Appeal No. UKEAT/0441/13/MC
UKEAT/0037/14/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21 February 2014
Judgment handed down on 23 May 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

LOOK AHEAD HOUSING AND CARE LTD — APPELLANT

(1) MISS D CHETTY
(2) MRS B EDUAH — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ELAINE BANTON (of Counsel) Instructed by: Levens Employment Cromwell House 14 Fulwood Place London WC1V 6HZ
For the First Respondent	MR JACK FEENY (of Counsel) Instructed by: Pattinson & Brewer Solicitors 4th Floor 11 Pilgrim Street London EC4V 6RN
For the Second Respondent	MR NICK SCOTT (Representative) Free Representation Unit Ground Floor 60 Gray's Inn Road London WC1X 8LU

SUMMARY

UNFAIR DISMISSAL

RACE DISCRIMINATION

In the case of the First Claimant, the Employment Tribunal had made (unchallenged) findings that the Respondent had not established a fair reason for the dismissal and had no reasonable grounds for the reason it had relied on. The Respondent's arguments on appeal failed to engage with these conclusions, which undermined both its case on unfair dismissal but also on discrimination.

In the Second Claimant's case, the Tribunal's findings of fact in respect of the race discrimination claim were not susceptible to challenge and undermined the Respondent's arguments in respect of the unfair dismissal case.

Generally, the Employment Tribunal had not erred in its approach to construction of a hypothetical comparator. Applying **Ahsan v Watt** [2008] IRLR 243 HL, the Tribunal had been entitled to look at the Respondent's treatment of other white employees, albeit that they were not strict comparators, in determining how a hypothetical comparator would have been treated in like circumstances.

Both liability appeals dismissed.

HER HONOUR JUDGE EADY QC

1. I refer to the parties as the Claimant and the Respondent, as they were before the Employment Tribunal below. There are two appeals and one cross-appeal before me. The Respondent appeals both the liability and the remedies judgments. The cross-appeal is pursued by the First Claimant alone and relates solely to the remedies judgment.

2. At the outset of the appeal hearing, after discussion with the parties, it was agreed that the appropriate way to proceed would be for me to first consider and give my judgment in the appeal on liability before going to hear submissions (if necessary) on the remedy appeal and cross-appeal. Not only would the parties be assisted by knowing my judgment on the liability appeal, it was also indicated that at least some issues relating to remedy might, in any event, be capable of agreement.

Introduction

3. The Respondent's first appeal is against the liability judgment of the London (East) Employment Tribunal under the chairmanship of Employment Judge Jones, sitting with members, on six days in October 2012 and in chambers on 28 November and 21 December 2012; the reserved judgment and Reasons being sent to the parties on 21 March 2013.

4. The Respondent's second appeal and the First Claimant's cross-appeal relate to the subsequent remedies judgment. The Tribunal, having sat again on 28 June 2013 and in chambers on 30 September 2013, sent its remedies judgment to the parties on 25 November 2013.

5. The Claimants appeared before the Employment Tribunal in person; Ms Banton (who also appears before me) represented the Respondent.

6. Each Claimant had pursued complaints of race discrimination in relation to their dismissal from the Respondent's employment. They also brought claims of unfair dismissal. The Employment Tribunal found in the Claimants' favour in respect of both the complaints of unfair dismissal and race discrimination. Having considered the question of remedy at a separate hearing, the Tribunal made monetary awards in respect of the First Claimant of £69,100 in respect of pecuniary losses (capped by reference to the limit applicable to unfair dismissal awards) plus £10,000 by way of injury to feelings in respect of her race discrimination complaint. In the Second Claimant's case, the Tribunal awarded £14,800.66 in respect of her pecuniary losses, with an additional £6,000 by way of compensation for injury to feelings in relation to the race discrimination complaint.

The background facts

7. The Respondent is a charity providing residential care and support to local people with mental health problems. It had six residential facilities in East London and employed around 80 people. The First Claimant, Ms Chetty, is Asian and had been employed the Respondent for approximately ten years. She had started as a project worker, but at the time of her dismissal was employed as the Deputy Manager of the Respondent's project at Marsh Hill. The Second Claimant, Ms Eduah, is Black African and had been employed as a Care Assistant by the Respondent since 2004, as a Sessional Bank Worker, also working at the Marsh Hill project.

8. Marsh Hill was a project where residents were being prepared for independent living in the community. One such resident was "G", who had to take anti-psychotic medication for her mental health and insulin for her diabetes. She took her medicines herself but under supervision. G was a long-term resident who was in the last stages of preparing to leave to live independently in the community. She was also known to be someone who was in the habit of refusing to take her insulin and would generally only take one of the two doses she was meant to have each day. G's key worker was a Ms Leann Murphy, but the Second Claimant had previously carried out this role and had been present when G had last visited her GP for a review of her medication.

9. Given the nature of the Respondent's work, it had a number of procedures in place in relation to medication. As the Tribunal noted (para. 32):

> **"...The person supervising the medication had to ensure that the following were in the resident's file:**
>
> **a. a medication chart – which contained details of the person and the medication being taken, dose/frequency and guidance for use;**
>
> **b. a medication profile form 1 which had the resident's photo attached, details of the GP and any other medical professional who is involved with that particular resident, details of medication, frequency/dosage**
>
> **c. an M9 form which records any changes in medication and which is signed off by the relevant GP."**

10. The Respondent had a separate medication policy, which stated (at B.1.2, under the title of "Safety"), that:

> **"The management and administration of prescribed medication must always be conducted in a way to ensure the safety of service users and staff. When there is any doubt do not give out medication; stop and ask a manager."**

11. Under the heading "C1. Rules – Self-Determination" the following was stated:

"C.2.1 All transactions must be recorded:

a) accurately

b) clearly and legibly

c) at the time administered

d) only on approved forms...

e) signatures must be recorded, alongside initials.

f) records must be signed only by the person responsible (never sign for medications given by somebody else where you were not present or to corroborate an action that has not been seen."

12. And at C.2.2:

"Do not administer any medication where there is any discrepancy between 2 or more records....

