Appeal No. UKEAT/0390/14/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 April 2015
Judgment handed down on 7 July 2015

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR H AHMED — APPELLANT

MINISTRY OF JUSTICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS NABILA MALLICK (of Counsel) Instructed by: Saracens Solicitors 16 Harcourt Street London W1H 4AD
For the Respondent	MR JAMES PURNELL (of Counsel) Instructed by: Treasury Solicitors One Kemble Street London WC2B 4TS

SUMMARY

RACE DISCRIMINATION - Direct

The Employment Tribunal found that the Claimant had been treated less favourably because of race in connection with a move from the Waltham Forest and Redbridge Group to the East Group of the Magistrates' Courts in London. This was issue 2.1 in a list of issues agreed for the hearing. However, the Employment Tribunal found that his claim in respect of this issue was out of time; and it declined to extend time.

As to issue 2.1: held (1) the Employment Tribunal had applied the wrong legal test when making its finding of direct race discrimination; (2) the Employment Tribunal had not erred in law in finding that the claim was out of time and in declining to extend time.

In respect of all other issues relating to discrimination (issues 2.2 to 8 which encompassed direct race discrimination, harassment and victimisation) the Employment Tribunal found against the Claimant. The Claimant appealed on the ground that the Employment Tribunal failed, when deciding whether to draw inferences or apply the burden of proof provisions, to consider its findings in totality. Held: the Employment Tribunal had not erred in law in this way.

Appeal dismissed.

HIS HONOUR JUDGE DAVID RICHARDSON

1. By a Judgment dated 18 March 2014 the Employment Tribunal sitting in London (Employment Judge Russell presiding) dismissed claims brought by Mr Haras Ahmed ("the Claimant") against the Secretary of State for Justice ("the Respondent").

2. In the course of its reasons the Employment Tribunal found that the Claimant had been treated less favourably because of race in connection with a move from the Waltham Forest and Redbridge Group to the East Group of the Magistrates' Courts in London. This was issue 2.1 in a list of issues agreed for the hearing. However, the Employment Tribunal found that his claim in respect of this issue was out of time; and it declined to extend time. The Claimant appeals from the finding that his claim was out of time and that time should not be extended. The Respondent resists the appeal and also seeks to uphold the dismissal of the claim on the basis that the finding of race discrimination was erroneous in law. In respect of all other issues relating to discrimination (issues 2.2 to 8 which encompassed direct race discrimination, harassment and victimisation) the Employment Tribunal found against the Claimant. The Claimant appeals on the ground that the Employment Tribunal failed, when deciding whether to draw inferences or apply the burden of proof provisions, to consider its findings in totality.

3. There is one other short ground of appeal. When the list of issues was originally drawn it included issues 9 and 10, addressing the question whether the Claimant suffered personal injury of a psychiatric nature. Complaint is made that the Employment Tribunal did not decide these issues. However there was a case management order dated 15 April 2013 which specifically directed that the hearing should be limited to liability only, leaving over questions of remedy and causation specifically because specialist medical evidence would be needed: see

paragraph 7 of the order. The Employment Tribunal was therefore correct not to decide issues 9 and 10.

4. The Employment Tribunal hearing lasted for five days. Both parties were represented by counsel. The Claimant gave evidence. Nine witnesses gave evidence for the Respondent; it is relevant to note that these witnesses included Ms Pamela Smith and Mr Alan Eccles. The Employment Tribunal reserved judgment. Within its reasons its findings of primary fact occupied some 16 pages of close typed text. I will summarise them before addressing separately the three aspects of the appeal.

The Background Facts

5. The Claimant, a qualified barrister, began to work for the Respondent as a legal advisor in the Magistrates' Court with effect from January 2000. He progressed well. By November 2010 he had been appointed as Legal Team Manager for Waltham Forest and Redbridge Magistrates' Court, responsible for a team of 16 lawyers.

6. The Magistrates' Courts were then and still are part of Her Majesty's Courts and Tribunal Service ("HMCTS"), an agency of the Ministry of Justice. They were administered in groups. The Claimant's line manager in the Waltham Forest and Redbridge Group was Ms Huntley and her manager in turn was Mr Ring. The Claimant had a good working relationship with them.

7. In August 2011 a major scandal broke in the Redbridge Magistrates' Court. A junior administrative officer, Mr Munir Patel, had been taking bribes for arranging that speeding fines and penalty points would not be recorded. He dealt with the administrative side of applications

under section 142 of the **Magistrates' Court Act** whereby cases may be reopened if it is established that a summons was not served on a defendant. He abused this system so that summonses were effectively "lost".

8. The scandal came to light through a journalist. It was a matter of great concern to HMCTS. Such was the scale of wrongdoing that it was thought others must have been involved. Mr Patel had been reported as saying to a journalist that it was something that he did for his "Asian brothers". An investigation was carried out by the agency's internal fraud team, headed by Ms Smith, an ex-police officer. Three employees were suspended.

