Appeal No. UKEAT/0172/14/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 October 2014

Before

THE HONOURABLE MRS JUSTICE SIMLER

(SITTING ALONE)

DR V J LYFAR-CISSE — APPELLANT

BRIGHTON & SUSSEX UNIVERSITY HOSPITAL NHS TRUST AND OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ALTHEA BROWN (of Counsel) Instructed by: Bindmans LLP 236 Grays Inn Road London WC1X 8HB
For the Respondent	MR THOMAS KIBLING QC (One of Her Majesty's Counsel) Instructed by: Cater Leydon Millard Limited 68 Milton Park Abingdon Oxfordshire OX14 4RX and Eversheds LLP Solicitors 1 Wood Street London EC2V 7WS and Wragge Lawrence Graham & Co 3 Waterhouse Square 142 Holborn London EC1N 2SW

SUMMARY

RACE DISCRIMINATION

Direct

Inferring discrimination

Burden of proof

The Tribunal failed to address adequately or at all, two of three allegations of unlawful discrimination against Mr White. The allegations were not abandoned; nor were they addressed by a finding as to the reason why Mr White intervened in the grievance process. Absent a finding as to a non-discriminatory explanation for differential, detrimental, less favourable treatment, it was incumbent on the Employment Tribunal to make findings on each of those questions and consider the two stage burden of proof.

There was also an error in the Tribunal's approach to the burden of proof in that a gloss to the statute was added when the Tribunal asked whether it was "legitimate and right" to draw inferences by virtue of what it identified as a more "stringent" test in **Madarassy**. This was incorrect. The statutory test should be applied without any gloss.

THE HONOURABLE MRS JUSTICE SIMLER

1. This is an appeal from a Judgment with Written Reasons of the Employment Tribunal sitting at Havant, with Employment Judge Coles presiding, sent to the parties on 1 August 2013 and following an eight-day hearing. By that Decision the Employment Tribunal purported unanimously to dismiss all claims of unlawful race discrimination made by the Appellant against the First Respondent, The Brighton and Sussex University Hospital NHS Trust and three named Respondents. The only Respondent with which I am concerned is Mr White.

2. The principal issue raised on this appeal is whether or not the Tribunal addressed two of the three allegations made by the Appellant against Mr White and whether there is any error of law in the approach adopted by the Tribunal to those allegations. In addition there is a question as to whether the Tribunal applied the burden of proof provisions. Save in relation to the two allegations made against Mr White, there is no other challenge to any of the other findings made by this Employment Tribunal.

3. I shall refer in this Judgment to the parties as the Claimants, the First Respondent and Mr White, as they were before the Employment Tribunal. The Claimant appeared at the Tribunal by Counsel, Mr Elesinnla, and before me is represented by Ms Althea Brown of Counsel. Before the Tribunal Mr Thomas Kibling appeared on behalf of two of the named Respondents while Ms Eady QC appeared for the employer, and for Mr White. On this appeal all Respondents are represented by Mr Kibling.

The Facts

4. The background facts, so far as relevant to this appeal, can be summarised by reference to the Tribunal's findings. The Claimant is a black British woman of Afro-Caribbean ethnic origin and Jamaican national origin. She has worked as a Clinical Biochemist since October 1985, thereafter obtaining promotions to Senior Clinical Biochemist and Principal Chemical Biochemist posts with the First Respondent. In 2005 she brought claims against the First Respondent for unlawful race discrimination and, by a Judgment dated 20 July 2007, findings of unlawful race discrimination were made in her favour. There was a period of extensive negotiations between her and the First Respondent following that Judgment, as a result of which she received a sum of money and a public apology for her treatment, and she continued in her employment with the First Respondent and remains an employee of the First Respondent to this day.

5. Since 1991 the First Respondent has offered a Down's syndrome screening service. Delivery of that service requires collaboration between three departments, namely Biochemistry, Ultrasound and Maternity. The Claimant is the lead for the Biochemistry Service, and Mr Bradley is the lead for the Maternity side. The Claimant is assisted in that work by Donald Ndebele and the two have worked successfully together for a long time. The events that led to the claims commenced on 21 October 2011, when the Claimant took a period of immediate compassionate leave, following her father's death. That coincided with a period of annual leave for Mr Ndebele. The Claimant liaised with him directly to ask him whether he could cover her duties on the Down's syndrome screening service and he confirmed that he was happy to return from annual leave early in order to do so, and that is what happened.

