Appeal No. UKEAT/0199/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 December 2014

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

MS S ALAM — APPELLANT

LONDON PROBATION TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PATRICK HALLIDAY (of Counsel) Instructed by: Simons Muirhead & Burton 8-9 Frith Street London W1D 3JB
For the Respondent	MR SIMON CHEETHAM (of Counsel) Instructed by: Essex County Council Legal Services New Bridge House 60-68 New London Road Chelmsford Essex CM2 0PD

SUMMARY

RACE DISCRIMINATION - Inferring discrimination

The Employment Tribunal mis-directed itself by appearing that discrimination had to be the sole cause for the Appellant's treatment as opposed to being an "effective case" - see **O' Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School** [1997] ICR 33 and **O' Donoghue v Redcar and Cleveland Borough Council** [2001] IRLR 615. The case was remitted for a re-hearing before a differently constituted Tribunal.

HIS HONOUR JUDGE HAND QC

Introduction

1. This is an appeal by Miss Shama Alam, who from now on I will refer to as the Appellant. She is described in the written reserved Reasons of the Employment Tribunal in this case (paragraph 11) as "an Asian woman of Pakistani origin". She had been employed as a Probation Prosecutor by London Probation Trust (who from now on I will call the Respondent) for a period of about seven years when she was dismissed by a letter dated 29 November 2010. She subsequently appealed, but her dismissal was upheld. Consequently she complained to an Employment Tribunal, sitting at London (Central) over six days in July 2013, with two further days in chambers in August 2013, that she had been unfairly dismissed, discriminated against directly on the grounds of race and victimised.

2. The Employment Tribunal, comprising Employment Judge Grewal, Miss Samek and Mr McLaughlin, by a Judgment and reserved Written Reasons set out in the appeal bundle at pages 2 to 23 and sent to the parties on 6 November 2013, dismissed all three claims.

3. At the hearing today the Appellant has been represented by Mr Halliday of Counsel, and the Respondent has been represented by Mr Cheetham of Counsel. Neither Counsel appeared below at the Employment Tribunal.

The Claimant's Case

Ground 1

4. The Notice of Appeal, which is at pages 24 to 41 of the appeal bundle, set out seven grounds of appeal, but as a result of the sift process, Lewis J only allowed five to proceed to

this hearing and they have been compressed even further today. What were grounds 1 and 2 have been amalgamated into what we have called ground 1. This is a complaint that the Employment Tribunal established that, by comparison with others in the Probation Service, the way in which the Appellant had been treated was different and more severe to the way those others had been treated. That arose because the Employment Tribunal, although at paragraph 2.3 of its Judgment (see page 2 of the appeal bundle), it had said, "The Claimant relied upon Josephine Ong, Simon Leeper and Terrence O'Connor as actual comparators as well as a hypothetical comparator", in fact had never considered a hypothetical comparator with characteristics similar to or the same as the Appellant in the same circumstances. Thus the Employment Tribunal had failed to test properly whether there had been less favourable treatment of the Appellant because of the protected characteristic of her race or whether she had been subjected to a detriment because she had previously alleged she had carried out a protected act or acts. Also the Employment Tribunal had failed to consider, as a result of failing to test the factual circumstances by that hypothesis, whether the Appellant had produced sufficient evidence to require the Respondent to give a cogent explanation as to why that treatment had not been either because of a protected characteristic or because she had done a protected act.

5. Both in his Skeleton Argument and in his oral submissions it seemed to me that Mr Halliday was raising an additional and slightly different point in respect of ground 1, namely whether the Employment Tribunal had misdirected itself at paragraph 86 of its Reasons in the first sentence, where it had said:

> **"We considered whether the decision to instigate disciplinary action against the Claimant, and not Mr Leeper, was due to the fact that she was Asian or Pakistani or that she had previously made allegations of discrimination or to the fact that in light of the circumstances set out in paragraph 85 (above) Ms Sharpe genuinely took the view that the Claimant's actions were more serious and amounted to potential misconduct while … those of Mr Leeper did not."**

6. Mr Cheetham accepted that was an unhappily worded series of alternatives but resisted Mr Halliday's submission it was plainly erroneous. In the context, Mr Cheetham submitted, it was an unfortunate turn of phrase, but looked at overall, the Judgment of the Employment Tribunal whilst by no means perfect was a sound application of the law to the facts.

