the Commandant, Major General Marriott. He had a report completed by three people, which is dealt with at length by the Tribunal at paragraph 76.24. The three who completed different sections of the report were Captain Symons as Platoon Commander, Major Tonkins as Company Commander and Lieutenant Colonel McCutcheon, who wrote the third entry.

At paragraph 76.25 the Tribunal found that, based on this and having heard verbal contributions from those three individuals, Major General Marriott noted an unwillingness to learn and a desperately poor performance, which equalled "Unsatisfactory". He noted that there were issues of character here. His final notation was "Personal: unsatisfactory: character/military/leadership." Generally, he found that she was "not to be deployed on operations" and was "not to return on subsequent PQO course".

28. Standing back and looking at the Tribunal's findings as I have just summarised them, in most instances the Tribunal found that the Claimant was treated no differently than others would have been in similar circumstances. She was not singled out or subjected to hostile treatment. Where there was different treatment (and the length of questioning in the PRACTAC exercise is one example), the Tribunal accepted the Respondent's explanation for

the treatment as providing a wholly non-racial explanation. It is implicit in the Tribunal's findings as a whole that it regarded the impugned treatment as reasonable in light of the Claimant's performance failings. This is not, accordingly, a case like **X v Y**, where the Tribunal made numerous findings of breach of contract and unfair or unreasonable treatment and then failed to stand back and consider whether, looked at holistically, race may have been a reason for that treatment. Here there were no such cumulative findings and this ground of appeal accordingly fails.

Ground 5: error in finding no prima facie case or making findings of fact

29. This ground of appeal is closely linked to ground 2 and was not separately developed in oral argument but was dealt with together with ground 2. Mr Stephenson contends that, read as a whole, the Tribunal adopted a two-stage approach to the burden of proof but that, in doing so, the Tribunal erred in law by holding, first, that no *prima facie* case had been established, and secondly, by failing to make primary findings of fact from which inferences could have been drawn.

30. I do not accept these submissions. First, the Tribunal did make findings of fact on all material issues including the reason for the impugned treatment in each case. Secondly, this was a case, accordingly, where positive findings could be made and the burden of proof could not have made any difference.

31. Thirdly, even if the burden of proof had been treated as having shifted, it would not have altered the outcome in light of the Tribunal's findings about each of the matters relied on, as I have just summarised them. So far as concerns the matters relied on by the Claimant as affording a basis for drawing inferences, in particular set out at paragraph 41 of the Claimant's

skeleton argument, for a variety of reasons the Tribunal rejected these matters and, in light of the evidence and the findings, was entitled in my judgment to do so. They did not afford a basis for drawing inferences accordingly.

32. I deal with them shortly:

(i) The Tribunal did not find a high degree of hostility directed towards the Claimant. Whilst it is right that the only two black officers failed, the Tribunal accepted the reason for the failure as fully explained by performance concerns in each of their cases. The Tribunal recognised that these were the only two black officers and dealt with that explicitly at paragraph 77A. On the evidence the findings made by the Tribunal were open in the circumstances.

(ii) Both the Claimant and Dr Wartenberg were warned, but Dr Wartenberg had made no complaint. That undermines the suggestion that the reason for the warnings was a protected act. But in any event there was a fully justified basis for the warning, as the Tribunal found.

(iii) The similarity of Captain Symons' assessment does not, in my judgment, afford any basis for drawing an inference in the absence of positive findings about this. There are none, and that in my judgment is consistent with the Tribunal regarding this point as immaterial, as do I.

(iv) The failure of the Claimant and Dr Wartenberg was fully explained by reason of performance inadequacies.

(v) The delay in relation to the PRACTAC exercise was fully explained, and the Tribunal accepted that explanation as affording a non-racial reason for the treatment.

(vi) The "born in Africa" comment has been dealt with and afforded no basis for any inference to be drawn.

(vii) The "Good Somalian" comment was rejected as not having been made.