6. On 31 October 2011 the Maternity Care Assistant, who had herself been on annual leave during that earlier week, was unable to find results for a patient who had been tested on 27 October 2011. Enquiries having been made, Karen Gregory, the Screening Support Midwife, became involved and was told that Mr Ndebele was coming in that evening from annual leave in order to verify certain test results relating to the patient. Miss Gregory mentioned what had happened to Mr Bradley, the Consultant Obstetrician and Gynaecologist, but he was relaxed about the situation because he was told that Mr Ndebele would be attending that evening. In the result, on 1 November 2011, when Miss Gregory arrived at work, the results were not available and the Tribunal held that she panicked. She spoke to Mr Bradley, who also became concerned. There was then communication with the Biomedical Sciences Department and, in particular, Mr Wardle.

7. As a consequence of those discussions, described by the Tribunal as reflecting some confusion in paragraph 32, Mr Bradley sent an e-mail to Mr Wardle on 1 November referring to what he described as the unexpected absence of Mr Ndebele and the Claimant at the same time and to the fact that they were the only people allowed to do the checking of screening results and the fact that accordingly the results could not be released until one or other of them had approved those results. Mr Wardle responded to that e-mail by sending an e-mail to the Claimant and Mr Ndebele, copied to a number of others, asking whether it would be possible to train other members of staff in order to authorise the screening service results in the event of both of them being unavailable in the future. The Tribunal recorded the fact that Mr Ndebele came to the lab later that morning (that is to say, 1 November) and validated all the outstanding results; that thereafter the Claimant returned to work on 7 November and Mr Ndebele returned on 12 November; and that on 12 November 2011 Mr Ndebele e-mailed Mr Wardle explaining that there had in fact been no delay in authorising the results and that they had in fact been

authorised within the three-working-day policy that was in place at the hospital. The Claimant took exception to Mr Wardle's e-mail and on 14 November she e-mailed Mr Wardle requesting that Mr Bradley justify his complaint against Mr Ndebele and herself. There were further exchanges of e-mails resulting in an e-mail from Mr Wardle to the Claimant and Mr Ndebele, stating that he wished to reassure them that no complaint had been made and that he appreciated their flexibility in providing a service in exceptional circumstances where other members of the staff are off and he particularly thanked Mr Ndebele for coming in off annual leave. He explained that he was keen to consider the best way to have contingency plans in place in the future in order to avoid the same problem happening again, and he invited input from the Claimant and Mr Ndebele in addressing that issue.

8. The Claimant regarded that response as inadequate and felt that her request for Mr Bradley to justify his complaint had not been dealt with. On 2 December 2011 she lodged a grievance against Mr Bradley and Mr Wardle complaining that the allegations made by Mr Bradley were unfounded and were intended to undermine her professionally. She complained that the conduct of Mr Wardle was evidence of bullying and harassment and that this conduct sought to further undermine her professionally. The grievance was investigated by an Associate Director, Mr Twyning. In an investigation report dated 9 March 2012 he upheld many of the Claimant's complaints and made recommendations including that a disciplinary process be instituted against Mr Bradley in relation to comments made by Mr Bradley in the e-mails. He also recommended action against Mr Wardle in relation to his failure to make it clear to the Claimant that there had been no delays in fact in the screening service process.

9. The Tribunal found that Mr White, who had been appointed as HR Director for the First Respondent on 1 August 2011, and who had ultimate responsibility for all Human Resource

matters within the Trust became aware of the Claimant's grievance and met solicitors for the First Respondent on 7 December 2011. The Tribunal found that he did so principally to discuss an unrelated matter, but in the course of that meeting he discussed the Claimant's grievance and whether there was any action that he could or should personally take to avoid the matter escalating and, in particular, in order to deal with any justified complaints that the Claimant may have had regarding comments made by Mr Bradley and Mr Wardle. The Tribunal found that the upshot was that Mr White asked both Mr Bradley and Mr Wardle to meet him. Meetings took place on 14 and 15 December 2011 with them respectively. Mr White urged both of them to apologise in writing to the Claimant in relation to certain aspects of their e-mails. They were both concerned that their e-mails could inadvertently have caused distress to the Claimant and for that reason, whilst not accepting that they had done anything wrong, they were both prepared to write e-mails of apology. Mr White drafted those apologies himself on behalf of Mr Bradley and Mr Wardle, but the impression given to the Claimant, who was not told about Mr White's involvement, was that the apologies had come spontaneously from Mr Bradley and Mr Wardle whereas in fact they had not.