C.9.1 – Administration of medication may only be undertaken by staff trained and authorised in our medications policy and procedure, and assessed competent to do so.

...

C.9.18 – Staff must observe that medication has been swallowed by person receiving it before signing confirming it has been administered."

13. Under the heading "C7 Confirmation or Change of medication (Pro forma M9)" it stated:

"Any change (i.e dose, type, or time) in prescribed medication can only be authorised by a doctor."

14. It was the First Claimant's responsibility to check the medication records on a monthly basis, and on the weekend at the end of February 2010 a junior manager, Chris Davis, left completed medication charts on her desk to sign as part of this check. The following Monday morning it was noted that G's M9 form was missing from the charts.

15. A new manager, Ms Morton, had recently been appointed at Marsh Hill. She had relevant experience as a manager and was not unfamiliar with the correct procedure for the

administration of medication. She had, however, to be trained in the Respondent's unique procedures. Ms Banton submits that the evidence was that Ms Morton still had to complete an examination in this respect. The Employment Tribunal's finding was, however, that:

> **"Ms Morton had already had all the training and had signed to confirm this. She had been through the observation part of the training where she witnesses a colleague give meds to a resident and checks and signed the relevant form. As manager of the project, [Ms Morton] was the senior manager...throughout the incidents considered in this case."**

16. In any event, the Employment Tribunal noted that Ms Morton had been in post for three months at the relevant time and was due to have her last observation on 5 March 2010. It concluded:

> **"...it would be reasonable for Ms Morton to be considered to be trained in and familiar with the Respondent's medication policy."**

17. Having noted that G's M9 was missing, Leann Murphy informed Ms Morton about this and told her that on previous occasions staff had given medication in accordance with the unsigned charts and got them signed later. She asked whether she should do this on this occasion, and the Tribunal records:

> **"She was not told that under no circumstances should this be done. So she gave G...her meds without the chart. Once [the First Claimant] came into work, she signed the charts as people came in for their meds."**

18. The Tribunal found as a fact that the First Claimant only came in to work that day (1 March) *after* G's medication had been given and that she did not sign G's chart. Similarly, the Tribunal found that the Claimant had not been present at the handover session that morning but Ms Morton had, and it was likely that the issue of the missing M9 form had been discussed.

19. When the First Claimant was told of the missing form, she volunteered to sort it out, albeit strictly it was not her responsibility to do so. Ultimate responsibility vested in Ms Morton but (the Tribunal found) it could be said that she had delegated this task to the First Claimant. The First Claimant put a note asking staff about G's M9 form in the movement/day book and also immediately set in motion an enquiry of the GP's surgery to get a replacement M9 form completed and signed by the GP asking Chris to go the surgery to stress the urgency of the request; keeping Ms Morton informed as to what she had done.

20. The following day, 2 March 2010, the Second Claimant was administering medication and saw that G's M9 form was missing and her medication chart was still unsigned. The Tribunal records her next actions as follows:

> **"47. ...She did not speak to anyone about it. Instead, as she was familiar with [G's] meds she checked the medication to make sure that it was all there and intact. [G's] meds were all clearly marked and were either in a blister pack or in a dosette box. The dosage for each day would be clearly set out and it would be obvious from the dosette box if the day's meds had already been taken. [The Second Claimant] decided that even though there was no M9 in the file that it was unlikely that [G's] medication had altered. She concluded that if there had been a change of medication it would have been communicated at handover at the beginning of her shift.**
>
> **48. At the time that [the Second Claimant] administered [G's] meds none of the managers were present at the project. She knew from reading the activity book that one of [the] junior managers had gone to [G's] GP surgery to get a new M9 form signed and once that was obtained the medication chart would be signed and put in the folder. She tried to get [G] to wait for all this to occur but [G] refused and said that she wanted her meds as she was going out. We find that [the Second Claimant] was not confused or unsure about the situation and that she believed that the meds had not changed. They were 'in date'. [G] was not due for a review...**
>
> **49. [G] had diabetes, which meant that her blood sugar needed to be checked regularly and she would be at risk of serious ill-health if she spent a day without taking insulin. As she usually refused to take any other day of insulin, the morning dose before she left the project was the most important dose for her. Although the Respondent's case is that if [the Second Claimant] had called the managers at this point they would have been able to make [G] wait until the signed M9 form had been obtained, we question how easy that would have been as no-one had been able to persuade her to take a second dose of insulin..."**

21. On the morning of 3 March 2010 the Tribunal found that Ms Morton herself supervised G taking her medication, in conjunction with a bank worker, Mr Duncan:

> **"Ms Morton was by now familiar with the Respondent's procedures and was aware that the forms were missing. She did not halt the process but allowed [G] to take her medication in the absence of the M9 and in breach of the Respondent's procedures."**

22. The chart was actually signed by the First Claimant, having (so the Tribunal found) been asked to do this by Ms Morton.

23. Later that morning Ms Morton mentioned to Mr Baldock that she had supervised G taking her medication while the form M9 was missing and her medication chart unsigned. Mr Baldock immediately saw this as a serious issue and asked her to instruct the First Claimant to write a statement about the incident. He then commissioned Ms Atiror to conduct an investigation, but also spoke to Leann Murphy himself and suspended her for giving the medication when she had not been given a "verbal prompt" from a manager to do so. The same day, Mr Baldock met with the Second Claimant and suspended her for having administered G's medication on 2 March without the medication chart; information the Tribunal concluded he must have obtained from Ms Morton, thus confirming her knowledge of these events.

24. The Tribunal observed that its findings as to Ms Morton's knowledge of events on 1-3 March 2010 were contrary to what she said when interviewed by Ms Atiror in April 2010 when she volunteered only that she became aware that there was something wrong on 3 March 2010 having previously been reassured by the First Claimant that everything was OK.

