Appeal No. UKEAT/0155/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 & 6 March 2014
Judgment handed down on 5 June 2014

Before

HER HONOUR JUDGE EADY QC

PROFESSOR K C MOHANTY JP

MR S YEBOAH

PROFESSOR C D FRASER — APPELLANT

UNIVERSITY OF LEICESTER & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS NABILA MALLICK (of Counsel) Direct Public Access Scheme
For the Respondent	MR TIMOTHY PITT-PAYNE (One of Her Majesty's Counsel) Instructed by: Eversheds LLP Eversheds House 70 Great Bridgewater Street Manchester M1 5ES

SUMMARY

RACE DISCRIMINATION

Application of the burden of proof: **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337; **Igen v Wong** [2005] ICR 935; **Laing v Manchester City Council** [2006] ICR 1519; **Madarassy v Nomura International plc** [2007] ICR 867 followed.

Multiple allegations of discrimination requiring the Tribunal to determine each complaint whilst still taking a holistic – not a fragmented – approach, so as to enable it to see the bigger picture: **Qureshi v Victoria University of Manchester** [2001] ICR 863; **Fearon v Chief Constable of Derbyshire** [2004] UKEAT/0445/02; **Rihal v London Borough of Ealing** [2004] IRLR 642; and **X v Y** [2013] UKEAT/0322/12 applied.

In this case the Tribunal had correctly applied the burden of proof and demonstrated that it had considered the detail of the individual complaints; those complaints as part of more general themes and also the bigger picture more generally: it had kept sight of both the wood and the trees and no error of law was disclosed.

Appeal dismissed.

HER HONOUR JUDGE EADY QC

Introduction

1. This is a unanimous judgment of the Court. We refer to the parties as the Claimant and the First, Second or Third Respondents, as they were below.

2. This is the Claimant's appeal against a judgment of the Leicester Employment Tribunal, under the Chairmanship of Employment Judge Maidment, sitting with members over a period of 19 days with a further 5 days for deliberations. The reserved judgment and reasons were sent to the parties on 30 July 2012. Representation below was as before us.

3. The Tribunal was charged with the determination of two separate claims of race discrimination (involving claims of direct discrimination, harassment and discrimination by way of victimisation). In determining these complaints, it was presented with 12 lever arch files of documentation (something over 4,000 pages) together with a bundle of witness statements. It heard oral evidence from the Claimant (who read into the record his 138 page witness statement and was cross-examined for around 3 days). It then heard from the following witnesses for the Respondents: Professor Mark Thompson (the Third Respondent and Senior Pro-Vice Chancellor of the First), Professor Burgess (the 2nd Respondent and Vice Chancellor of the First); Mr Nigel Grundy, counsel, who had chaired the Grievance appeal committee; Ms Jane McNeil QC, who had chaired the Grievance committee; Ms Mhairi Fitzpatrick, the First Respondent's Human Resources Business Partner; Mr Roger Bettles, Chair of Council of the First Respondent and Mr Alun Reynolds, Human Resources Director of the First Respondent. The Tribunal heard full submissions from both parties and reserved its decision, ultimately concluding that the Claimant's complaints were not made out and fell to be dismissed. That conclusion was set out in the Tribunal's reserved judgment, provided with written Reasons comprising some 112 pages, 630 paragraphs.

4. Before us, there have been three bundles of documentation (including the core documentation required by the EAT) plus a bundle of authorities. We have also been provided with "skeleton" arguments from both sides of 34 and 32 pages respectively.

5. After hearing from the parties over the course of the two days listed for this case, we reserved our judgment and spent further time deliberating over the arguments presented to us.

6. Whatever else might be said about this matter, a great deal of time and care has gone into the hearings at each stage.

The background facts

7. The Claimant is an employee of the First Respondent having been appointed as a Professor of Economics in September 1995. He is black, Afro-Caribbean, of Jamaican birth but of British nationality and has been a UK resident since 1960. He has been employed in higher education since 1978 and works in the field of theoretical economics.

8. The First Respondent is a research led University, in which Economics was one of around 40 Departments. Since 1999, the Second Respondent has been the First Respondent's Vice-Chancellor. The Third Respondent is the Senior Pro Vice-Chancellor and Chair of the Budget and Resources Committee.