10. The apologies were e-mailed to the Claimant on 22 December 2011, and when she found out about the involvement of Mr White in the process and his drafting of the e-mailed apologies she lodged a formal grievance against him by letter dated 29 March 2012. That grievance was heard by the Third Respondent, Mr Jones, a non-executive director on 13 June 2012. The Tribunal did not set out his findings in detail but said (at paragraph 45) that Mr Jones was highly critical of Mr White's intervention in the Claimant's grievance, which was in direct contravention of the First Respondent's policies and procedures, and recommended that the Chief Executive should consider disciplinary action against him. The Tribunal recorded the fact, nevertheless, that Mr Jones rejected the Claimant's contention that Mr White, by reason of

his actions, had been guilty of unlawful race discrimination or victimisation. The Tribunal observed, however, that it was clear from its own questioning of Mr Jones that he did not understand the correct definition of victimisation but, having been told what the correct definition was, assured the Tribunal that his decision would have been the same had he had a correct understanding at the time.

11. There was an appeal from Mr Jones' decision but it is unnecessary to address that any further. Suffice to say, so far as the other claims were concerned, the Tribunal concluded in relation to those that the e-mails sent by Mr Bradley and/or Mr Wardle on 1 November were innocuous and that there was no justification for concluding that they amounted to unreasonable complaints let alone acts of unlawful discrimination. The Tribunal found that they were no more than proper and temperate concerns about a situation in which, by reason of personally justifiable absence on the part of both the Claimant and Mr Ndebele, a lacuna could arise which might result in test results not being available within the normal or target period. That, the Tribunal found, in itself could give rise to anxiety on the part of patients without any fault on the part of the Claimant or Mr Ndebele, and the Tribunal accepted that the preparedness on the part of Mr Bradley and Mr Wardle to apologise was not because they had done something wrong but because they had no intention of causing the Claimant any distress.

12. The Tribunal went on to find that there were time points in relation to that complaint, but dealt with the case on the basis that all complaints had been brought in time.

The Appeal

13. The principal ground of appeal advanced on behalf of the Claimant by Ms Brown is that the Employment Tribunal erred in law by failing adequately or at all to deal with two of the

three allegations of direct race discrimination and victimisation made by her against Mr White, it being accepted that the Tribunal dealt appropriately with the third of the allegations against Mr White, which concerned the drafting of the apologies.

14. In her ET1 the Claimant set out those allegations against Mr White, starting at page 39, under the heading "Mr White's actions", stating that there were a number of additional actions taken by Mr White which she believed amounted to discrimination and victimisation on the grounds of her race. The first two were as follows:

> **"Mr White's interference in my grievance is in breach of the Trust's Dignity at Work policy.**
>
> **Mr White's attempts to "explore an appropriate resolution to the matter" by meeting with the perpetrators Mr Bradley and Mr Wardle and not me as the victim (in the latter case permitted under Trust policy) clearly demonstrates that the perpetrators were treated more favourably than me. Furthermore, that Mr White should believe that an apology would be an "appropriate resolution" to my grievance is further insult to injury."**

15. On the following page of her ET1 she continued in the last paragraph:

> **"… That Mr White should consider a resolution was possible without meeting me as the victim and that Mr White should consider an apology an "appropriate resolution" for unfounded allegations intentionally directed at two black members of staff responsible for the provision of DSS for which the perpetrators have offered no explanation for their actions in their defence is I believe … further evidence of racial discrimination and victimisation."**

16. She continued on the last page of her ET1 in the first paragraph:

> **"… I also state that if we were to accept Mr White's explanation that he met with the perpetrators to "explore an appropriate resolution to the matter" then according to the informal process outlined in the policy he would have been required to me [sic] with me too and the fact that he did not clearly demonstrates the perpetrators were treated more favourably than me."**

She went on:

> **"Mr White's position was that his designated role in my grievance was neither formal or informal but rather that he undertook a "peripheral role". That being said Mr White could not demonstrate where in the Trust's Dignity at Work Policy such a role exists. Clearly, Mr White's explanation is all rather bizarre and a breach of the Trust's Dignity at Work Policy.**
>
> **It is clear that Mr White's unlawful interference in my grievance was in breach of the Trust's Dignity at Work Policy. I have outlined in the presentation of my claim why I believe Mr White's actions were to my detriment and why I believe Mr White subjected me to discrimination and victimisation on the grounds of my race."**

17. The ET1 accordingly set out in the clearest terms the factual basis for the allegations the Claimant was making against Mr White, namely those identified at paragraphs 4.1-4.3 inclusive.