33. These were, in my judgment, unassailable findings on the evidence. The Claimant did not establish the primary facts on which her case was founded. This ground of appeal accordingly fails.

Grounds 3 and 4: approach to comparators

34. Grounds 3 and 4 seek to challenge the Tribunal's approach to the statutory and evidential comparators in this case and, in particular, the Tribunal's asserted failure to deal properly with Sarah Bremner as a comparator when considering whether or not the Respondent's decision to fail the Claimant and to refuse to allow her to resit was tainted by race or victimisation. Whether Sarah Bremner was relied on in relation to the sit-up test only or for wider purposes, Mr Stephenson accepts that Tribunals can legitimately avoid arid and confusing disputes about the identification of an appropriate comparator by concentrating primarily on why the Claimant was treated as she was (see **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285). As Lord Nicholls explained in that case, what is called for is an examination of all the facts of the case and, in particular, the reasons, conscious or unconscious, in the mind of the alleged discriminator for the treatment afforded to the Claimant.

35. In my judgment that is precisely what the Tribunal did here. It examined all the facts of the case and considered, in particular, the reasons, conscious or unconscious, in the mind of Captain Kennelly and others for the treatment complained of by the Tribunal. The Tribunal

repeatedly found that the reason why the Claimant failed particular tests and ultimately the course or was otherwise treated in the way she complained of was her performance and for no other reason save only the allegation in relation to the refusal to allow her to resit the course which I shall return to in a moment. The Tribunal heard witnesses examined at length and considered many documents. It accepted the evidence of the Respondent relating to the Claimant's performance. It rejected her case that she in fact passed the test but was the victim of negative views or views that had been poisoned as a consequence of the antipathy of Captain Kennelly towards her by reason of her race.

36. Again, these findings are unassailable. Mr Stephenson contended that the failure to deal with Sarah Bremner as an actual or an evidential comparator nevertheless vitiates the Tribunal's conclusions because it meant that the Tribunal did not address the direct race discrimination complaint in relation to her failure on the course and her ultimate discharge. I do not agree. First, Sarah Bremner was in a different platoon. Her treatment by a different person and not Captain Kennelly could not afford a proper basis of comparison. Secondly, in any event, even if Sarah Bremner could afford a basis of comparison, the Tribunal did make the necessary findings. As already discussed, it made detailed findings on the incidents relied on by the Claimant. In relation to her failure on the course, the Tribunal found at paragraph 61 that this was a comprehensive fail and that her refusal to accept this was evidence of a fundamental lack of insight on her part. If there was force in her case, it was only in relation to the refusal to let her resit.

37. At paragraph 76.31 the Tribunal found again that the failure was by reason of her performance. The fact that that finding is in a paragraph dealing with victimisation does not detract from the force of it.

38. At paragraph 76.26 the Tribunal dealt with the Claimant's discharge from the Army. Colonel Ryan was the decision maker in this regard. He gave evidence at the Tribunal and he was the recipient of the report referred to at paragraph 76.24 and dealt with above. At paragraph 76.34 the Tribunal found that performance was the main reason why the Claimant was not offered a resit. The Tribunal dealt with this at paragraph 76.45:

> **"… Looking at this objectively there is evidence that there was a difference between the Claimant and Capt Wartenberg's performance such that it can be explained in performance terms why Capt Wartenberg was offered a re-take and the Claimant was not. Performance reasons represent the main reasons why the Claimant was not invited to re-take the course."**

39. The subsidiary reason for the refusal to let her retake the course is dealt with at paragraphs 76.33 and 79. The Tribunal found that there had been discussion about the Claimant's complaints and that, as a consequence, Major General Marriott was influenced in reaching his decision by the fact that she was blaming others and displayed an inability to accept criticism or to be self-aware about her own performance inadequacies.