Ground 2

7. Ground 2, which was formerly grounds 3 and 7, amounted to a complaint that the Employment Tribunal had failed to consider properly whether a *prima facie* case of discrimination had arisen on the facts excluding the Respondent's explanatory evidence. This point also arose from paragraph 86 of the Reasons. But in ground 2 it was submitted that the Employment Tribunal had approached this in a way that no reasonable Tribunal, properly directing itself, could have approached the matter. There is, submitted Mr Halliday in paragraph 86, no reasoned explanation for the second sentence of paragraph 86, which reads:

> **"The Claimant has not adduced any evidence from which we could infer that Ms Sharpe who, we accept, made the decision that the matter merited disciplinary action, was in any of her dealings with the Claimant in any way influenced by the Claimant's race or the fact that she had made allegations of discrimination. There was no evidence from which we could infer that had the Claimant been of a different race or someone who had not done the protected acts, Ms Sharpe would have acted any differently."**

Ground 3

8. The third ground of appeal, which originated in ground 4 of the Notice of Appeal and Grounds of Appeal, complained that the Decision was inadequately reasoned at paragraph 86. The Employment Tribunal had, in the submission of Mr Halliday, failed to articulate any reasoned conclusion as to why it could not infer evidence of direct discrimination or victimisation. Other matters in the context of ground 3 were raised, to which I will come back in due course.

The Employment Tribunal Decision

9. The Employment Tribunal directed itself as to the law in a concise passage at paragraph 9 of the Judgment. It made reference to direct discrimination (section 13 of the **Equality Act 2010**), to victimisation (section 27 of the **Equality Act**) and to the reversal of the burden of proof, which is provided for by the mechanism set out in section 136 of the **Equality Act**. Reference was made to the cases of the Court of Appeal of **Igen v Wong** [2005] IRLR 258 and **Madarassy v Nomura International** [2007] ICR 867.

10. No criticism has been made of that brief self-direction. The problem stems, according to Mr Halliday, from consideration of the factual matrix. The Employment Tribunal made extensive findings of fact starting at paragraph 11 of the Judgment and continuing through to conclusions at paragraph 77. The Appellant, the Employment Tribunal found, as a Probation Prosecutor was responsible for a variety of tasks. By 2010, however, much of her work was concerned with the issue of warrants. When an offender has been sentenced to a community order, what I believe is now called "Community Payback" or a suspended prison sentence, coupled with some other community order, it will be a condition of the order that the offender commits no further offence during the currency of the community order and that he or she carries out certain tasks and commitments imposed by the making of the order. Frequently offenders commit breaches either by committing further offences or by not complying with some of the terms and commitments imposed by the order. In some circumstances, where such breaches are alleged, it may be necessary for the Prosecutor or the Probation Officer, because both can do so, to seek a warrant of arrest so that the person alleged to be in breach can be detained in custody pending the breach being considered by the court. When a warrant has been issued and executed, the matter may come back before the court and the offender may or may not be admitted to bail by the court.

11. In general terms some offenders are regarding as being "high risk" cases. The highest level of risk is Tier 4. The Employment Tribunal found that in such cases obtaining a warrant is a matter of high priority. It said this at paragraph 19 of the Judgment:

> **"It is repeatedly emphasised to all Probation Prosecutors that warrants for Tier 4 offenders must be given priority and processed immediately upon receipt. It was not in dispute that the Claimant was aware of this."**

12. When obtaining a warrant is deemed necessary, the person charged with that task, who might be, as in the instant case, a Probation Prosecutor or might be, as in the case of one of the persons with whom she was compared, Mr Leeper, a Probation Officer, needs to obtain three relevant documents: firstly the probation breach report; secondly, the offender additional information sheet, and thirdly, a copy of the original court order imposing a community sentence. The first two of those documents are held on a database to which the Probation Prosecutor has access. The third comes from the court. When all three documents are available, a warrant can be obtained, but the case then has to be listed to go before a Judge who issues the warrant.