25. The Tribunal found that Mr Baldock asked Ms Atiror to conduct an investigation into the two Claimants rather than into what had actually occurred and that investigation did not include Ms Morton:

> **"This suggested to us that without knowing all the facts the Respondent had already determined that [the Claimants] were to be the focal point of any investigation or action. The investigation was not into how such important paperwork had initially gone missing, or what had happened including what was Ms Morton's involvement or any other aspect of the incident. We find that five members of staff were involved at this stage: Ms Murphy, Ms Morton, [the First Claimant], John Duncan and [the Second Claimant] and yet they chose to focus only on the two black members of staff for that investigation at the beginning of the process before knowing all the facts.** ***We find that this is a fact from which we can infer less favourable treatment on the grounds of race."***

26. In respect of Ms Murphy the Tribunal noted:

> **"67. At the time of the incident Leann was in the process of working out her notice as she was leaving the UK to live in Ireland. She did indicate in her meeting with Ms Atiror that she was willing to return to face disciplinary action if asked, as long as it was in the next three weeks. She had 16 working days left with the Respondent.**
>
> **68. We find that it would not have been possible to conclude the investigation with that time as the Respondent needed to speak to [the first Claimant] as part of the investigation. When the investigation began she was off sick. The Respondent would have needed to conclude the investigation before they decided who to discipline and it would have been only then that any disciplinary action against Leann could have taken place.**
>
> **69. ...following her interview, Leann is effectively out of the investigation. The Respondent made no attempt to discipline here as already stated and there was no evidence that they had written to her to inform her of the outcome of the investigation and that it was likely that she would have been disciplined had she remained employed..."**

27. The Claimants were both invited to disciplinary hearings, which were conducted by Mr Baldock. In the case of the Second Claimant, the Tribunal found that Mr Baldock's style:

> **"...bordered on badgering...He did not allow her to complete her sentences but interrupted her so that he could make the same point."**

28. In deciding that the Second Claimant should be dismissed, the Tribunal found:

> **"80...Although he stated that he had taken into account the rationale behind the Claimant's decision and the other mitigating factors, there was no list of things he did take into account. He does not appear to have given consideration to or addressed the point about [G's] health which the Claimant submitted was the main reason for her breaching the procedure and her consideration that she had properly weighed up the risks to the residents and the risk she exposing herself and the Respondent to by breaching the procedure. As these points were not mentioned in the letter of dismissal or in the meeting we find that it is unlikely that any real consideration was given to them before Mr Baldock arrived at the decision to dismiss...**
>
> **82. The dismissal letter...stated that she was dismissed because the allegation that she had failed to follow or implement the Respondent's medication policy and procedures had been proven as she had given a service user medication without a medication chart in place and had**

> **failed to stop the administration of medication and seek advice from a manager. We find that what she did could be said to have been quite the opposite of that. She did breach procedure but she did it because she was concerned to maintain [G's] health and actually keep alive a seriously ill resident. We find that there does not appear to have been any recognition of this as a mitigating factor."**

29. As for the First Claimant, after her disciplinary hearing, on 23 April 2010, Mr Baldock decided that she should also be dismissed for gross misconduct. In contrast, the Tribunal observed:

> **"88 ... By Tuesday 27 April Ann Green of the Respondent wrote to Ms Morton exonerating her from all involvement in the incident."**

30. In respect of the role of Ms Morton in these events, and the way in which she was treated, the Employment Tribunal made a number of findings adverse to the Respondent, e.g.:

> **"86 Mr Baldock stated in [the First Claimant's] hearing that Ms Morton was being investigated but there was no evidence of any investigation being conducted at that time which looked at Ms Morton's involvement in the incident. We find that the obvious contradiction in her evidence was not picked up by the Respondent. We find that instead the Respondent chose to clear Ms Morton from any involvement when she was the manager of the project and ultimately responsible while at the same time they instituted disciplinary proceedings against her deputy who was not responsible for administering medication and had not been present when it was done. *These are facts from which we can infer less favourable treatment to the Claimant on the grounds of her race.***
>
> **...**
>
> **90. Ms Green's letter sought perhaps to reassure Ms Morton that she did not have anything to worry about. We are not sure why this was a priority rather than having a thorough investigation of what we were told the Respondent considered to be a serious matter and for which they stated they have a strict adherence policy. We query also whether it was appropriate for Ann Green to conduct the later investigation... given that she had already come to the conclusion without any apparent investigation that Ms Morton had no responsibility in this incident.**
>
> **...**
>
> **94. We find that [the First Claimant] did sign [G's] medication chart for Tuesday 2 March even though she had not given or witnessed medication being taken by the resident. This was in breach of procedure. The Claimant was following Ms Morton's instructions.**
>
> **95. Ms Morton did not tell her line manager about the missing documents as soon as she became aware of it... She did not make a formal report to Luke Baldock... By contrast, [the First Claimant] had the matter reported to her by her line manager, which was Ms Morton, when she arrived for work on Monday 1 March. She volunteered to sort the matter out and the task was delegated to her. Ms Morton does not appear to have received any sanction for not reporting the matter as soon as she became aware. She also appears to have altered her version of events in [the First Claimant's] disciplinary hearing. She received no sanction for**

> **any of this.** ***These are facts from which we can infer less favourable treatment on the grounds of race.*****"**

31. Both Claimants appealed against the decision to terminate their employment. In so doing, they raised complaints of race discrimination, complaining of differential treatment as compared to Ms Morton and Mr Duncan. The Tribunal found that it was highly likely that it was the raising of these allegations in the Claimant's appeals which led to a fuller investigation into the conduct of Ms Morton and Mr Duncan, who were then disciplined for failing to follow the Respondent's medication and procedure. Both received oral warnings that were to remain on their respective personnel files for six months. In Ms Morton's case, regard was had to the fact that she was still being trained in the Respondent's induction procedures at the time, and this was considered to mitigate her culpability. In looking at Mr Duncan's case, it was felt that he was unsure of his role and had assumed Ms Morton was familiar with the medication policy and that all the other required documentation was on file. The Tribunal found:

> **"...that Ms Morton and Mr Duncan were given oral warnings while the decision was taken to dismiss... both Claimants are facts from which we can infer less favourable treatment on the grounds of race."**

32. As for the Claimants, both their appeals were unsuccessful and their dismissals confirmed.

33. It is right to note that the First Claimant had been subject to various disciplinary procedures and warnings during her employment. Before the Employment Tribunal she contended that these amounted to further examples of race discrimination. Although the Tribunal expressed concerns as to recent examples of disciplinary action taken against the First Claimant, it did not make substantive findings in this regard, noting it had not heard

evidence on these points, these were not part of the substantive case before it and that the First Claimant had not brought a claim in respect of these matters before.