40. At paragraph 79 the Tribunal held as follows:

> **"Had the complaint been a protected act, then the Claimant would have established a prima facie case, unrebutted by the Respondent, that the fact she blamed others for her performance in that complaint did have a significant influence on Major General Marriott's decision not to offer her a re-take because it formed part of Lt Col McCutcheon's entry on the final report which recommended that she did not re-take the course. Major General Marriott relied on this final report. The complaint was not the only source of evidence before Major General Marriott that she blamed others for her failure without taking personal responsibility. Capt Symons wrote her part of the final report saying the same before being alerted to the Claimant's complaint."**

41. Then at paragraph 80 the Tribunal found:

> **"The primary reason why she was not offered a re-take was the extent of her failure on the course which, sadly, was comprehensive. We were very surprised by the Claimant's contention to us that she had passed it. That further corroborated the Respondent's view that she was not taking responsibility for her failings."**

42. The Tribunal was not there simply accepting the genuinely held belief of the Respondent on these issues. It was making primary findings of fact based on what was clearly

a wealth of evidence that the reason for the Claimant's treatment was her comprehensive performance failure. That fully explained all of the treatment save for the refusal to invite her to retake the course where it was the primary or the main reason. The subsidiary reason was that she blamed others and failed to accept her own performance inadequacies. But in relation to all of these reasons the Tribunal's findings show that it found that race played no part in any of the treatment whatsoever.

43. In these circumstances the Tribunal's approach cannot properly be challenged as in error of law, and grounds 3 and 4 accordingly fail.

Grounds 6 and 7: victimisation

44. Grounds 6 and 7 seek to challenge the Tribunal's finding that the Claimant did not do a protected act for victimisation purposes when she made her service complaint of 6 December 2010 just days before she was assessed as having failed the course. The Tribunal made findings about the Claimant's complaint of 6 December 2010 at paragraphs 76.2, 76.5, 76.6, 76.7, 76.9, 76.10, 76.11, and 76.12. As a result it found at paragraph 76.13 that Lieutenant Colonel McCutcheon, who made the recommendation upon which Major General Marriott acted on 13 December 2010, twice asked the Claimant whether she was alleging race discrimination relevant to her complaint and that the Claimant answered "no" on each occasion and said that it was non-racial harassment about which she was complaining. At paragraph 76.32 the Tribunal found that Lieutenant Colonel McCutcheon did not think it likely that the Claimant would raise a race discrimination complaint in future, and the Tribunal concluded that he understood and dealt with the Claimant's case on the basis that she was alleging non-racial harassment.

45. Against those findings Mr Stephenson relies on **Durrani v London Borough of Ealing** UKEAT/0454/2012/RN, particularly at paragraph 27. He submits that, even in a situation where the Claimant was asked whether she was raising race and said no, the Respondent was alive to the issue and may well have believed she was or would in the future do so. It was accordingly open to the Tribunal to find that this was the Respondent's understanding despite what she said.

46. The difficulty with that submission is that the comprehensive findings of fact made by the Tribunal resolved this dispute of fact against the Claimant. The Tribunal recognised that careful analysis was required in this regard (see paragraph 76.1). The Tribunal could have rejected the evidence of the Respondent's witnesses. It could have found that, although this is what the Claimant said, nevertheless their belief was different or their belief as to the future was different. These were matters canvassed in cross-examination, and those were findings that would have been open to the Tribunal. However it did not make those findings. This is a case where the Claimant was asked direct questions by Lieutenant Colonel McCutcheon and others, and she gave direct answers that she was not raising race in relation to her complaint. Having done so the Tribunal was entitled to conclude on the evidence that she did not do a protected act and that the relevant officers of the Respondent did not believe she had done or was likely to do a protected act in future.

47. At the appeal hearing Mr Stephenson produced a document said to form part of the Army Welfare Officer's complaint raised by the Claimant, where "Racial harassment" is ticked. Ms Wolstenholme disputes that this document was before the Tribunal. But, even if it was, it is an undated document and there is nothing to show that it formed part of the Army Welfare Officer complaint or that Lieutenant Colonel McCutcheon saw it or indeed knew about it at all.