18. At paragraph 6 of its Reasons the Tribunal identified the issues raised by the claims made by the Claimant against all the Respondents, explaining that these had been comprehensively set out in a schedule to the order made by Employment Judge Bridges at a CMD on 23 November 2012 and then setting them out exhaustively. So far as the direct race discrimination claims in the first claim were concerned, they included:

> **"A4 The claimant relies upon the following allegations of direct race discrimination:-**
>
> **4.1 Mr White failed to speak to the claimant about his intervention in the claimant's grievance of 2 December 2011 against Mr Robert Bradley and Mr Chris Wardle ("the grievance").**
>
> **4.2 Mr White failed to speak to the claimant at all about the grievance."**

19. The third of the allegations, at 4.3, was that Mr White drafted apologies on behalf of Mr Bradley and Mr Wardle for the sole purpose of providing them with mitigation in relation to the formal grievance process, but as I have already indicated, it is accepted that allegation was satisfactorily addressed and dealt with by the Tribunal.

20. So far as victimisation is concerned, the Claimant asserted that the protected act relied upon by her was her previous Employment Tribunal claim in which Judgment was sent to the parties in mid-2007 and the alleged detriments relied on by the Claimant were expressly stated to be the same as the allegations in her direct discrimination claim against Mr White, as set out at paragraph 4.19 above.

21. At paragraph 22, properly referred to by Mr Kibling, the Tribunal said this:

> **"… This Tribunal is dealing with the specific allegations of race discrimination, victimisation and harassment brought by this individual claimant as identified in the list of issues referred to above."**

It went on at paragraph 23 to say:

> **"The Tribunal's judgment on the issues of the case is therefore based, having regard to the relevant statutory provisions and judicial authorities, on the factual evidence presented to it, the primary facts as found by it and its determination as to whether inferences can properly be drawn from those facts of race discrimination as alleged by the claimant against her personally."**

22. Most, if not all, of the factual ingredients necessary to establish claims of unlawful race discrimination and victimisation against Mr White are capable of being found amongst the Tribunal's Reasons. Importantly, in the findings of fact already identified, the factual basis for allegations 4.1 and 4.2 was established. There is no dispute by Mr Kibling about that. The Tribunal also made a number of further important findings that are relied on by both sides on this appeal. They are as follows:

(1) There is a critical passage in paragraph 37 of the Tribunal's Reasons stating that the involvement of Mr White in this process and his actions were highly significant in factual terms in this case. The Tribunal found that Mr White, who had long experience of working in HR and, in particular, in dealing with religious sectarian discord and discrimination was:

> **"… a firm advocate of "restorative justice", including his belief that often potentially explosive situations of the type involving the claimant's grievance can be resolved by early reconciliatory process, involving where appropriate a swift and spontaneous apology."**

I shall return to that finding in due course.

(2) At paragraph 39 the Tribunal referred to the meeting of 7 December 2011 between Mr White and the First Respondent's solicitors, Capsticks, which I have already referred

to, in the course of which he asked for advice as to whether he should become involved and if so how.

(3) At paragraph 40 the Tribunal found that the upshot was that Mr White asked both Mr Bradley and Mr Wardle to meet him, which they did. Mr Kibling has submitted that those words "the upshot" refer back to paragraph 37 and to Mr White's belief in restorative justice. I am not persuaded that is the correct understanding of the Tribunal's finding. In my judgment "the upshot" refers back to the meeting on 7 December referred to in the immediately preceding paragraph (paragraph 39) where they found that he sought advice on whether he should personally take any action to avoid the matter escalating and to deal with any justified complaints that the Claimant may have had regarding comments from Mr Bradley and Mr Wardle. That seems to me to be the more appropriate reading of the Tribunal's Decision, but ultimately it may not matter very much.

(4) At paragraph 43 the Tribunal recorded the evidence that Mr White gave that he was adamant that he was not aware of any protected acts made by the Claimant.

(5) The Tribunal found at paragraph 54 that the evidence of Mr White was not as convincing as it could have been. In particular they found it hard to believe that most members of management were not aware that the Claimant had been successful in a discrimination claim to an Employment Tribunal, that there had been a compromise agreement under which she was paid a substantial sum of money and further there had been a public apology for discriminatory action issued by the Chief Executive.