13. Between paragraphs 22 and 38 of the reserved Written Reasons the Employment Tribunal set out the history of the relationship between Mr Clarke, who was the Claimant's line manager, Miss Sharpe, who had been a Probation Prosecutor but then took over line management responsibility, and the Appellant between January 2009 and February 2010. There had been some previous difficulties relating to the way in which the Appellant was carrying out her duties. All these matters are gone into by the Employment Tribunal. They noted that Miss Sharpe, who had become the Claimant's supervisor, found that task increasingly difficult. Mr Clarke had also had some involvement in his capacity as the Assistant Chief Officer.

14. In the course of these difficulties, the Appellant had made some statements, which it was accepted by the Employment Tribunal might amount to protected acts. These are matters which are referred to by the Employment Tribunal at paragraphs 77, 78 and 79. The Employment Tribunal then said this at paragraph 80:

> **"We then considered whether Ms Sharpe and/or Mr Clarke instigated the disciplinary process against the Claimant either because she had made those protected disclosures or because she was Asian and of Pakistani origin. We accepted the point made by the Claimant's representative that if the instigation of the process had been an act of direct discrimination or victimisation and those who had carried out the investigation and disciplinary process had subsequently relied on the evidence of Ms Sharpe, then any dismissal that flowed from [that] would be tainted with discrimination even though those who carried out the investigation and disciplinary hearings had not discriminated against the Claimant."**

15. So the Employment Tribunal approached the case on the basis that, even though there was a disciplinary hearing and then an appeal, both conducted by persons against whom no complaints had been made by the Appellant, nevertheless the Employment Tribunal still could reach the conclusion that the process had been, as it said at paragraph 80, "tainted with discrimination".

16. The incident which was the subject of the disciplinary procedures to which I have just referred started when the Appellant was sent information about an offender called TS on 26 February. TS was a Tier 4 offender who was the subject to a community order. The allegation was that he was in breach of it in three different ways. He was described by the Employment Tribunal as a crack cocaine and heroin addict and was of no fixed abode.

17. The Employment Tribunal deal with the circumstances in more detail at paragraph 35 of the Judgment where it is said:

> **"… These factors [that is, the matters I have just summarised] should have indicated to the Claimant the urgency of pursuing the warrant for this offender."**

That started on Friday, 25 February, but, as the Employment Tribunal recognised, the information started to come through after the Claimant had left for work. She worked at Southwark Crown Court. But on Monday communication about TS resumed. The Appellant recorded that she had received no papers on the appropriate computer database, which I think may be called Enforcement Tracker. In fact she could have got the breach report and the drug rehabilitation report from that same database. It was also observed by the Employment Tribunal in the penultimate sentence of paragraph 35 of the written reserved Reasons, that because the Appellant worked at Southwark Crown Court she could "easily have obtained a copy of the court order from the court office". Indeed events on 1 and 2 March did form part of the complaints made by the Respondent about the Appellant and were included in the factual matrix that was alleged to constitute misconduct, as set out in the letter of dismissal and the appeal letter, neither of which are before me but which Counsel have looked at over the short adjournment and are agreed that the events of the Monday and the Tuesday, which I will describe in a moment, were part of the criticisms made against the Appellant by the Respondent. But at the Employment Tribunal it was accepted that it was not the Appellant's responsibility to obtain the court order and that her failure to do so could not amount to misconduct (see the last sentence of paragraph 35 of the Judgment).

18. The next day, Tuesday, 2 March, information came to the Appellant's attention that TS was now under arrest as a result of an alleged offence of interfering with a motor vehicle and was in custody at what is described by the Employment Tribunal as Paddington Police Station but I think must be Paddington Green Police Station. This was an escalation of the situation. The previous difficulties relating to TS had been that he was alleged to be in breach of the community order in different ways; that he was alleged to have committed an offence; that he

had failed to attend a meeting; that he had left his girlfriend's address without giving any indication as to where he was going. But now, on Tuesday, 2 March he was in custody.

19. At 3.50 that day the Employment Tribunal found that the Appellant was sent an e-mail emphasising the urgent need for a warrant because, although TS was now in custody, it was likely he would be bailed (see paragraph 36 of the Employment Tribunal's Judgment where more detail, which is not necessary to burden this Judgment with, is given).