9. The Claimant was not one of those suspended. He had no line responsibility for Mr Patel's team. Nevertheless he came under suspicion. Ms Smith carried out an investigation into possible links between him and Mr Patel. By 21 September 2011 investigations into possible criminal proceedings against him were complete. There was no evidence to connect him to Mr Patel's misconduct.

10. The Respondent's IT Operations Department investigated the Claimant's use of his IT account. An initial report was produced in September 2011. It said that there were inappropriate personal emails and hyperlinks - even a reference to "Muslim sites containing weapons". Mr Ring doubted whether this report was fair. He commissioned a Deputy Justice's clerk, Mr McAllister, to conduct further investigations. On 21 September Mr McAllister reported back. He found there had been little personal use of the account and that the reference to "Muslim sites containing guns" was in fact a gallery of photographs relating to a clay pigeon shoot stag weekend attended by the Claimant and some of his friends. A reference given by the

Claimant in 2010 may have been inappropriate and a written warning might have been proportionate, but no more.

11. Notwithstanding these results senior management of the Respondent informed Mr Ring that they wished disciplinary proceedings to be taken against the Claimant - or, at the very least, they wished him to be removed from Redbridge. Mr Ring did not believe that suspension or disciplinary action of a severe nature could be justified. He did, however, suggest that failure to complete audit checks on files might constitute grounds for disciplinary action or justify a temporary move from Redbridge.

12. A senior manager with HMCTS, Mr Eccles, decided to move the Claimant. Mr Ring implemented this decision. In an email dated 3 October the Claimant expressed concern at what he described as a unilateral move, under a cloud, without prior consultation and with his professional integrity questioned. Nevertheless the move went ahead under the guise of a recent exercise whereby legal team managers and assistants had been asked to express a preference as to their location. The Claimant was moved to the East Group. This move was the subject of issue 2.1 before the Employment Tribunal.

13. The Claimant started at his new location on 17 October 2011. His line manager was Ms Francis. He was now responsible for ten assistants rather than 16 but this was because the East Group contained more legal managers.

14. Shortly before his move, another legal manager, Ms Fowler, sent an email dated 5 October 2011 with the subject line “Personal Protect. Absolutely not to be forwarded. Burn

after reading". Among other proposals she suggested that the Claimant should be kept at Stratford more or less full-time to be "coached and monitored" by Ms Francis.

15. To some extent the Claimant was coached and monitored by Ms Francis when he arrived at the East Group. The Employment Tribunal found this was not done with "sinister intent" or carried out in an oppressive manner but as part of the discharge of her duties to ensure that a new employee settled into a busier team. It did not continue beyond the end of 2011.

16. As the Employment Tribunal found, however, the attention of senior management continued to rest upon the Claimant. A final report from the IT Operations Department in January 2012 continued to be critical of the Claimant - still, however, without accessing the hyperlinks which it said were open to criticism. A further report by Mr McAllister again firmly stated that there were no grounds for serious concern.

17. In late January 2011 the Claimant, while looking for work-related papers, came across Ms Fowler's email. He was distressed by the title and by the contents relating to "coaching and monitoring", which he took to show that there was a pre-planned agenda. He met Mr Ring to discuss his concerns. He recorded the conversation. Mr Ring, referring to the period when the Claimant was under investigation, said he had told others that there was a danger that the Claimant might be a victim of race discrimination - he had said that there was "no evidence and it was racial profiling."

18. Emails about the Claimant's IT use continued to circulate at a high level within HMCTS. It was said that the Director General was "strongly of the view that Mr A ought to be

dismissed and that we should take our chance at Tribunal" (email from Finance Director 27 March 2012).

19. In late February or early March 2012 a legal advisor reporting to the Claimant, Ms Gill, disclosed information tending to suggest inappropriate remarks by the Claimant including a remark that at university he and his friends would "pass around Sikh girls". Arrangements were made for her to have a different line manager. Ms Gill was at this time unwilling to make a formal complaint.

20. In June 2012 the Claimant returned to work after a short period of absence. At his return to work meeting he complained of the way in which Ms Francis treated him. He in turn was told that he would be subject to an investigation into his IT use. Thus began a series of procedural steps. Firstly, the Claimant submitted a formal grievance concerning his treatment by Ms Francis. Secondly, the Respondent began a formal disciplinary investigation into the Claimant's IT use. Thirdly, Ms Gill stated a formal grievance, which itself became the subject of investigation. In brief these three procedures developed in the following way.

21. (1) The Claimant's grievance was eventually determined on 28 March 2013. It was upheld only in part. It was found that he had been subjected to unfair treatment in connection with the decision to move him out of Redbridge. He was to receive an apology. But his allegations of subsequent unfair treatment were rejected, and his allegations of race discrimination were also rejected.

22. (2) The investigation into IT use was also determined on 28 March 2013. It was found that there were no serious conduct issues to address - only minor issues that could be dealt with by words of reminder from a senior manager.

23. (3) The investigation into Ms Gill's grievance had already been determined by this time. It had been upheld in part; and it had been recommended that disciplinary proceedings against the Claimant be commenced. These had not started by March 2013.