34. The Tribunal found that a final written warning had been given to the First Claimant on 19 May 2008 but that a further final written warning had then been given to her again on 3 March 2009 (apparently within the life of the first). It also found that a written warning was subsequently given to the First Claimant by letter of 2 June 2009. Although observing that none of the warnings specified from when they actually started (i.e. the date of the incident, the date of the disciplinary hearing, or the date of the letter), it noted that if the written warning ran from the date of the letter, it would still have been in operation at the time of the incident with which the Tribunal was concerned.

35. In any event, at the appeal stage, the Tribunal recorded that it was confirmed that, *leaving aside the extant warnings*, the First Claimant's dismissal was still considered to be appropriate and proportionate in respect of her failure to follow the Respondent's medication policy procedures and practice, and her neglect as Deputy Manager.

The Employment Tribunal's Judgment and Reasons

36. The Employment Tribunal made findings adverse to the Respondent as to background matters relied on by the Claimants as supporting their complaints of race discrimination, concluding (paragraph 145):

> **"...even though the Respondent employed a majority of black and minority ethnic workers and agency staff at the project there was evidence that black staff were more harshly dealt with if there were issues of conduct in comparison to their white colleagues..."**

37. In respect of the treatment of the Claimant relating to the incidents directly in issue in the case, the Tribunal expressly found three facts from which they considered they could infer less favourable treatment on the grounds of race:

> **"144.1 The decision to focus on the Claimants quite early on in the investigation, before all the facts were known when, at that stage what was known was that five people had been involved in the administering of medication...without proper documentation.**
>
> **144.2 The Respondent's decision to institute disciplinary proceedings against [the First Claimant] who had no direct responsibility for administering medication and had not done so...while at the same time, exonerating her line manager who had overall responsibility for the project and who had personally administered medication in breach of the procedures.**
>
> **144.3 The Respondent's decision even after finally conducting an investigation into the involvement of John Duncan and Joanne Morton that it was appropriate to issue the project manager, Ms Morton, with an oral warning which the Claimants remained dismissed."**

The Tribunal concluded (para. 147) that:

> **"the Claimants both made a prima facie case that the decisions to dismiss them was based on or tainted by race."**

38. That being so, the Tribunal considered that the burden of proof had shifted to the Respondent to demonstrate that it had cogent, non-discriminatory reasons for the treatment of the Claimants: i.e. the decisions that they should each be dismissed. The Tribunal accepted that the need to be seen upholding the Respondent's policies and procedures could constitute a non-discriminatory reason for dismissing the Claimants (para. 148). In respect of the First Claimant, however, the Tribunal held that:

> **"(a) She had not, as a matter of fact, breached the Respondent's procedures and it was not appropriate to hold her responsible for the operation of the medication policy while exonerating Ms Morton in this regard.**
>
> **(b) It had been appropriate to investigate the First Claimant. It might also have been appropriate to discipline her for not taking care of the charge of the situation and resolving it.**
>
> **(c) The Claimant had not, however, failed in her duties as the Deputy Manager and had not put the service user at risk.**
>
> **(d) Ms Morton was not a proper comparator in the First Claimant's case as she (Ms Morton) was a more senior employee and should therefore have been held to have had greater responsibility.**

(e) Notwithstanding Ms Morton's greater responsibility the First Claimant was treated more harshly."

39. In the Second Claimant's case the Tribunal concluded:

(a) She had breached the Respondent's policy and it had been appropriate to institute disciplinary proceedings against her. The Respondent had a reasonable belief that she committed an act of misconduct which could be seen as gross misconduct.

(b) It was not convinced that the Respondent would have dismissed Ms Murphy had she remained in its employment; no action was taken in relation to Ms Murphy which could lead it to conclude that there was a real possibility this would have happened.

(c) In deciding whether dismissal was an appropriate response to the Second Claimant's misconduct, the Respondent had failed to consider her mitigation. Had it done so, it was unlikely that it would have been reasonable to summarily dismiss her for the gross misconduct found. The Respondent had failed to have regard to those mitigating factors because of the Second Claimant's race.

(d) Further, as compared to the Respondent's treatment of Ms Morton - who had similarly misconducted herself - the Second Claimant was treated more harshly.

40. In respect of both Claimants, the Tribunal concluded their dismissals were because of their race.

41. On the First Claimant's unfair dismissal claim, the Employment Tribunal held:

(a) The Respondent did not have a reasonable belief that the First Claimant had committed acts of gross misconduct at the time of the decision to dismiss.

(b) The investigation was flawed in focusing on only the two Claimants when there were five employees involved.

(c) The appeal failed to rectify flaws in the dismissal process.

(d) Although there may have been a final written warning in existence, the Respondent's case had always been that the offences in question alone were sufficient and it was not seeking to rely on the cumulative effect of the written warnings to justify the sanction of dismissal.

(e) At most, the First Claimant's breach of policy was the signing the medication chart when she had not administered the medication to G. At the highest, that might be an act of misconduct not gross misconduct.

42. In the Second Claimant's unfair dismissal case the Tribunal concluded:

(a) That it had found that the Respondent had a reasonable belief in the Claimant's misconduct which could be considered to amount to gross misconduct.

(b) Nevertheless it considered the sanction imposed was unfair when comparing the Second Claimant's position to that of Ms Morton, who was guilty of the same offence and was the more senior employee.