The Tribunal nevertheless accepted that it might well be, as Mr White had stated, that he was not aware of the detail relating to those previous claims, but concluded that he had a general awareness that the Claimant had been actively pursuing cases not only involving herself but others as well more generally. The Tribunal was accordingly satisfied that Mr White must have been aware that the Claimant had done protected acts. That is, of course, a significant finding which I shall return to, but it is also right to point out that the Tribunal did not consider that Mr White had been deliberately untruthful or disingenuous about his knowledge of protected acts, but that he was not aware of the extent of knowledge required in order to amount to knowledge of the protected acts such as to give rise to a potential claim for victimisation. Miss Brown submits, and I accept that that finding does no harm to her case, it simply means that there was not an added plank that she could rely on to support the drawing of inferences.

(6) The Tribunal held at paragraph 59, that it was satisfied that Mr White's action in dealing with the Claimant's grievance in the way he did were aimed at one objective only, and that was to address swiftly the Claimant's perception that she had been unjustifiably personally criticised for the events that had occurred. The Tribunal rejected, in addition, the claim that Mr White was seeking to create unjustified mitigation on behalf of Mr Bradley and Mr Wardle.

(7) At paragraph 60 the Tribunal held that Mr White's actions, though inappropriate, were carried out for benign and laudable purposes, namely to seek to resolve issues of contention sooner rather than later. That may have been a fair finding to make in relation to Mr White's motives and purposes, but it was not necessarily an answer to the question whether there was less favourable detrimental treatment done because the

Claimant had herself previously done protected acts against the First Respondent or, alternatively, because she is a black woman or of a different ethnicity.

(8) At paragraph 63 the Tribunal found that the Claimant was likely to perceive events as amounting to race discrimination, victimisation or harassment because of the history and her experience but said that that perception is irrelevant if the evidence did not establish that she was justified in coming to those conclusions.

(9) At paragraph 64 the Tribunal stated that it listened carefully throughout the lengthy duration of the case to ascertain whether there existed facts "from which it would be legitimate and right to draw inferences of the discrimination alleged", concluding at paragraph 65, unanimously, that the Claimant had not been able to establish a prima facie case in relation to any of the claims that had been brought by her in the combined proceedings.

(10) Finally, at paragraph 66 the Tribunal said if it was wrong about that such that the burden of proof did in fact shift, it was unanimously satisfied from the evidence provided by the Respondents that they had provided explanations for each and every one of the acts complained of which were non-discriminatory.

23. Ms Brown contends that what is abundantly clear from that account of the Tribunal's findings and conclusions is that there was no consideration or findings as to whether Mr White's behaviour in failing to speak to the Claimant about his intervention in her grievance and in failing to speak to her at all about her grievance, which was accepted as inappropriate and in breach of the Dignity at Work policy, was

(i) less favourable treatment that was detrimental to her;

(ii) whether it was done on racial grounds or by reason of the protected acts done by the Claimant;

(iii) and whether, absent an explanation for that treatment, the Claimant had established facts from which a Tribunal could conclude that there was unlawful discrimination.

24. So far as (i) is concerned, she submits that it would have been relevant for the Tribunal to consider in this context, the finding that Mr White's intervention was a breach of policy, that it was regarded as inappropriate and wrong by the First Respondent, meriting potential disciplinary proceedings. So far as (ii) is concerned, the Tribunal did not investigate at all the fact that there was a difference in race and status as between the Claimant on the one hand, and Mr Bradley and Mr Wardle on the other.

25. So far as (iii) is concerned, the criticism is that, instead of dealing with those questions and adopting a staged approach, as they ought to have done, the Tribunal concluded that Mr White's motive or purpose in acting as he did was benign and laudable and that the explanation he gave, such as it was, for his actions was not an explanation for differential treatment, still less favourable treatment, but was instead an explanation simply for why he intervened. That amounts to a material failure on the part of the Tribunal to address what was recognised to be a significant part of the Claimant's case.

26. Against that, in a concise and compelling response, Mr Kibling advances two principal arguments. His primary case is that the Claimant abandoned those allegations against Mr White and that they were therefore not necessary to be dealt with. Alternatively, he submits that the Tribunal dealt adequately with issues 4.1 and 4.2, reaching a **Meek**-compliant decision

that dealt with all necessary components so that the argument that they failed to address, decide or record allegations 4.1 and 4.2 is simply misplaced.