24. Following the decision to uphold his grievance only in part the Claimant resigned on 4 April 2013. He said that the Respondent had repudiated his contract of employment. He complained of unfair dismissal, adding a second claim to an initial claim which had been brought in November 2012.

The Move to East Group - Liability

The Employment Tribunal's Findings

25. The Employment Tribunal found that the Claimant was moved "unreasonably and in bad faith" (paragraph 75). It said:

> **"75. We accept that the Claimant was moved unreasonably and in bad faith. The real reason for the move was pressure from senior management due to concern that the Claimant may be implicated in the Redbridge fraud; rather than giving this as an honest reason to the Claimant, Mr Ring found an alternative reason to justify the move, albeit one which was to some limited extent linked. Having found that a misleading reason was given, we consider that the burden of proof has passed to the Respondent to show that the decision was not in any sense because of race. …"**

26. The Employment Tribunal found that the Respondent initially had grounds to investigate the Claimant: see paragraph 77. However, by 22 September those grounds had been addressed. The Employment Tribunal said:

> **"78. We have given very serious consideration to the way in which the investigation proceeded. By 22 September 2011, Ms Smith knew that there was no evidence linking the Claimant to the Patel fraud, nevertheless, she remained suspicious of the Claimant. We**

> **conclude that the shared ethnicity between the Claimant and Mr Patel was part of the reason why Ms Smith still harboured suspicions despite the lack of evidence to support them. Contemporaneous e-mails from those more senior to her, such as Mr Eccles, suggest that they were not fully informed that initial concerns had been resolved in the Claimant's favour before Ms Smith returned from holiday on 5 October 2011. This caused senior managers such as Mr Eccles to retain a lingering, but entirely unfounded, suspicion that the Claimant may be involved and may tamper with evidence if not moved."**

27. The Employment Tribunal's central conclusions relating to this issue are contained in paragraphs 80 to 81:

> **"80. Notwithstanding the pressure from higher sources, the actual decision to move the Claimant was taken by Mr Eccles and it is his reasons which must be considered against this background of miscommunication and continued suspicion. By the end of September 2011, Mr Ring was concerned about the lack of any apparent evidential link between the Claimant and the Patel fraud, although not aware of Ms Smith's separate conclusion to that effect. Mr Ring warned his superiors that to move the Claimant from Redbridge without evidence might be found to be an act of discrimination. Mr Ring went even further on 1 February 2012 when he advised the Claimant that he referred to 'racial profiling' and referred [to] Ms Smith's comment that 'there is an Asian male'.**
>
> **81. Mr Ellis' e-mail on 23 September 2011 shows that he still believed that there was evidence which supported further enquiry into the Claimant; his email on 26 September 2011 suggests to us that he still believed, wrongly, that the Claimant might have removed Mr Patel's road traffic file. Also on 26 September 2011 Mr Spooner remained concerned that there was a risk to evidence if the Claimant remained at Redbridge. On 30 September 2011 Mr Eccles still believed that there were grounds for suspicion based upon the initial evidence, not least the handwritten note on the Patel road traffic file. Whilst each belief was erroneous, we have accepted that Ms Smith failed to inform them before going on holiday that there was no evidence against the Claimant. Furthermore, the audit of the Claimant's work had shown governance failings in the section 142 process. We are satisfied that these were the principal reasons for the Claimant's move. However, this is not enough and we must be satisfied that race was in no sense whatsoever linked to the decision to move the Claimant. Mr Eccles' mistaken suspicion was a result of Ms Smith's failure properly to disclose the absence of evidence. We consider that this was due to her continued suspicion of the Claimant based, by then, purely on his shared ethnicity with Mr Patel. We consider that Ms Smith's conduct in failing to absolve the Claimant before her holiday caused Mr Spooner, Mr Gillespie and Mr Ellis to continue to suspect the Claimant. This shared suspicion was also, to some extent, influenced by the shared ethnicity point. We consider that this much is clear from Mr Ring's comments. For that reason, we cannot say that the Claimant's race was entirely unrelated to the decision to move the Claimant and we find that the Respondent has failed to discharge the burden of proof."**

28. The Employment Tribunal found that moving the Claimant in this way amounted to a detriment. Even though sideways moves were not in themselves highly unusual, this particular sideways move caused colleagues to raise questions about the link with what had happened at Redbridge: see paragraph 82 of the Reasons. Moreover it was less favourable treatment.

> **"84. We have considered the position of a hypothetical as well as actual comparators when looking at the reason why the Respondent acted as it did towards the Claimant. The Claimant was treated less favourably than his comparators, Mr Williams, Ms Christodoulou, Ms Grant and Ms Hewitt, insofar as they were neither investigated nor removed from their positions. However, their situations were materially different as there was no evidence to suggest any links which needed to be investigated, as there was in the Claimant's circumstances. We are**

satisfied that a hypothetical non-Asian comparator in the same or not materially different circumstances would have been investigated in the same way that the Claimant was initially. However, we conclude that Ms Smith, and by consequence senior managers, would not have continued to harbour the same, unfounded, suspicions about a hypothetical employee non-Asian comparator. Such a comparator would, we think, have been absolved of suspicion by 22 September 2011 and would not, therefore, have been required to move."