43. The Tribunal concluded that both dismissals were unfair.

The grounds of appeal and submissions

44. For the Respondent Ms Banton first addressed the case of the First Claimant and the judgment that she had been unfairly dismissed. She submitted that the Tribunal had erred by failing to take into account the previous warnings - particularly the final written warning - when considering the reasonableness of this dismissal. In so doing, the Tribunal had fallen into the error of substituting its own judgment for that of the employer in these circumstances. Moreover, having found that the First Claimant had acted in breach of procedure and that, at

highest, that could have been an act of misconduct, it erred in failing properly to consider whether the Respondent's sanction of dismissal was within the range of reasonable responses available to an employer in response to that misconduct. Again, the Employment Tribunal impermissibly substituted its decision for the objective standard of the hypothetical reasonable employer. If the Employment Tribunal was entitled to conclude that the First Claimant's conduct merited an oral warning, then it erred by failing to take into account the still live warnings, one a final written warning, on her record at that time, see **Wincanton Group plc v Stone & Anr** [2013] IRLR 178, per Langstaff P. Furthermore the Tribunal had failed to take into account the sector in which the Respondent operated, see **Tayeh v Barchester Healthcare Ltd** [2013] EWCA Civ 29.

45. In respect of the Second Claimant's unfair dismissal claim, it was submitted that the Tribunal also erred. Having found that the Respondent had a reasonable belief that the Claimant had committed an act of misconduct which an employer could reasonably treat as gross misconduct, the Tribunal substituted its view for that of the employer by finding the dismissal to be outside the range of reasonable responses. Ms Banton contended that the Tribunal had focussed on the Second Claimant's mitigating circumstances, but had ignored the seriousness of the charge. Furthermore the Tribunal's listing of the mitigating circumstances that the Respondent should have considered was an impermissibly minute examination and a substitution of its view for that of the Respondent. In fact, the Respondent did take account of the Second Claimant's mitigation, but it was entitled to take the view that it did regarding the importance of its medication policy. This was all a matter of balance for the Respondent, not for the Tribunal.

46. Turning to the race discrimination claims, in respect of the First Claimant, Ms Banton made two general points. First, that once the substitution errors on the unfair dismissal claim were corrected, then the race discrimination case fell away. Second, that there was no real, as opposed to a hypothetical, comparator in this case.

47. Turning to the findings of race discrimination at para.144 of the judgment: when properly examined, these matters did not withstand scrutiny. Any detriment as a result of the matter identified at 144.1 would have been very limited: the investigation would have included the First Claimant in any event and there was a later investigation into Ms Morton and Mr Duncan. As to 144.2, this could not found a finding of race discrimination: the First Claimant was guilty of misconduct that would have at least meant an oral warning and therefore it was a fair dismissal given the warnings that were already live on her file. In respect of para. 144.3, the decision in question again could not found a finding of race discrimination: the First Claimant was guilty of misconduct that would have at least merited an oral warning and she had acknowledged that she was the most experienced person and the only manager trained to authorise and administer medication; her situation was different to that of Ms Morton and Mr Duncan, who were not subject to live written warnings.

48. Finally, there was a legal error in the Employment Tribunal's finding that the Respondent had focussed the investigation "only on the two black members of staff... at the beginning of the process". That ignored the case of Leann Murphy, who was white and who was also suspended and included in the investigation at the same time. More generally, the Respondent submitted that the decision was not **Meek**-compliant.

49. As to the Second Claimant's race discrimination claim, it was contended that the Tribunal erred in law in rejecting the Respondent's case that it would also have dismissed Ms Murphy. Ms Murphy was the first employee to be suspended. Her breaches might have been the same as the Second Claimant but she was already in her period of notice. The Tribunal could not reasonably conclude that she would not also have been dismissed. Irrespective of the comparison with Ms Morton the Tribunal substituted its view for that of the Respondent, finding that the Respondent's position that her training was incomplete remained unclear. That was a perverse finding in this case.

50. For the First Claimant, in response, it was observed that, on the unfair dismissal case, there was no challenge to the Tribunal's finding that the Respondent did not have a genuine belief or reasonable grounds in support of any belief that the First Claimant was guilty of the misconduct that had been relied on in dismissing her. There was equally no challenge to the Tribunal's finding that the Respondent's investigation was outside the range of reasonable responses. The first ground could not be upheld, as the Employment Tribunal did not find as a fact that any warnings were live at the time of the incident. The Tribunal had declined to make findings of fact on the previous warnings, but had noted various concerns including that the warnings did not give an expiry date. The highest the Tribunal put it was that there may have been a final written warning in existence.

51. Secondly, the Tribunal did not find as a fact that the First Claimant was guilty of the alternative misconduct; at the highest, the Tribunal found only that she was possibly guilty of such alternative misconduct. Third, and in any event, it would have been impermissible for the Respondent to rely on a different reason for dismissal to render an unfair dismissal fair. The reason for the dismissal was as set out in the dismissal letter: i.e. a failure to follow the

Respondent's medication policy and procedure and allowing a service user to be administered medication without the correct charts in place and thereby putting them at risk of harm. The alternative of potential misconduct was under a different breach of policy and did not fit the same definition of misconduct relied on by the Respondent. The Tribunal expressly found that would not constitute gross misconduct. Ultimately, the issue could only be relevant to remedy. It could not be relevant to the question of unfair dismissal as it was not the reason relied on by the Respondent in deciding to dismiss the First Claimant, see **W Devis and Sons Ltd v Atkins** [1977] ICR 662.

52. More generally, the Tribunal did not fail to have regard to the sector in which the Respondent operated. The potential breach of procedure being considered by the Tribunal was not listed as an act by the Respondent.

53. In respect of the race discrimination finding, the criticisms of the findings at para. 144 missed the point: the Tribunal was not seeking to make findings that these were acts of race discrimination that were the subject of the claims before it. These were part of the background material which the Tribunal felt it could take into account in then turning to the actual complaint of less favourable treatment complained of: i.e. the dismissal. The Tribunal was entitled to look at the evidentiary material and draw an inference from its findings in this regard. As for the question of comparators, the Tribunal was concerned with why the Respondent had acted in a particular way towards the Claimants and its contrasting behaviour to employees of different races. To the extent the Respondent was saying that the Tribunal should have taken into account the alternative finding of misconduct, the simple fact was that the Respondent had not disciplined the First Claimant on that basis; that was not something in its mind at the time, and it was irrelevant for the purposes of the race discrimination complaint.