In short, it takes the matter no further and cannot undermine in any way the clear findings of fact made by the Tribunal on this issue.

48. Mr Stephenson accepts that, if he fails on ground 6, ground 7 falls away with it. In my judgment it would have failed in any event for the reasons already given in relation to the earlier grounds of appeal.

Ground 8: the harassment ground

49. This ground concerns the Tribunal's findings on racial harassment and the dismissal of her case in this regard. Mr Stephenson now accepts that the Tribunal gave itself a sufficient self-direction in law. Nevertheless he contends that the Tribunal failed properly to apply the law because it made no findings, he says, on each of the component elements of a harassment complaint. He relies, in particular, on paragraphs 10 and 11 of **Richmond Pharmacology v Dhaliwal** to submit that the failure by the Tribunal to address each element, namely (a) unwanted conduct and whether it was related to race or not and (b) the purpose or effect of such conduct, means that the decision is necessarily flawed as in error of law.

50. I reject that submission. First, paragraph 11 of the **Dhaliwal** case itself makes clear that there can be overlap between these elements and that the evidence will inevitably overlap in many cases. This means that a clear differentiation between those elements is not always possible. Secondly, the Employment Appeal Tribunal speaks of this being a healthy discipline to ensure that clear factual findings are made. That is obviously correct. It does not, however, mean that an Employment Tribunal that does not deal with each element separately will make an error of law for that reason alone.

51. Thirdly, a Tribunal Decision must be read as a whole. The contention that the Tribunal did not deal expressly with racial harassment, as distinct from direct race discrimination and victimisation, has no weight if the facts found by the Tribunal earlier in its decision show that the harassment complaint failed. It would fail, as Mr Stephenson accepted, if the Claimant did not establish unwanted conduct related to her race. I have already dealt with the unfortunate lack of clarity about which specific incidents were relied on as racial harassment complaints and accepted that, by the end of the evidence, the parties proceeded on the basis that issues 2.5 and 2.12 only were relied on in this regard. That was the Tribunal's understanding, I infer, as well. In any event however, to the extent that the factual incidents relied on more generally were "unwanted conduct" the Tribunal's findings demonstrate that none of this unwanted conduct was on racial grounds.

52. Issue 2.12 is the only issue identified in the Claimant's closing submissions as a harassment ground. It was rejected expressly as such by the Tribunal at paragraph 68.3. But the Tribunal's findings in relation to each of the other matters relied on demonstrate that the allegation of racial harassment failed in any event in relation to the first element. The Tribunal's findings were as follows:

(1) In relation to the "bag of shit" comment, dealt with at paragraph 67.16, the Tribunal found this was in widespread use and that the Claimant was not singled out in any way in this regard. The comment signified that a cadet was not properly turned out. In other words, whilst the language may have been unwanted, it was not related to the Claimant's race and there was no need for the Tribunal to proceed further.

(2) In relation to the "born in Africa" comment, as I have already explained, the Tribunal found that the evidence was insufficiently cogent to say whether the question was asked but that if it was asked it was insufficiently cogent to say that it was related to race. Again, the allegation failed in relation to the first element and there was no need to go further.

(3) "Good Somalian": this was rejected as a matter of fact and therefore failed at the outset. Accordingly this is not a case where the Tribunal found that there was poor management and/or hostility directed only at the Claimant or that she was singled out for negative treatment, all of which might have been regarded as a symptom of unconscious racially related harassment. None of this was found. The disputed questions of fact in this regard were resolved against the Claimant. She cannot reargue the merits of those findings in the absence of perversity and, since there was ample evidence entitling the Tribunal to reach the conclusions it reached, she has not established any error of law. Ground 8 accordingly fails too.

53. For all those reasons, despite the attractive way in which this appeal was presented by Mr Stephenson, it fails and is dismissed.