Submissions

29. On behalf of the Respondent Mr James Purnell criticised the Employment Tribunal's reasoning in three main ways.

30. Firstly, he submitted that the Employment Tribunal erred in law in finding that the move was "less favourable treatment". He pointed out that a move from one area to another was not intrinsically "less favourable treatment". He submitted that the Employment Tribunal did not take care to construct a correct hypothetical comparator. Such a comparator would be a non-Asian employee where there had been evidence to suggest links to a fraud which needed to be investigated; the investigations had concluded; the investigation manager continued to harbour suspicions; and failed to disclose the absence of evidence to the decision maker prior to her holiday. A non-Asian employee in these circumstances would be treated in the same way.

31. To this submission Ms Nabila Mallick, on behalf of the Claimant, replied that the Employment Tribunal carefully considered the linked questions of detriment, less favourable treatment and hypothetical comparator in paragraphs 82 to 84 of its Reasons. It did not err in law.

32. Secondly, Mr Purnell submitted that the Employment Tribunal erred in law in its consideration of the question whether any less favourable treatment was "because of" the protected characteristic. The Employment Tribunal correctly concluded that it should concentrate on Mr Eccles' decision. It identified correctly why he took the decision in

paragraph 80 of its Reasons but it then applied an incorrect test in paragraph 81, appearing to consider that it was sufficient if race was "linked" or "related" to the decision.

33. To this submission Ms Mallick replied that the Employment Tribunal correctly identified the burden of proof provisions within the **Equality Act 2010** and correctly applied them to the primary facts which it had found. She took me, mainly in her skeleton argument, to well-known authorities on this question including **Nagarajan v LRT** [2000] 1 AC 501, **Amnesty International v Ahmed** [2009] ICR 1450 and **R(E) v Governing Body of JFS School** [2010] IRLR 186.

34. Thirdly, Mr Purnell submitted that there was no evidential basis for the criticism of Ms Smith in paragraph 81 of the Employment Tribunal's Reasons. Ms Smith had sent an email on 21 September 2011 before she went on holiday which suggested she had not reached a conclusion on the question whether the Claimant was to be exonerated. The Employment Tribunal had no basis for saying that Ms Smith had failed properly to disclose the absence of evidence.

35. To this submission Ms Mallick replied that there was ample basis in the evidence for the Employment Tribunal's conclusion on this point. She submitted that this was a perversity challenge and referred me to well-known authorities on the test for perversity.

Statutory Provisions

36. Section 39(2)(d) of the **Equality Act 2010** provides that an employer must not discriminate against an employee by subjecting the employee to a detriment.

37. Section 13(1) defines direct discrimination in the following terms:

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

38. Section 23(1) provides that, on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

39. Section 136(1) and (2) make provision for the burden of proof:

> **"(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."**

Discussion and Conclusions

40. I have reached the conclusion that there is substance in the second of Mr Purnell's submissions as I have summarised them above. My reasons are as follows.

41. Issue 2.21 was defined in the following terms: "on 17 October 2011 the Respondent moved the Claimant to the East London Group unreasonably, in bad faith and in a discriminatory manner without justification." It was, therefore, centrally concerned with the decision to move the Claimant. The Employment Tribunal found that Mr Eccles took this decision. The Employment Tribunal said it was considering his reasons, albeit against a "background of miscommunication and continued suspicion".

42. Given that the Employment Tribunal was considering Mr Eccles' decision, it is well-established law that the appropriate question was: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason?

43. The Employment Tribunal found that Mr Eccles took the decision to move the Claimant in the belief that there were still grounds for suspicion based on the initial evidence: see paragraph 81. The Employment Tribunal had already found that the initial decision to undertake an investigation into the Claimant was entirely unrelated to the Claimant's race (see paragraph 77). It does not, therefore, appear to be the Employment Tribunal's reasoning in paragraph 81 that Mr Eccles was acting, either consciously or unconsciously, because of a consideration relating to race which he himself held.

44. The Employment Tribunal's reasoning appears to turn on the failure of Ms Smith to inform senior management of the Respondent that there was no evidence to link the Claimant to Mr Patel's criminality. The fact that the Claimant shared ethnicity with Mr Patel was part of the "reason why" Ms Smith still harboured suspicions despite the lack of evidence to support them.

45. Why did the Employment Tribunal conclude that Mr Eccles' decision was unlawful when its criticism was not of Mr Eccles but of Ms Smith's failure to inform him that his suspicions, hitherto justified, could no longer be justified? The Employment Tribunal's reasoning was that it must be satisfied that race was "in no sense whatsoever linked to the decision to move the Claimant", and it said that it could not say that "the Claimant's race was entirely unrelated to the decision to move the Claimant". It therefore found Mr Eccles' decision to move the Claimant to be unlawful. It acted in part by the application of a "linkage" test and in part by the application of the reverse burden of proof.