27. Dealing with the abandonment argument first, Mr Kibling accepts that there was no formal withdrawal of issues 4.1 and 4.2 but that the Tribunal clearly used the Claimant's closing submissions as a route map and as informing their focus and driving their Decision. Given the fact that the closing submissions were silent on issues 4.1 and 4.2, the effect was that those issues were effectively abandoned, and it is not open to the Claimant to criticise the Tribunal on the basis that these matters were not addressed.

28. I do not accept that argument. It is clear from both paragraph 6 and 22 of the Reasons that the Tribunal regarded its task as to give a Judgment on the agreed issues in the case including in particular, issues 4.1 and 4.2. This is what informed their Decision, and I do not accept that the Tribunal or indeed any of the parties proceeded on the basis that those issues had effectively been abandoned. It may be that the closing submissions were not as clear as they could have been and that the Tribunal can be forgiven to some extent for not separately identifying them and dealing with them alone and separately, but it would not have been safe for this Tribunal simply to have assumed without checking, that those issues were abandoned, and I do not consider that is what they did. I am fortified in reaching that conclusion by the fact that the written submissions to the Tribunal on behalf of the First and Second Respondents addressed in detail allegations 4.1 and 4.2, reflecting their understanding that those issues remained live issues. Whilst it is right, as Mr Kibling submits, that those submissions would have been exchanged simultaneously, that would have meant that it was even more incumbent on the Tribunal, if it was to proceed on the basis that 4.1 and 4.2 had been abandoned, given that they were so clearly addressed and dealt with by the First and Second Respondents, at the

very least to have checked with the Claimant whether she was abandoning them or not. In my judgment paragraph 6 reflects the Tribunal's understanding that there had been no recalibration of any of the issues nor any abandonment. Moreover the Tribunal itself recognised at paragraph 37 the significance of the allegations made by the Claimant against Mr White, which again underlines the unrealistic nature of Mr Kibling's submission on that basis. In my judgment there was no abandonment, and that argument fails.

29. That leads to a consideration of the question whether or not the Tribunal did deal adequately with those issues. Mr Kibling emphasised before looking at this matter in detail a number of general points, all of which are relevant and fair points to make. This was a long hearing, with many witnesses of fact. There were 900 pages of documents for the Tribunal to go through, and it is all the more the important in the circumstances not to take too unduly critical an approach to the Tribunal's findings. I have firmly borne in mind the importance of giving proper latitude to possible infelicities of expression, to which all Judgments may be subject when considering the adequacy of the Tribunal's treatment of allegations 4.1 and 4.2 accordingly.

30. Mr Kibling contends that the allegations were rejected by the Tribunal on the basis that Mr White's intervention in the grievance process was fully explained by his belief, which the Tribunal accepted, and commitment to restorative justice and by the fact that the Tribunal found that everything he had done was done for the sole objective of addressing swiftly the Claimant's perception that she had been unjustifiably personally criticised for the events that had occurred. Mr Kibling submits that that commitment to restorative justice and to the need to act swiftly to correct her perception necessarily precluded her involvement. He addresses that argument by reference to paragraphs 37 and 39 of the Tribunal's Decision.

31. He urges that the Tribunal dealt with the reason why in this case, an approach that has the support of authorities such as **Laing** and **Derbyshire and Others v St Helens BC** [2007] UKHL 16 and that the Tribunal concluded, as a matter of fact, what the reason Mr White did what he did was, at paragraph 59. That, he says, was really the end of the case because that afforded a complete and non-discriminatory explanation for Mr White's actions and was a complete answer. That the Tribunal went on at 65 and 66 to deal with the first and second stages described under the burden of proof provisions, was simply belt and braces. The Tribunal had already done enough and could have stopped at paragraph 59.

32. I do not accept his argument for the following reasons. Firstly, whilst it is right that the Tribunal found that Mr White was a firm advocate of restorative justice and believes potentially explosive situations can be resolved by early action, I do not consider paragraph 37 (even reading it as generously as I can) involves a finding that restorative justice necessarily precludes involving the Claimant. The words of the paragraph do not say that, and the words in the last sentence of paragraph 37 undermine his argument, by making clear that, whilst a swift and spontaneous apology is one of the ways, where appropriate, that restorative justice can be achieved, it is not the only way. The words "involving where appropriate a swift and spontaneous apology" suggest that there are other ways that might be appropriate in other circumstances. There is no reason in logic or rationality for assuming that one of the ways that might be appropriate is not to involve a complainant and seek his or her views as to what might be an appropriate means to achieve swift and spontaneous resolution, or swift and early resolution. Furthermore, Mr Kibling accepted the Tribunal finding at paragraph 59 provides an explanation for why Mr White got engaged in the process in the first place. What it does not do is explain why, having got involved, Mr White treated the Claimant differently by not involving her and by not speaking to her about the swift, spontaneous apology he regarded as the means