20. By 4.18 on 2 March the Appellant had received the court order and, as the Employment Tribunal found at paragraph 37, therefore had everything that she needed to prepare the warrant. The Tribunal say this:

> **"… in view of the urgency of the case [she] should have done so immediately."**

21. The following day the Appellant said, according to an entry she made on Enforcement Tracker, that she was awaiting some missing paperwork. This was something that she had also said on the Tuesday afternoon. Miss Sharpe, who had access to the database, and could study developments, posted this message, which I quote from paragraph 38 of the Employment Tribunal's Judgment:

> **"This is a TIER 4 HIGH RISK CASE. Prosecutor to go straight to warrant."**

And she sent an e-mail at 10.17, saying:

> **"… You are reminded that an application to go to warrant on a Tier 4 should be acted on immediately. He is of no fixed abode. Paperwork (breach pack) can follow later."**

22. By her reply the Appellant appeared to acknowledge that the paperwork need not have held up the warrant (see paragraph 39 of the Written Reasons). At some stage she went out (see paragraph 40 of the Written Reasons) and at some stage she had completed the warrant

application and given it to a Miss Storrar, who was located at Blackfriars Crown Court and who was responsible for listing warrants at Southwark Crown Court.

23. A number of entries on the computer database called Enforcement Tracker are given the timing of 10.45 here and at one stage the Appellant faced an allegation that she had fraudulently misstated the time of certain actions. This allegation was never pursued beyond the original investigation and it is accepted that there was never any intention to mislead on the part of the Appellant. But there was a dispute as to what the precise time might be when the paperwork was handed over in a state so that Miss Storrar could obtain a listing of the application before a Judge. The Appellant put this at 12.30pm. Miss Storrar originally said it was 1pm, but appears to have accepted at some point that it might have been earlier, something of the order of 12.50. Any earlier than that, Ms Storrar appears to have said, and she would have endeavoured to get the case before a Judge.

24. But Ms Storrar's position was that the material had been presented too late for her to get the case before the court until after the short adjournment: that is to say, the traditional, if perhaps slightly odd, name for the lunch break taken more or less universally by criminal courts between 1.00 and 2:00 in the afternoon.

25. In fact, before the paperwork had been completed at 11:37 (see paragraph 41 of the Judgment) the Appellant had been sent an e-mail by Miss Sharpe updating her on the position, which was that the offender, TS, was now at Marylebone Police Station, having committed a yet further offence, and was due to attend at City of Westminster Magistrates Court and it was desirable for a warrant to be enforced so that he could be rearrested when he came out of court.

26. At 12:19, the Employment Tribunal found, the Appellant had replied to say that she was in the middle of work and would respond when she got the opportunity (see paragraph 41 of the reserved Reasons). In fact TS appeared at the Magistrates Court at 12:45pm, and although the District Judge was told that the Probation Service were in the course of obtaining a warrant, the Judge was not persuaded to put the case back and TS was released on bail.

27. A warrant not backed for bail was sworn at 3:15 on the Wednesday afternoon. Subsequent events are set out at paragraphs 44 to 68 of the written reserved Reasons. There the disciplinary hearing is investigated by the Employment Tribunal, and I need say little about it except to note that at paragraph 56 the disciplinary hearing panel's view is recorded as follows:

> **"… the Claimant did not appear to appreciate the critical nature of her work in ensuring that Tier 4 high risk warrants were treated as a top priority."**

28. The Employment Tribunal also noted that the panel had been "concerned" that the Claimant did not appreciate the reputational damage and risk to the Respondent given that the offender had been released and had gone on to commit a further offence or offences. The Employment Tribunal, at paragraphs 69 to 76, considered under the heading of "Comparator evidence" the circumstances of three other individuals. At paragraphs 73 and 74 the Employment Tribunal considered the case of Ms Ong, who was a Probation Prosecutor. The Tribunal did not find there to be any meaningful comparison between the situation of Ms Ong and what she had done and the case of the Appellant. I do not understand Mr Halliday to take issue with that part of the Employment Tribunal's analysis.

29. At paragraphs 75 and 76 the case of a probationary employee, a Mr Terrence O'Connor, was considered by the Employment Tribunal. Mr Halliday did explore the circumstances of his case. The Employment Tribunal found that his contractual arrangement was such that although

he was obliged to give a month's notice the Respondent could terminate his employment at any time. This was presumably because he was on a probationary period.