As for the findings in relation other employees, the Tribunal was entitled to have regard to what had taken place in relation to Ms Morton, and the adverse finding could not be said to be perverse. To the extent that the treatment of Ms Murphy was in any way relevant to the First Claimant's case, again, the Tribunal's conclusion was not perverse: it had in mind the absence of any subsequent correspondence with her and the failure to inform her of the outcome of the investigation.

54. Standing back, the Employment Tribunal had used neither Ms Morton nor Ms Murphy as comparators in the race discrimination complaint. As it was entitled to do, it simply had regard to those other cases in constructing the hypothetical comparator and testing how that hypothetical comparator would have been treated.

55. For the Second Claimant, it was submitted that the Employment Tribunal had found such failings in the Respondent's investigation in these cases that the subsequent parts of the **Burchell** test, including the question of sanction, simply did not arise.

56. Turning to the question of sanction, it was plain that the Tribunal had regard to the fact that the Respondent had taken into account some of the mitigating factors listed, but it still concluded that no proper consideration had been given to those, and that was a conclusion it was entitled to reach given its findings as to Mr Baldock's approach to the decision to dismiss. It was also apparent from the Tribunal's findings that it had in mind the nature of the sector in which the Respondent was operating. Hence its appreciation of the importance of the Respondent's medication policy.

57. Viewing the decision overall, it was plain that the Employment Tribunal had applied the correct test to the question whether the Second Claimant had been unfairly dismissed. The Tribunal had not been solely swayed by the Respondent's failure to have sufficient regard to the Second Claimant's mitigation. It also expressly had regard to its findings on the race discrimination complaint. The Respondent would have to demonstrate perversity - an overwhelming case, applying the **Yeboah** test - to establish that the Employment Tribunal erred in its findings in that regard.

58. Turning to the race discrimination complaint, on the comparator point, the Employment Tribunal's approach was fundamentally correct. It had applied the approach laid down in **Ahsan v Watt** [2008] IRLR 243 HL. It had accepted that there was no exact comparator and therefore looked at what had happened in the cases of others to construct the hypothetical comparator. In respect of Ms Murphy, the Employment Tribunal was not convinced, on the evidence, that she would have been dismissed. It was not looking at the question of her suspension but having to contrast what would have happened if she had remained in the Respondent's employment with what actually happened to the Second Claimant. The evidence before the Employment Tribunal supported its conclusion in this regard. At page 219 of the EAT bundle, the following exchange was apparent in the appeal transcript:

> **"BE [Second Claimant] She can't be dismissed anyway**
>
> **JJ [Jo Jolley, Managing Director of the Respondent] Well actually that's not the case. If a person leaves us whilst something serious has happened they can either come back and participate or we can hear things in their absence. So it won't be a situation where we don't do anything, we will see the process through to the end with or without their participation but at the moment I don't believe it's complete"**

59. That evidence was sufficient to support the Tribunal's conclusion that the Respondent would not have dismissed Ms Murphy, there having been no further action taken by it.

Legal principles

60. The relevant provisions of the **Employment Rights Act 1996** are section 98(1), (2) and (4):

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason for a kind such as to justify the dismissal of an employee holding the position which the employee held**
>
> **(2) A reason falls within this subsection if it –**
>
> **(a) …**
>
> **(b) relates to the conduct of the employee**
>
> **…**
>
> **(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

61. On the question of the reason for the dismissal, in **W Devis & Sons Ltd v Atkins** [1977] ICR 662, it was held that:

> **"The determination of the question whether a dismissal was fair or unfair depended on 'the reason shown by the employer' and the Tribunal could not have regard to matters of which the employee was unaware at the time of the dismissal, since it had to consider the conduct of the employer and not whether the employee in fact suffered any injustice, but since the amount of compensation to be assessed...had to be 'just and equitable in all the circumstances' the Tribunal in assessing that compensation may take into account of misconduct which came to light after the dismissal and reduced the compensation which would have otherwise to a nominal or nil amount."**

62. On the question of reasonableness well-known guidance is set out in **BHS v Burchell** [1980] ICR 303 (albeit that this must be read subject to the neutral burden of proof now applicable to the second and third stages of the guidance):

> **"First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."**

63. In relation to sanction, in **Graham v Secretary of State for Work and Pensions (JobCentre Plus)** [2012] EWCA Civ 903, having referred to the **BHS v Burchell** test, the Court of Appeal noted that:

> **"If the answer to each of those questions is 'yes', the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a '*band or range of reasonable responses*' to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether *they* think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which '*a reasonable employer might have adopted*'. An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice."**

64. In respect of the existence of past warnings, the guidance of the EAT President, Langstaff J, is set out in **Wincanton Group plc v Stone** [2013] IRLR 178, at paragraph 37:

> **"We can summarise our view of the law as it stands, for the benefit of Tribunals who may later have to consider the relevance of an earlier warning. A Tribunal must always begin by remembering that it is considering a question of dismissal to which section 98, and in particular section 98(4), applies. Thus the focus, as we have indicated, is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. If a Tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid. If it is so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently. Where the earlier warning is valid, then:**
>
> > **(1) The Tribunal should take into account the fact of that warning.**
> >
> > **(2) A Tribunal should take into account the fact of any proceedings that may affect the validity of that warning. That will usually be an internal appeal. This case is one in which the internal appeal procedures were exhausted, but an Employment Tribunal was to consider the underlying principles appropriate to the warning. An employer aware of the fact that the validity of a warning is being challenged in other proceedings may be**

expected to take account of that fact too, and a Tribunal is entitled to give that such weight as it sees appropriate.

(3) It will be going behind a warning to hold that it should not have been issued or issued, for instance, as a final written warning where some lesser category of warning would have been appropriate, unless the Tribunal is satisfied as to the invalidity of the warning.

(4) It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore Tribunal should be alert to give proper value to all those matters.