of resolving the grievance. The explanation given emphasises the fact that it is an explanation for Mr White's actions in intervening in the complaint. What the Tribunal do not do in that paragraph is to look for and identify an explanation for Mr White's differential treatment.

33. Nor am I persuaded by Mr Kibling's argument that paragraph 65 and 66 are simply belt and braces. That is not a natural reading of this Decision. The Tribunal appears to have adopted the two-stage approach and, consistent with its self-direction based on **Igen v Wong** [2005] IRLR 258 refers expressly to that two-stage approach. Nowhere in the Tribunal's self-direction on law nor in its findings does it say or make clear that it regards the "reason why" question as a satisfactory alternative, as it could plainly and obviously have done. Reading paragraphs 65 and 66 as generously as I can, there is nothing to suggest that these are simply belt and braces because a decision about the "reason why" had already been made. Paragraphs 65 and 66 reflect the Tribunal's final conclusion on questions of unlawful discrimination and, unless there were adequate earlier findings on the necessary components, they would be vitiated by a failure to make those earlier findings.

34. The Tribunal did not go through the staged approach Ms Brown identified as necessary. Because of that the Tribunal was not focussed on asking why Mr White treated the Claimant differently from the way he treated Mr Wardle and Mr Bradley. They answered a different question that failed to recognise the fact that there was less favourable detrimental treatment and a difference in status or race that might require explanation.

35. Having found that Mr White departed from best practice by intervening in the grievance process inappropriately and in circumstances where he had no role to play, and having rejected Mr White's evidence that he was unaware of the Claimant's protected acts, there was an

obvious inference to be drawn that Mr White acted as he did because of his knowledge of the Claimant as an individual who had previously raised claims against the First Respondent that were successful and led to a substantial money payment and public apology. That inference was neither considered nor addressed. Certainly it was not answered by a finding that Mr White's intentions were positively motivated and benign. However laudable a person's intentions are, that does not mean that his actions might not inadvertently or otherwise exclude, disadvantage, alienate or discriminate on prohibited grounds, as Ms Brown has submitted. Whilst of course I accept, as Mr Kibling submits, that is not incumbent on a Tribunal slavishly to deal with each of the components of the statutory definition, it is incumbent upon a Tribunal to deal with the issues in the case. In this case, unfortunately, the Tribunal did not make findings, as Mr Kibling has suggested, as to why Mr White spoke to Mr Bradley and Mr Wardle on the one hand but not to the Claimant on the other, and in the absence of any finding that he was precluded from doing so by his commitment to restorative justice or any other evidence that explained his failure to do so, no non-discriminatory explanation was identified and found by the Tribunal, and it was therefore necessary and relevant for the Tribunal to consider the remaining components that would have to be addressed in order to address issues 4.1 and 4.2.

36. Accordingly, for all those reasons, I am satisfied that this ground of appeal is well-established and that there was a failure on the part of this Tribunal to address issue 4.1 and 4.2.

37. Ground 2 challenges the Tribunal's approach to the burden of proof. Ms Brown submits that the Employment Tribunal erred in law in its approach to the burden of proof by putting a gloss on the statutory test when it said that it could only draw inferences or would only draw inferences from the primary facts found at the first stage if it was "legitimate and right" to do

so. She submits that those are not words to be found in the statute; that they indicate that there was some separate hurdle or condition that had to be met by the Claimant before any inference could be drawn; and that the Tribunal was adding a gloss to the statute which is difficult to understand. The statutory test requires a Tribunal to ask whether a claimant has established facts from which a tribunal "could conclude" that unlawful discrimination had been established, and requires no gloss. As courts have said repeatedly, guidance is no substitute; the statute is clear and simple. The Tribunal erred in its approach in those circumstances.

38. Against that Mr Kibling responds that there is no dispute between the parties as to the law, which is well established in this area. With that position I emphatically agree. He says that, when the Tribunal said at paragraph 53 that they would need to consider whether it would be legitimate and right to draw inferences, that was just a reference back to the law the Tribunal had already set out in the section of the Decision dealing with the law, rather than any concept that the Tribunal was trying to graft on to the statutory scheme.