30. On 24 March he gave notice that he was resigning. Either that date is an error on the part of the Employment Tribunal or page 94 of the appeal bundle has in it some sort of error. The e-mail from Mr O'Connor is in fact dated 25 March. It had been forwarded by Miss Sharpe, so it is possible that it bears the forwarding date and not the original date. But probably nothing much turns on that. The significance of it, according to Mr Halliday's submissions, is that here is a document that shows Mr O'Connor was indeed resigning his employment as a probationer and purporting to do so on one week's notice. That would of course have expired on either 1 or 2 April according to what the date of the original e-mail actually was and according to how one computes the period. The precise date is immaterial. The point is that he is said to give a week's notice.

31. On 6 April, however, according to the Employment Tribunal, the Respondent is said to have accepted his resignation and indicated that it would terminate on 24 April. That would be approximately one month after 24 March. The Tribunal then go on to say that on 13 April Miss Sharpe sent an e-mail to staff saying that, as of Monday, 11 April, Mr O'Connor was no longer employed by the Respondent. It was alleged (see paragraph 76 of the written reserved Reasons) that Mr O'Connor had refused to go to court to action a warrant for a Tier 4 High Risk offender and had been asked to leave immediately and not permitted to work any further part of his notice period.

32. During the appeal hearing Miss Sharpe had said that this had happened on 26 March. The Employment Tribunal accepted that could not be correct. They refer to a letter of 6 April,

which is not part of the bundle. Mr Halliday observes, quite sensibly, that since that is not really in issue, there was no need to place it before this Tribunal. What is relevant is that he was apparently working out seven days' notice, and the facts as set out that he was then summarily dismissed on 11 April are inconsistent with that. The Employment Tribunal say at paragraph 76 about this confusion over dates:

> **"… We accepted that Ms Sharpe was telling the truth about the incident and the premature termination of Mr O'Connor's employment but that she was mistaken about the date. We find that incident occurred between 6 and 11 April 2010. It was not clear, however, on the evidence whether Mr O'Connor had been paid until the end of his notice period or not."**

33. I take some time over that because it is said to be one of the prominent features of the case that the Employment Tribunal have failed properly to take into consideration the critical issues relating to whether or not there was a *prima facie* case of discrimination or victimisation and whether or not the burden of proof had shifted.

34. The Employment Tribunal looked at these three comparators at paragraphs 82, 83 and 84 of the written reserved Reasons. As to Mr O'Connor they concluded that the Appellant had not been treated less favourably than him. Both had their employment terminated, albeit in different ways, because of the way they had conducted themselves in relation to the processing of Tier 4 warrants. They say this about Mr O'Connor at paragraph 82:

> **"… The termination of Mr O'Connor's employment provided some support for the Respondent's case although there were differences between his circumstances and those of the Claimant. She had inexcusably delayed in processing a warrant for a Tier 4 High Risk offender. He had refused to obey a management instruction to go to court to process a warrant for a Tier 4 High Risk offender."**

35. That was the Employment Tribunal's reasoning for thinking that the comparison between the Appellant and Mr O'Connor had not advanced the Appellant's case that she had been discriminated against or victimised. It did not, in short, amount to less favourable treatment.

36. Paragraph 83 deals with Ms Ong's case, and in view of what I have said earlier about the significance of her case for this appeal, I can content myself by quoting the last sentence of paragraph 83, which reads:

> **"We were satisfied that no disciplinary action was taken against Ms Ong because there was no evidence of any wrongdoing on her part."**

37. The most controversial of the three turned out to be Mr Leeper. The Employment Tribunal start paragraph 84 of the written reserved Reasons by saying:

> **"The circumstances in Mr Leeper's case were in many ways similar to the circumstances in the Claimant's case."**

38. They go on to analyse the fact that the offender in his case, who was called RC, was a Tier 4 offender of no fixed abode with a drug addiction and a record making him, as they put it, a prolific offender. Moreover the timescale appears to have been more or less identical, at least initially. The request arrived on a Friday, and a warrant was not drafted and presented to the relevant court until the following Wednesday. But the Employment Tribunal had earlier in their Judgment examined the circumstances at Isleworth Crown Court. I need not go into the detail save to say that they had concluded that in operation there was a particular system that meant that cases might be delayed, and they found (see paragraph 84 of the judgment) that in the case of Mr Leeper any delay after the Wednesday was attributable to Isleworth Crown Court and not to him. The Employment Tribunal explains this further at paragraph 85 of the judgment, the first sentence of which is:

> **"There were, however, some significant differences between the two cases."**

The first difference was that the Claimant was aware another offence had been committed by TS and that he was at a police station and due to appear at court. Moreover the next sentence reads:

> **"The urgency of getting a warrant in those circumstances to prevent him from being at liberty again was emphasised in no uncertain terms."**

The Tribunal go on to say that was not the case with RC. He was at liberty and had to be found before a warrant could be served. The Tribunal added:"

> **"Any offences committed thereafter could have been attributed to the Respondent's failure to get a warrant to the magistrates' court in time. In spite of the urgency having been emphasised, when the Claimant received the court order at 4.18 that day she did not prepare the warrant until shortly before 1pm the following day. The court had indicated that it could have issued it between 12 and 1 that day. Therefore, the delay in issuing the warrant was not attributable to a delay in the court listing it but to the Probation Service not having drafted the warrant. Mr Leeper had the order prepared and ready by the time the court could deal with it."**

39. Mr Halliday submitted that the Employment Tribunal at this point in their written reserved Reasons are emphasising outcome as opposed to considering circumstances and conduct. But conduct, submitted Mr Halliday, is the same in the case of the Appellant and in the case of Mr Leeper. Both have delayed in getting the warrant. And the real difference was that TS was temporarily in custody whereas the offender with whom Mr Leeper was dealing was not.

40. The Tribunal then, in effect, conclude their consideration of these comparative issues and of the question of the instigation of disciplinary action at paragraph 86. I have already quoted the first sentence of paragraph 86 and the second sentence. The third sentence reads:

> **"Mr Clarke sanctioned the decision to instigate a disciplinary investigation. It is clear that he and the Claimant did not enjoy a good relationship which stemmed largely from the fact that he raised performance issues with her and dealt with them in a way that the Claimant did not feel was acceptable. Having carefully considered the issue, we concluded that Ms Sharpe escalated the matter relating to the warrant for TS because she felt that it was serious and potential misconduct on the part of the Claimant. The Claimant's race and protected acts played no part in her decision to escalate the matter or in the evidence that she gave in the disciplinary process. We were satisfied that the difference in treatment between the Claimant and Mr Leeper was due to the factors set out at paragraph 85 (above) and not their race or because the Claimant had done protected acts."**

Paragraph 87 deals with the way in which the panel addressed these matters and has not formed any part of the argument on this appeal.

Submissions

41. Mr Halliday submits, in essence, that the focal point of this case is paragraphs 85 and 86 of the written reserved Reasons. His first point was that, when one steps back and looks at the factual matrix of the case, it involves the dismissal of somebody employed for seven years on account of a delay of a few hours, it being accepted she was not culpable to be really no longer for the earlier period of delay. Therefore, he submitted, this was a harsh decision.

42. The second background fact that he emphasised was that these were very similar cases, and the differences, regarded as being of importance by the Employment Tribunal, were really outweighed by the similarities. In particular, there was never disclosed any difference in conduct. He emphasised those points because he submitted that when, in a case of this kind, one comes to look at a comparison to establish whether there is some evidence of discrimination calling for an explanation from the employer, one way of approaching the matter, and an obvious way of approaching the matter, is by reference to an actual or a hypothetical comparator or an evidential comparator. Here the Employment Tribunal have recognised the importance of a hypothetical comparator at paragraph 2.3 of the Judgment, to which I referred above, and they appear to have concluded that none of the three potential comparators were actual comparators in the sense in which that term reflects the concept of section 23 of the **Equality Act 2010**. The Tribunal had found that there were differences in each case. Mr Halliday referred me to the Judgment in **Balamoody v United Kingdom Central Council for Nursing Midwifery & Home Visitors** [2002] ICR 646 and to paragraphs 54, 57, 59 and 60 in the Judgment of the Court of Appeal given by Ward LJ.