(5) Nor is it wrong for a Tribunal to take account of the employers' treatment of similar matters relating to others in the employer's employment, since the treatment of the employees concerned may show that a more serious or a less serious view has been taken by the employer since the warning was given of circumstances of the sort giving rise to the warning, providing, of course, that was taken prior to the dismissal that falls for consideration.

(6) A Tribunal must always remember that it is the employer's act that is to be considered in the light of section 98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur."

65. It is also right to note that an Employment Tribunal must have regard to the particular context in which the employer operates (see, e.g. **Tayeh v Barchester Healthcare Ltd** [2013] EWCA Civ 29).

66. In respect of the claims of race discrimination, by section 1(1)(a) of the **Race Relations Act 1976** it was provided that:

"A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if—

(a) on racial grounds he treats that other less favourably than he treats or would treat other persons;..."

The operation of the burden of proof in such cases was addressed at section 54A:

"(1) This section applies where a complaint is presented under section 54 and the complaint is that the respondent—

(a) has committed an act of discrimination, on grounds of race or ethnic or national origins, which is unlawful …

…

(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent—

(a) has committed such an act of discrimination …against the complainant, …

the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act."

67. On the question of comparators, it was common ground that the guideline authority relevant to this case is that of **Ahsan v Watt** [2008] IRLR 243, in which, at paras. 36 and 37, it was stated:

"36. The discrimination which section 12 makes unlawful is defined by section 1(1)(a) as treating someone on racial grounds "less favourably than he treats or would treat other persons". … to summarise:

(1) The test for discrimination involves a comparison between the treatment of the complainant and another person (the 'statutory comparator') actual or hypothetical, who is not of the same sex or racial group, as the case may be.

(2) The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in either case should be (or be assumed to be), the same as, or not materially different from, those of the complainant: section 3(4).

(3) The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a tribunal may infer how a hypothetical statutory comparator would have been treated … This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in question (the 'evidential comparator') to those of the complainant and all the other evidence in the case.

37. It is probably uncommon to find a real person who qualifies under section 3(4) as a statutory comparator. … At any rate, the question of whether the differences between the circumstances of the complainant and those of the putative statutory comparator are 'materially different' is often likely to be disputed. In most cases, however, it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator. If the tribunal is able to conclude that the respondent would have treated such a person more favourably on racial grounds, it would be well advised to avoid deciding whether any actual person was a statutory comparator."

68. In considering the judgment of an Employment Tribunal, I was reminded that it is not for the EAT to overanalyse the Tribunal's reasons; this Court should avoid substituting its view for that of the Tribunal at first instance, see **London Borough of Brent v Fuller** [2011] ICR 806. Where the challenge is on perversity grounds it was further observed that the appellant

must show an "overwhelming case" that no Employment Tribunal could have reached the decision in question, see **Yeboah v Crofton** [2002] IRLR 634 CA.

Discussion and conclusions

69. I consider, first of all, the First Claimant's case and the Employment Tribunal's judgment in respect of the unfair dismissal complaint made by her. The main complaint made by the Respondent is that the Employment Tribunal failed to have proper regard to the live warnings on the First Claimant's file, one of which included a final written warning. This is put variously as a substitution of the Tribunal's view for that of the employer; alternatively a failure to take that relevant matter into account, in particular in distinguishing the Claimant's case from that of other employees without such a disciplinary record.

70. There is a difficulty for the Respondent in this case in that the Employment Tribunal plainly did find the previous warnings unsatisfactory in terms of the lack of clarity as to when they started to run from and therefore as to whether they were still in existence at the time. Allowing, however, that such warnings were in existence and operative against the First Claimant at the relevant time, the greater difficulty for the Respondent is that the Employment Tribunal was not looking at the question of the fairness of sanction in respect of the reason for dismissal relied on by the Respondent in this case; its findings adverse to the Respondent were at an earlier and more fundamental stage. The Tribunal had rejected the Respondent's case on the question of the reason for dismissal. It found that the Respondent had no reasonable belief in the gross misconduct it sought to rely on to justify its dismissal of the First Claimant. It had not carried out a reasonable investigation so as to give it that belief and, in any event, could not have found that the First Claimant was guilty of that gross misconduct. The Respondent does not (and could not) appeal against those findings.

71. The best the Respondent has is the Tribunal's speculative consideration of the possibility that the First Claimant might have been guilty of an alternative act of misconduct in terms of a lesser breach of a different policy. Whilst that might not be quite the mischief which concerned the court in **Devis** (the facts in question were known to this Respondent at the relevant time), equally that was not the reason actually relied on by the Respondent. When applying section 98(4) ERA, therefore, the Employment Tribunal was not testing the fairness or otherwise of the dismissal for that potential alternative reason. That being so, the Employment Tribunal was entitled to take that matter no further at that stage. It was not obliged to consider what might have happened if the Respondent had turned its mind to that alternative breach of procedure on the part of the First Claimant at the liability stage. It was a matter which might properly arise for consideration at the remedy stage but the Respondent simply did not make out its case as to the reason for dismissal and therefore the matter went no further for the purpose of establishing liability.

72. On the First Claimant's race discrimination case, given that I do not accept that the Employment Tribunal here substituted its view for that of the employer in the unfair dismissal context, the main plank of the Respondent's challenge to the race discrimination finding fails.

73. More particularly, the criticisms made of para. 144, in my judgment, fail to engage with the approach adopted by the Tribunal. Those findings were not findings of detriments forming the subject of separate complaints before the Tribunal; they went to the background matters which might enable the Tribunal to draw an inference one way or the other.

74. As already observed in respect of the finding of unfair dismissal, the Tribunal held that the Respondent had no reasonable basis for concluding that the First Claimant was guilty of the gross misconduct it had relied on in dismissing her. Given the Tribunal's findings of fact, that conclusion was not open to challenge. It also found as a fact that the Respondent had approached the investigation with a bias against the two Claimants, as seen in its focus on those employees and not the others involved. Further, when the Respondent's treatment of others involved was considered, the Tribunal plainly considered there was a striking difference of treatment that, in Ms Morton's case at least, was not adequately explained by the Respondent. Given the evidence before it and its findings of fact, the Tribunal was entitled to come to those conclusions and they were also not susceptible to challenge on appeal.