39. Attractive as that submission is, my difficulty with it is that, when one looks back at paragraph 48, by reference to the case of **Igen v Wong** and **Madarassy v Nomura International** [2007] ICR 867, the Tribunal said:

> **"… The correct approach at the first stage is to ask whether a reasonable Tribunal could properly conclude from the evidence before it that the respondent has committed an act of race discrimination. This is a more stringent test than asking whether the evidence shows that the respondent could have committed an act of discrimination."**

40. Mr Kibling had no real answer to that point, and it seems to me that had the Tribunal's discussion of **Madarassy** at paragraph 48 stood alone, I might have been persuaded that this was an isolated infelicity of expression. However, given the conclusions of the Tribunal at paragraphs 53 and 64, with the repeated reference to a requirement on the Claimant to establish

facts from which it would be both legitimate and right to draw inferences, I cannot be confident that the Tribunal adopted the correct approach at the first stage. Whilst of course there would be no error of law in failing altogether to adopt a two-stage approach and instead asking the question why, (see **Laing** and **St Helens)**, the Employment Tribunal purported to adopt a two-stage approach.

41. The burden of proof point on its own could not have justified overturning this decision because, as Mr Kibling reminds me, at paragraph 66 the Tribunal in fact assumed, on a belt and braces basis, that the burden had shifted and it nevertheless reached the same conclusion. However, in circumstances where I have concluded that the conclusion at paragraph 66 is itself vitiated by the Tribunal's earlier failure to make relevant findings, it is appropriate to record the error identified in its approach to the burden of proof.

42. It is at least arguable that, had the Tribunal followed the statutory language and considered whether the Claimant had proved facts from which it could conclude, in the absence of an adequate explanation, that Mr White had committed acts of discrimination against her which are unlawful, the answer would have been yes and the Tribunal would have had to consider whether there was a non-discriminatory explanation for Mr White's actions. Alternatively if the Tribunal wished to avoid a two-stage approach and to adopt a reasons why approach instead, considering why Mr White behaved as he did, it would have had to consider (in addition to features already described such as his knowledge of her protected acts and the fact that he had behaved in breach of the dignity policy by intervening in the first place) why he treated her differently in the way that he did. Again, it seems to me to be at least arguable that the reason why he did so may have had some connection with the Claimant's protected acts. In other words, these are claims that have some substance and are not obviously bad. They

deserved to be addressed properly and in accordance with the appropriate legal principles by the Tribunal. In all those circumstances I am satisfied that this appeal in relation to allegations 4.1 and 4.2 must be allowed.

43. This is not a case where either side has suggested that the Appeal Tribunal could say with any confidence what the conclusions should have been had the Tribunal dealt adequately with these allegations. That means that issues 4.1 and 4.2 must be remitted to be re-heard. The parties diverge, however, as to whether the case should be remitted to the same or to a differently constituted Tribunal. I accept that the issues concerning Mr White are significant and are regarded by the Claimant as important. Ms Brown accepts that the delay is not so significant in this case as to make it impractical to send the case back to the same Tribunal for it to deal with these issues again. The real question here is the concern identified by Ms Brown on behalf of the Claimant: that this Tribunal will be deflected from looking at these issues properly afresh by their conclusion that Mr White's motives were benign and laudable and that he meant no harm. That would, as I have already indicated, be the wrong approach. The best motives do not convert unlawfully discriminatory actions into non-discriminatory ones, nor do they mean that hurt and detriment is not suffered as a consequence. Nevertheless I am confident that, with the guidance of this Judgment, the Tribunal, which carried out its duties professionally and appropriately in relation to all other complaints, as is necessarily accepted in the limited nature of this appeal, will do that equally if the matter is remitted to it to deal with issues 4.1 and 4.2 afresh.

44. I am satisfied that the proportionate approach, given the limited nature of the issues now to be re-addressed, is to remit this case to the same Tribunal for it to rehear and reconsider issues 4.1 and 4.2. It will be for the Tribunal to determine whether it is appropriate to have a

directions hearing, to identify whether any additional evidence is to be heard, and what if any documentary evidence will be necessary. The Tribunal can also provide any case management directions necessary for the exchange of additional Skeleton Arguments.

45. It remains only to thank all parties for the helpful way in which this appeal has been conducted.