43. As the argument progressed, there was a measure of agreement between Mr Cheetham and Mr Halliday that paragraph 54 of **Balamoody**, if read too literally, might lead to a very

artificial situation, in which in every case it is necessary, if there is no actual comparator, to construct a hypothetical comparator. As Mr Cheetham put it, the learning in **Balamoody** can probably be distilled into the single sentence: that it is always important for an Employment Tribunal to ask whether it thinks it is necessary to construct a hypothetical comparator but that should not be interpreted as producing a situation where axiomatically in every case an Employment Tribunal must doggedly go through the process of constructing a hypothetical comparator. Mr Halliday's submission here was that the way in which the Employment Tribunal had reasoned matters out at paragraph 86 was erroneous, and things would not have gone wrong had the Employment Tribunal tested the concepts that they set out at paragraph 86 by the construction of a hypothetical comparator.

44. As Lord Nicholls pointed out in the case of **Nagarajan v London Regional Transport** [2000] 1 AC 501 the crucial question in discrimination (in that case victimisation) is to determine why the Appellant was treated as s/he was. Mr Halliday submitted that the assertions (he did not use that word but I think that was very much what he suggested paragraph 86 amounted to) that there was no evidence from which the Tribunal could infer that there would have been different treatment of somebody of different race or of somebody who had not done protected acts would have been a sound conclusion only if the question had been asked whether a white probation officer or probation prosecutor who had conducted themselves in the same way would have been dismissed.

45. Whether in this case that crucial question of why the Appellant was treated as she was cannot be answered without constructing a hypothetical comparator, I am very much disposed to doubt. I do not understand exactly how the hypothetical comparator in this case would have produced a different perspective to the one adopted by the Employment Tribunal. Here the

Employment Tribunal had a series of three comparators to consider. I do not understand how the conclusion would have been different by assembling from their component parts a hypothetical comparator as opposed to using the evidence about them as a basis for considering Lord Nicholls' crucial question: why was the Appellant treated as she was? I do not think that paragraph 86 contains any error of law of the Employment Tribunal did not use the component parts of the actual comparators to assemble a hypothetical comparator.

46. But Mr Halliday has an alternative way of looking at the matter: that is, whether if one adopts what Lord Scott and Lord Rodger said at paragraphs 109 and 143 of the House of Lords in **Shamoon v Chief Constable of the RUC** [2003] ICR 337 and considers these as "evidential comparators", one might arrive at a conclusion that there was here a combination of less favourable treatment and the Appellant's ethnic origin at least sufficient to give to rise to an inference that discrimination might be the reason for the Appellant's dismissal, and the fact that she had done protected acts might be a potential reason as to why she had suffered the detriment of being dismissed. Mr Halliday referred me to the synopsis of the passage in **Shamoon**, helpfully set out by Lord Hoffmann at paragraph 36 of his speech in **Watt v Ahsan** [2008] 1 AC 696. The passage appears at page 708 to 709 of the Judgment. In particular he says, in paragraph 37 on page 709 between D-E:

> **"At any rate, the question of whether the differences between the circumstances of the complainant and those of the putative statutory comparator are "materially different" is often likely to be disputed. In most cases, however, it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator. If the tribunal is able to conclude that the respondent would have treated such a person more favourably on racial grounds, it would be well advised to avoid deciding whether any actual person was a statutory comparator."**

47. Before I deal with that I turn to what might be described as the subsidiary aspect of ground 1; this arises from the first sentence of paragraph 86 of the judgment, which I quoted above at paragraph 5 of this judgment but I will repeat here for the convenience of the reader:

> **"We considered whether the decision to instigate disciplinary action against the Claimant, and not Mr Leeper, was due to the fact that she was Asian or Pakistani or that she had previously made allegations of discrimination or to the fact that in light of the circumstances set out in paragraph 85 (above) Ms Sharpe genuinely took the view that the Claimant's actions were more serious and amounted to potential misconduct while … those of Mr Leeper did not."**

Mr Cheetham accepts the wording is infelicitous. Mr Halliday's point is that it more than infelicitous. It sets out as stark alternatives reasons, which are, in fact, capable of existing simultaneously, so that if a material contribution is made to a decision by unlawful discrimination or unlawful victimisation, the fact that other factors co-exist and even predominate is not a basis for reaching the conclusion that there is nothing to explain. The question is whether discrimination or victimisation was a significant factor in the treatment,

Ground 2

48. Ground 2 is that the conclusion reached is a perverse conclusion; one which no reasonable Tribunal properly directing itself could have reached, on the basis that this was a harsh decision with no real point of distinction between the conduct of Mr Leeper and the Appellant and with other matters such as Mr Clarke having started the process by raising allegations against the Appellant in relation to the Monday and Tuesday, which were later found to be unsustainable. These are matters that are dealt with by the Employment Tribunal at paragraphs 45 and 70 of the Judgment. Other matters that are developed by Mr Halliday in support of this submission are that Mr Clarke and the Appellant did not enjoy a good relationship and that Mr Clarke was not called as a witness.