75. In simple terms, the Tribunal had concluded that this Respondent had no proper basis for concluding that the First Claimant had misconducted herself in the way it had found and that it had adopted a very different approach towards a white employee. Whilst that white employee might not have been an exact comparator, there was still a question as to why, in respect of apparently *more* culpable behaviour, the Respondent had taken such a conspicuously more lenient approach. Taking those factors along with the Tribunal's findings on the background evidentiary material, the Tribunal was entitled to look to the Respondent for an explanation for its decision to dismiss the Claimant.

76. Those questions could not be answered by the Respondent simply seeking to rely on the lesser form of misconduct considered by the Employment Tribunal coupled with the previous warnings that might have been extant against the First Claimant. Those matters were not (on the Tribunal's findings of fact) in the Respondent's mind at the time, so could not have

constituted its reasons for its action: why then did it act as it did? The Employment Tribunal was entitled to find that the Respondent had not met the burden of proof upon it.

77. As for the Second Claimant and the unfair dismissal finding, I am not convinced by the submission made on her behalf that the Employment Tribunal did not even need to look at the question of the sanction because the Respondent had not satisfied it on the earlier **Burchell** limbs: in particular that it carried out a reasonable investigation. In her case, the Tribunal found that the Respondent did have a basis for finding that she had been guilty of the misconduct in question and that a reasonable employer could reasonably conclude that amounted to gross misconduct.

78. What weighed with the Employment Tribunal was the very strong mitigation in the Second Claimant's case and the difference in the Respondent's treatment of her as compared to others. This inevitably brings in the findings on race discrimination and it is plainly right that regard should be had to the Tribunal's reasoning as a whole in this respect.

79. Turning first, however, to the mitigating factors in the Second Claimant's case, the Employment Tribunal's findings as to Mr Baldock's approach to the Second Claimant's disciplinary hearing and decision to dismiss (set out above) demonstrated that the Tribunal plainly had regard to what the Respondent had taken into account and concluded that it did not turn its mind properly to the particular mitigation that the Tribunal concluded was important in the Second Claimant's case. The Tribunal was obviously aware of the content of the dismissal letter and the appeal documentation. Equally, however, it had heard the Respondent's witnesses give evidence and seen that evidence tested under cross-examination. Its conclusion was that

the Respondent had failed to have regard to those very relevant factors in reaching its decision as to the appropriate sanction.

80. Even if I was incorrect in my reading of the Employment Tribunal's judgment in this regard, it is plain that this was not the only basis on which it found a decision to dismiss the Second Claimant to have been unfair. This necessarily brings in the findings in respect of the race discrimination complaint, in particular as to the inconsistency of treatment.

81. On this question, the Employment Tribunal did not err by treating this as a strict real-life comparator case; it recognised that it was not possible to do so. It did as it was obliged to do - and as it was guided to do by **Ahsan** – and had regard to what happened to others (not, themselves, strictly comparators) in constructing the hypothetical comparator.

82. Thus the Tribunal had regard to what had happened to Ms Morton. She was more senior, more experienced and, on the Tribunal's findings, more culpable, yet was not dismissed. More than that, initially she was not even the subject of any investigation but was exonerated at an early stage. When she was investigated, she was only subjected to a six-month oral warning. The Respondent's explanation for this difference of treatment was that it took the view that Ms Morton had not been fully trained and her training in the relevant procedures had not been finally signed off. That might have been mitigation to be taken into account in her case, but the Tribunal's findings of fact were such that it plainly considered this to be insufficient mitigation to adequately explain the startling contrast in treatment it had found.

83. As for the case of Ms Murphy, she was more of a comparable employee given the similar level of position held, and the same act of misconduct found. The Respondent was,

however, entitled to point to the fact that it had suspended Ms Murphy and to draw a distinction between her case and that of the Second Claimant, in that she had already given her notice and shortly thereafter left its employment. The Tribunal was plainly aware of these facts but also had regard to the other evidence before it, apparent from the Respondent's own documentation in the transcript of the appeal proceedings. There it was made plain that the Respondent did not take the view that the departure of an employee meant that the disciplinary process would necessarily end. As the part of the transcript I have already referred to records, the Respondent's Managing Director had stated that the former employee might still be called back to answer the case against them. Alternatively, the process could continue in their absence and a finding made, which might presumably have been adverse to them. The fact that the Respondent did nothing in relation to Ms Murphy's case, notwithstanding this evidence, provides sufficient evidential basis for the Tribunal's conclusion that it was not convinced that the Respondent would have dismissed Ms Murphy in these circumstances. That was a finding that was open to the Tribunal given the evidence before it.

84. Given the findings it had made on the background evidentiary material along with its conclusion as to what the Respondent had failed to take into account in respect of the Second Claimant's mitigating circumstances and the striking distinction between the Respondent's attitude towards her and its attitude to other, white employees, the Tribunal was entitled to look to the Respondent to provide a coherent, non-discriminatory reason for the decision it took in respect of the Second Respondent. That was a relevant question, which the Tribunal found was not answered and founded its conclusion on the race discrimination complaint. That was also a matter it was entitled to take into account as infecting the Respondent's case on the unfair dismissal claim.

85. Having thus analysed the Tribunal's judgment in the light of the arguments made on appeal, ultimately I cannot help but conclude that I am being asked to substitute my view for that of the Employment Tribunal. I resist the temptation to do so. Whether I would have reached the same conclusions as the Tribunal in these cases, I cannot say. I do not, however, consider those conclusions to be perverse or to disclose any errors of law. I dismiss these appeals.

86. This disposes of the liability appeals but leaves the appeal and cross-appeal on remedy. Assuming these matters remain live, a further hearing will need to be listed. At this stage I would provisionally set the remedy appeal and cross-appeal down for a further half day hearing. The parties should write in within seven days of this judgment being handed down should they take any different view or if there is no longer any need for such a hearing. In the absence of any such written submissions, the listing office will proceed to make contact with the parties for dates to avoid.