46. The phrase "in no sense whatsoever linked to" is redolent of the explanation of the burden of proof provisions within section 63A of the **Sex Discrimination Act 1975**, approved

by the Court of Appeal in **Igen Ltd v Wong** [2005] IRLR 258: see paragraph 11 of the "Revised Barton Guidance" set out in the annexe to the judgment of the court. But the Employment Tribunal changed the wording in an important way. The guidance referred to the treatment being "in no sense whatsoever on the grounds of" sex. This reflected the wording, prior to the **Equality Act 2010**, of the definition of direct discrimination. Section 13 now adopts the words "because of" in place of "on the grounds of" but the meaning remains the same. So, transposed, the correct question is whether the treatment is "in no sense whatsoever because of" the protected characteristic in question. Thus, even when the reverse burden applies, the key question remains: what, consciously or unconsciously, was the reason of the discriminator? It is not sufficient if his decision is "in some way linked to or related to" race if race was not - either consciously or unconsciously - a significant part of the reason.

47. Paragraph 81 of the Employment Tribunal's Reasons appears to impugn Mr Eccles' decision by reason of Ms Smith's conduct in failing to absolve the Claimant before her holiday - a matter about which of course Mr Eccles did not know. Ms Smith took her decision, on the Employment Tribunal's findings, based "purely on his shared ethnicity with Mr Patel". But Mr Eccles did not take his decision for that reason. If the Employment Tribunal had applied the correct legal test, Ms Smith's failure would not have contributed to a finding against Mr Eccles on the burden of proof, because the Employment Tribunal's primary finding of fact was that he did not know of Ms Smith's failure.

48. There is also reference within paragraph 81 to a shared suspicion of three other members of management (not Mr Eccles) being "influenced by the shared ethnicity point". There is some tension between that finding and an earlier finding in paragraph 79 that those managers' involvement was in no way connected with the Claimant's race. But I need not

resolve that tension. The key point is that the Employment Tribunal did not ask or answer the question whether Mr Eccles himself took the decision to move the Claimant, wholly or in part, consciously or unconsciously, because of race.

49. It therefore appears to me that there is a significant error of law within paragraph 81 of the Employment Tribunal's Reasons. Mr Eccles' decision was found unlawful on an incorrect legal basis.

50. If this point had stood alone I would have set aside the finding of race discrimination under issue 2.1. I would, however, have remitted the matter to the Employment Tribunal. While it seems to me likely that the Employment Tribunal acquitted Mr Eccles of taking his decision because of race, either consciously or unconsciously, I cannot be sure that this is the case when it did not ask or answer the correct legal question. I do not think I am in a position confidently to say what the Employment Tribunal's conclusion must have been if it had asked and answered the correct legal question. In such circumstances the matter would have to be remitted: see **Jafri v Lincoln College** [2014] ICR 920.

51. I turn to deal with Mr Purnell's first and third submissions. As in so many cases, the Employment Tribunal's finding that there was less favourable treatment is bound up with its finding as to the "reason why" question. I would see no error of law in the Employment Tribunal's reasoning if indeed it had correctly concluded that Mr Eccles took the decision to move the Claimant on racial grounds. If he had done so, the treatment would have been detrimental and a hypothetical non-Asian comparator would not have been treated in the same way. So Mr Purnell's first submission does not have an independent life.

52. I would reject Mr Purnell's third submission, which amounts to a complaint of perversity. In paragraph 18 of its Reasons the Employment Tribunal stated that Ms Smith accepted in evidence that the investigations into potential criminal proceedings against the Claimant ended on 21 September as there was no evidence to connect him to the fraud. It was not perverse for the Employment Tribunal to find that she should have made this clear immediately to senior members of management. Her email did not do so.

The Move to East Group - Time Limit Point

53. As we have seen, although the Employment Tribunal made a finding of unlawful discrimination against the Respondent, it dismissed the Claimant's complaint on this point as being out of time. The move to East Group took place on 17 October 2011. Time to present the claim (it reasoned) expired on 16 January 2012. The first claim form was not presented until 30 November 2012, over ten months out of time. The Employment Tribunal decided that it was not just and equitable to extend time. Its reasoning was as follows:

> **"109. The Claimant is a qualified and experienced barrister. Even though he does not practice in the area of employment law, we would consider that his professional qualifications and experience would give him an understanding of the legal process and the ability to undertake legal research to discover his employment rights. Furthermore, one of the Claimant's closest friends was a qualified solicitor and partner in a law firm, this friend is named on the ET1 as his legal representative. In his grievance submitted on 25 June 2012, the Claimant made extensive references to discrimination and we consider that he was well aware of the legal right not to be discriminated against. The first ET1 was submitted in November 2012, before his employment was terminated, from which we infer that the Claimant was aware of the need to issue a protective claim to ensure that time limits were complied with. We have heard no satisfactory explanation for why the claim was not presented in a timeous manner. We are conscious that the merits of the claim are strong, given our findings, but we also bear in mind that we have reached those findings in no small part due to the difficulty which Mr Ring, amongst others, had in recollecting details of what had happened at the time. To that extent, the Respondent has been placed at a significant disadvantage due to the delay and our findings may have been different had the evidence been more cogent. For these reasons, we are satisfied that the claims were presented out of time and it is not just and equitable for time to be extended. Accordingly, therefore, the race discrimination claims fail."**

Submissions

54. On behalf of the Claimant Ms Mallick submitted that the Employment Tribunal's decision was erroneous in law for two reasons.