49. Over the short adjournment in respect of the latter matter, which really amounts to a criticism of the failure of the Employment Tribunal to draw an inference from him not being called to give evidence, I have been provided with the authority of **Wisniewski v Central Manchester Health Authority** [1998] PIQR P324, a judgment of the Court of Appeal of some

complexity. At first instance Thomas J had inferred an adverse conclusion from the absence of the oral evidence at trial of the treating doctor in what was a clinical negligence case. This was in fact critical because the other point on which the plaintiff had succeeded at trial was overturned by the Court of Appeal. The Court of Appeal concluded that Thomas J had been wrong to reject the evidence of the defendant's medical experts, so the inferential conclusion was crucial. I confess, and no doubt this is a shortcoming on my part, to having difficulty in understanding whether the inferential conclusion related to the credibility of the doctor or it related to the somewhat complex intellectual structure of the approach to clinical negligence and, in particular, to whether the actions of a hypothetical doctor who had not attended at the birth might have been to intervene immediately or not.

50. Now is certainly not the time to engage in any further analysis of that decision. If a point was being made about Mr Clarke's absence from the hearing was raised, it is not alluded to it in the course of the judgment. But whether it was raised or not do I accept that the fact a witness does not attend is of itself necessarily a primary fact from which an inference can be drawn irrespective of the circumstances. In the **Wisniewski** case the historical circumstances, as it seems to me, were crucial. There is simply silence about the absence of Mr Clarke, and Miss Sharpe did give evidence, which in many respects, if it did not overlap completely with what Mr Clarke might have said, provided an explanation of her position.

51. I do not regard any of the material put forward by Mr Halliday in support of Ground 2 as coming anywhere close to amounting to material which would have compelled a reasonable Tribunal, properly directing itself on that material, to reach a different conclusion.

52. I can deal with Ground 3 very briefly; it does not seem to me that this is an inadequately reasoned decision. It is all very clear why the Appellant lost. It is to be found in paragraphs 85 and 86.

53. The real issue in this appeal, in my judgment, is whether there is an obvious error of approach at the start of paragraph 86. What is required is not that the treatment is solely because of a protected characteristic but that the protected characteristic is an "effective cause" of the treatment (see **O' Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School** [1997] ICR 33 and **O' Donoghue v Redcar and Cleveland Borough Council** [2001] IRLR 615). When this is added to the fact that in paragraphs 85 and 86 there is no analysis as to whether the evidential comparisons might have amounted at least to a potential case of discrimination, I am concerned whether the firm conclusion reached by the Employment Tribunal on the evidence that the Appellant was treated differently because she was guilty of a more serious matter than Mr Leeper proceeds from a material mis-direction as to the approach to be taken?

54. My mind has moved backwards and forwards, but I have reached the conclusion that where there is an obvious error of approach, as I find that there is in the first sentence of paragraph 86, I am not confident that the Employment Tribunal have looked at the evidence from the right perspective. In particular, I am not confident that had the Employment Tribunal approached the issue on the basis that it was necessary for discrimination or victimisation to be an effective cause but it need not be the sole cause it would be bound to have reached the same conclusion on less favourable treatment.

55. Not without some hesitation, therefore, I have reached the conclusion that this is a matter, where at the critical point of the Employment Tribunal's analysis, there is an error that may have skewed their approach to the case. In those circumstances it seems to me that the appeal ought to be allowed and the matter ought to be remitted.

56. I have been shown the latest authority in the Court of Appeal, **Jafri v Lincoln College** [2014] ICR 920. It is said by Mr Halliday that this restores orthodoxy. It seems to me, in any event, this is a case where I could not possibly reach any conclusion myself on the factual material. Therefore, it seems to me that there is no alternative and unpalatable though it may be this is a matter which must go back to a differently constituted Tribunal for a complete re-hearing.