55. Firstly, she submitted that the Employment Tribunal did not consider whether by reason of the move on 17 October 2011 there was a "continuing discriminatory state of affairs": see **Commissioner of Police of Metropolis v Hendricks** [2003] ICR 330 at paragraph 48. She made that submission below and it was not addressed by the Employment Tribunal.

56. Secondly, and more forcefully, she submitted that the Employment Tribunal's reasoning on the question of "just and equitable extension" was erroneous in law, either because it failed to consider all the matters which it should have considered or because its conclusion was perverse. She submitted that the Employment Tribunal did not sufficiently consider or balance the relative prejudice to the parties.

57. Ms Mallick, in particular, argued that the Employment Tribunal was wrong to take into account the difficulty which Mr Ring and others had in recollecting detail. She submitted that the Respondent had been alive at the time to the issue of race discrimination; Ms Smith had not kept a written record of the investigation; and the Employment Tribunal had found that there was a lack of note-taking because of the fear of disclosure in later proceedings: see paragraph 18 of its Reasons. No reasonable Employment Tribunal would have found prejudice to the Respondent in such circumstances. Further, Ms Mallick submitted, the Employment Tribunal ought to have taken into account that the Claimant was pursuing a grievance throughout the period of delay and that the Claimant did not take legal advice until shortly before commencing proceedings.

58. In response to these submissions Mr Purnell argued that the Employment Tribunal exercised its jurisdiction lawfully. It was correct to find that the 3 month time limit ran from the date of the move. It had taken into account relevant circumstances. Its reasoning showed

that it balanced the prejudice to the parties. Its decision could not be described as perverse. Mr Purnell took me to passages in the Employment Tribunal's reasoning indicating the difficulty of Mr Ring and Ms Francis in recollecting the detail of what took place at the time of the move. The Employment Tribunal's criticism did not extend to Mr Ring and Ms Francis at this time. The Employment Tribunal was entitled to find that there was no real excuse for the delay.

59. The parties took me to leading authorities on the question of just and equitable extension of time.

Statutory Provisions

60. The relevant statutory provisions are to be found within section 123 of the **Equality Act 2010**:

> **"(1) Proceedings on a complaint within section 120 may not be brought after the end of -**
>
> **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the employment tribunal thinks just and equitable.**
>
> **…**
>
> **(3) For the purposes of this section -**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it."**

Discussion and Conclusions

61. I can deal with Ms Mallick's first submission briefly. On the Employment Tribunal's finding the move to East Group was the only act of discrimination. There was no "conduct extending over a period" (section 123(3)). Ms Mallick's submission relating to "conduct extending over a period" depended on success in some or all of the other issues in the case. The Claimant was unsuccessful: the point therefore falls away, and this is why the Employment

Tribunal did not deal with it. If, of course, Ms Mallick is successful in overturning other findings of the Employment Tribunal, it would then be necessary to revisit this question.

62. The legal principles relating to section 123(1)(b) (the "just and equitable" extension) are well-known. It is for the Claimant to satisfy the Employment Tribunal that time should be extended. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be extended. The Employment Tribunal is required to consider all relevant circumstances including in particular the prejudice which each party will suffer as a result of granting or refusing an extension. Relevant matters will generally include what are known as the "**Keeble**" factors: see **British Coal Corporation v Keeble** [1997] IRLR 336. These include: the length of and reasons for the delay; the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the Respondent had co-operated with requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate professional advice once he knew of the possibility of taking action. But these factors are not a checklist which must be slavishly followed by the Tribunal.

63. An appeal lies to the Employment Appeal Tribunal only on a question of law: see section 21(1) of the **Employment Tribunals Act 1996**. The Employment Appeal Tribunal therefore must not interfere merely because it would have reached a different conclusion. The Employment Appeal Tribunal must be satisfied that the Employment Tribunal took a demonstrably wrong approach, or attached importance to that which was irrelevant, or ignored that which was relevant; or reached a conclusion which no reasonable Employment Tribunal could have reached.

64. In my judgment the Employment Tribunal's evaluation in paragraph 109 is not open to criticism in any of these ways. It took into account the prejudice to each party. It had regard to the length of and reason for delay; the effect of delay on the cogency of the evidence; the promptness with which the Claimant acted and the ability of the Claimant to take legal advice. These were all relevant considerations.

65. It is true that the Employment Tribunal had been critical of the Respondent's approach to note-taking: see paragraph 18 of its Reasons. That paragraph, however, relates principally to the investigation stage. The Employment Tribunal was considering the exercise of discretion in relation to issue 2.1. This concerned the move to East Group. Mr Ring and Ms Francis were respectively the manager who implemented the move and the manager who received the Claimant. The Employment Tribunal made specific findings as to their difficulty in remembering events: see paragraphs 14, 23 and 24 of its Reasons. There is no suggestion that the Employment Tribunal was critical of Mr Ring or Ms Francis in this respect.

66. I do not think the Employment Tribunal's Decision can be described as perverse. Nor do I think it can be said to have left out of account the grievance process which it specifically mentioned in paragraph 109.

67. To a lay person it may seem curious that an Employment Tribunal, having found an act of discrimination, may then find that an employee is out of time for claiming in respect of it. But this is an inevitable consequence of section 123(3). There will be cases where an Employment Tribunal has to consider and make findings relating to a series of alleged acts of discrimination in order to discover whether there was a course of conduct which might result in time running only from the end of a period. This was such a case. Having examined that

course of conduct, the Employment Tribunal found that the only act of discrimination was in October 2011. It was then bound to apply section 123(1), conscientiously deciding whether it was just and equitable to extend time for that one event.

Totality

68. I turn, then, to the Claimant's appeal on the ground that the Employment Tribunal failed, when deciding whether to draw inferences or apply the burden of proof provisions, to consider its findings in totality.

The Employment Tribunal's Reasons

69. For the most part the Claimant's allegations of less favourable treatment, victimisation and harassment were rejected because the primary facts were found against him. Thus it was found that the investigation of his IT account was an appropriate step so that there were no primary findings of fact which would shift the burden of proof (issue 2.4, paragraph 87). There was no secret plan of surveillance: Ms Francis' actions were good management practice (issue 2.5, paragraphs 88 to 90). He was not instructed to remain almost exclusively at Stratford (issue 2.6, paragraph 91). He was not required to justify requests for leave to an extent beyond that of other employees (issue 2.7, paragraph 92). Ms Francis was not unhappy to be managing him initially; she did pass on positive feedback and she did not criticise him unduly (issues 2.8 to 2.10, paragraphs 93 to 94). She did ask him about his loyalty during appraisal but this was because of an allegation made by Ms Gill, not in any way because of race (issue 2.11, paragraph 95). There was no impropriety or racial element in Mr Parsons' dealing with the procedural matters (issue 2.13). The Gill grievance was unrelated to the Claimant's race and the investigation of it was unrelated to the Claimant's race (issues 2.4 to 2.16).

70. Allegations of harassment and victimisation were rejected on the facts - indeed most of the allegations of victimisation were not pursued.

71. There was one issue concerning direct race discrimination which caused the Employment Tribunal more difficulty. This was issue 2.12, which related to the decision to institute disciplinary proceedings. It dealt with this issue at some length in paragraphs 96 to 100 of its Reasons. It found that the burden of proof passed to the Respondent to show that the decision to institute disciplinary proceedings was "in no sense because of race" (note the use here by the Employment Tribunal of the correct formulation). The key paragraph is paragraph 100, which I will quote in full:

> **"100. In deciding this issue, we have found it more helpful to look for the reason why the disciplinary proceedings were commenced, rather than trying to approach the issue through a hypothetical comparator. The decision to initiate disciplinary action was taken by Mr Ring, albeit under pressure, by April 2012 when Mr Parsons was appointed to investigate. The decision was notified to the Claimant on 25 June 2012 upon his return from sick leave. We are satisfied that the Redbridge fraud had brought the Claimant within the scrutiny of senior managers involved in resolving the fallout. Despite Ms Smith's emails and their misrepresentation of the evidence, after careful scrutiny, we accept that Mr Gillespie and Mr Hancock's pressure upon Mr Ring to discipline the Claimant arose not from his race, nor even a lingering suspicion that the Claimant had been connected to the actual Patel fraud, but a genuine reliance upon the Operational Security Team report which did, even if incorrectly, show grounds for disciplinary action. The delay in initiating disciplinary action was caused in no small part by delay in HR providing that advice. We consider that it was unreasonable to proceed to a formal disciplinary investigation based upon a fundamentally flawed report and under pressure from senior managers who had not even reviewed the evidence before reaching a judgment about the desired outcome. We are satisfied, however, that the entire reason for the actual decision to initiate disciplinary action was the mistaken belief in the minds of those senior to Mr Ring caused by the Operational Security Team report. Whatever Ms Smith's own views and perceptions may have been, we accept that she did not play any part in the decision to initiate disciplinary proceedings and her involvement in April 2012 was purely because she had been asked to explain the circumstances in which the issue had come to light. We have accepted, therefore, that the decision to initiate disciplinary proceedings was not in any sense whatsoever because of the Claimant's race."**

Submissions

72. Ms Mallick submitted that the Employment Tribunal was bound, in a discrimination case, to avoid a fragmented approach and review the totality of the evidence. She cited **Qureshi v Victoria University of Manchester** [2001] ICR 863 at paragraph 32, **Anya v**

University of Oxford [2001] ICR 847 at paragraph 9 and **Rihal v London Borough of Ealing** [2004] IRLR 642 at paragraph 30.

73. Based on these authorities she argued that the Employment Tribunal failed to consider the Claimant's allegations cumulatively. Rather, it adopted a compartmentalised approach which disabled it from drawing any inference from the primary facts - in particular any inference from unreasonable conduct by the team which produced the flawed report into the Claimant's IT account and by senior members of management who relied on those reports. Nothing in the Employment Tribunal's Reasons indicated that it looked at the overall picture thematically and cumulatively as it should have done.

74. In response to this submission Mr Purnell argued that the duty to avoid a fragmented approach and to consider the totality of the material is pertinent to the question of the reason for any less favourable treatment. It did not materially assist in determining whether there had been less favourable treatment. In this case most of the Claimant's allegations foundered because he did not establish the primary facts to support them. The only finding of the Employment Tribunal which depended on the Respondent's reason to any significant extent was issue 2.12. It was plain from the Employment Tribunal's treatment of issue 2.12 that it did not consider it in isolation.

Discussion and Conclusions

75. Whenever a case is concerned with an alleged course of unlawful conduct over a period (whether it be a discrimination case or some other case altogether) the first task of the Employment Tribunal or court will be to find primary facts. When doing so, it will not treat each allegation separately in a watertight compartment. In deciding a particular issue of fact, it

may garner support from other findings in relation to different aspects of the case. If A has behaved in a particular way on one occasion, this may support a finding that A has behaved in a similar way on another occasion. This is an elementary part of fact-finding. It is not special to discrimination cases.

76. The principle to which Ms Mallick has referred is, however, specific to the linked questions, whether the Claimant was less favourably treated than a comparator and, if so, whether it was by reason of a protected characteristic such as race or sex. It is a specific, added, requirement in discrimination cases, where discriminatory thinking is unlikely to be admitted and may even be unconscious on the part of the discriminator.

77. Thus in **Qureshi** Mummery J said:

> **"… The function of the tribunal is to find the primary facts from which they will be asked to draw inferences and then for the tribunal to look at the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the acts or decisions complained of in the originating applications were on "racial grounds". The fragmented approach adopted by the tribunal in this case would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have on the issue of racial grounds." (page 875)**

78. In **Rihal** Keene LJ approved this principle and noted that it might not only apply to the second stage of the process (the "reason why" question) but might also apply to the linked question, whether there was any less favourable treatment (see paragraphs 26 to 30).

79. It is common in discrimination cases for an Employment Tribunal to include within its Reasons a statement that it has stood back as a whole and considered all the primary facts in accordance with this approach. The Employment Tribunal did not include any such paragraph in its Reasons. The question, however, is whether the Employment Tribunal did look at the

whole picture when reaching its conclusions on the linked questions of less favourable treatment and race.

80. In my judgment the Employment Tribunal did so. The particular area of the Employment Tribunal's findings which called for a cumulative approach was issue 2.12: it was essential that the Employment Tribunal did not leave out of account its findings under issue 2.1 when it reasoned in respect of 2.12. The Employment Tribunal gave issue 2.12 "careful scrutiny". It plainly had regard to its earlier findings especially the adverse finding concerning Ms Smith. It had a tenable reason for distinguishing between issue 2.1, where it found unlawful discrimination, and issue 2.12, where it did not. This lay in its finding that Ms Smith played no part at all in the decision to institute disciplinary proceedings in April 2012.

81. In other respects, as Mr Purnell correctly submits, the Employment Tribunal's conclusions were based on findings of primary fact adverse to the Claimant. The drawing of inferences did not arise in the same way. Where - as for example in relation to issue 2.11 - the Employment Tribunal found that there was at least unfavourable treatment, it made a finding as to reason which was specific to the incident in question.

82. I therefore conclude that the Employment Tribunal has not erred in law.

Conclusions

83. It follows that the appeal will be dismissed: the Employment Tribunal's dismissal of the Claimant's claims will stand. I make it clear that if the dismissal of the claims had not stood, I would in any event have set aside the finding on issue 2.1 and remitted it.

84. I should add one postscript. The Judgment of the Employment Tribunal was given prior to the decision of the Employment Appeal Tribunal in **Reynolds v CLFIS (UK) Ltd** [2014] ICR 907 (21 May 2014). No ground of appeal on either side was based on the Employment Appeal Tribunal's decision in **Reynolds**, but there was some discussion of it during submissions. The Employment Appeal Tribunal's decision has since been reversed by the Court of Appeal: **CLFIS (UK) Ltd v Reynolds** [2015] EWCA Civ 439. The decision of the Court of Appeal affirms that it is the motivation of a decision maker (such as Mr Eccles for the purposes of issue 2.1) which must be addressed when considering whether a particular action is unlawful race discrimination: see paragraph 36 of the judgment of Underhill LJ. It does, however, also explain that earlier acts (or presumably omissions) underlying a decision may themselves be unlawful race discrimination: see paragraph 39 of the same Judgment.

85. Since issue 2.1 has in any event failed on time grounds I do not think I need say anything further about **Reynolds** for the purposes of this Judgment.