9. From September 2005 until August 2008, the Claimant was Head of the Department of Economics. Prior to that, a Professor Demetraides had been Head of Department. The Claimant felt Professor Demetraides was divisive and the Tribunal found that the Department

had not been particularly happy under his leadership. More generally, the fortunes of the Department fluctuated and there were divisions amongst those within the Department – particularly at a senior level - as to its future direction. As the Employment Tribunal found:

> **"51. The Claimant found himself clashing with Prof Demetriades over the Claimant's desire to broaden the research base by hiring more theorists (like himself), which was seen by some as an attack on the applied economists.**
>
> **52. The then Dean of Faculty, Professor Jackson, had suggested the setting up of a Senior Management Group ("SMG") … Such group was formed and included Prof Lee, Prof De Fraja and Prof Mezzetti. The Claimant and the 2 other Professors in the Department at the time fell outside this group.**
>
> **53. Prof De Fraja had only joined the Respondent and its Department of Economics in 2004 but was clearly, early on, perceived by some as having "superstar" status as indeed was Prof Demetriades – the Claimant uses such term in describing them in email correspondence although with an element of sarcasm. … Prof De Fraja very much fell into the Demetriades camp and on the opposite side to the Claimant in the "applied" versus "theoretical" debate.**
>
> **…**
>
> **57. There was a recovery [of the Department's fortunes] under the Claimant's headship. …**
>
> **58. There were nevertheless tensions within the Department, which were largely the result of a continuance of a clash between the Claimant's philosophy for the priorities in expanding the Department and that of Prof De Fraja and Prof Demetriades, particularly whether there should be further senior appointments in the area of Finance.**
>
> **…**
>
> **62. Prof Thompson was well aware throughout the Claimant's headship that tensions and arguments existed between senior colleagues and that effectively Prof De Fraja and Prof Demetriades were vehemently opposed to the Claimant's vision for the future of the Economics Department.**
>
> **63. The impression the Tribunal is left with is that there was a degree of petulance and obstructiveness in the behaviour of Prof De Fraja and Prof Demetriades towards the Claimant … they did little to hide their feelings and the conflict was very much one voiced publicly within the academic cadre in the Department of Economics during the Claimant's headship. …**
>
> **64. … Prof Thompson formed a view that this SMG had ceased to function effectively. There was undoubtedly, as we have found, a legitimate basis for such a conclusion."**

10. Given the criticisms subsequently made of Professor Thompson, these findings are significant. It further concluded that the tensions between the senior academic staff in the Department were unrelated to race, see (e.g.):

> **"66. … The Claimant confirmed that he did not suggest that the treatment of him by Prof Demetriades was on the grounds of his race or colour. Indeed, he also agreed that the bullying and harassment of him which he attributed to Prof De Fraja was not on the grounds of his race.**
>
> **67. The Tribunal has not heard from Prof de Fraja, but can not avoid the impression that he might accurately be described as an overbearing, unpleasant and unempathetic**

> **individual who treats anyone who is not one of his disciples or acolytes equally badly. There are examples of other academics within the department who have accused Prof De Fraja of bullying behaviour Their ethnicity and nationality vary. Indeed, looking at the email circulation list of the Department there appears to be only a small minority of individuals who by their name might be assumed to be of British nationality and ethnicity, the Claimant himself being one of them."**

11. The matters with which the Employment Tribunal were concerned started during the Claimant's Headship, with an email he sent to the Second Respondent on 10 March 2008. This was headed "Finance in the Department of Economics" and the earlier sections of the email referred to Professor De Fraja's views regarding a future appointment in Finance. In the third paragraph of the message, however, the Claimant complained of being subjected to:

> **"…an unprecedented and persistent attack by mass circulation of emails by my predecessor and successor that, had I been of less robust temperament would have hospitalised me – and might still do."**

12. The Second Respondent responded by email of 18 March 2008, thanking the Claimant for his email "concerning the development of Finance in the Department of Economics"; stating that he had asked the Third Respondent to call a meeting involving both the Claimant and Professor De Fraja to move matters forward "in a positive way". There were indeed meetings of senior academics in the Department but no discussion of the treatment of the Claimant. The Second Respondent did not engage with the Claimant's suggestion that he had personally suffered an attack that might have impacted upon his health.

13. In August 2008, Professor De Fraja became Head of Department and the Claimant began (as would be usual) a period of absence on study leave.

14. During the Claimant's study leave, a lecturer in the Department, Dr Francesco Moscone, resigned, emailing the Second Respondent about this and complaining of his treatment by Professor De Fraja. Dr Moscone had copied Professor De Fraja and the Claimant into his email and the Claimant then emailed the Second Respondent to observe:

> **"… I would be remiss if I failed to point out that his case is not isolated … Miltos [Makris] outlined a similar catalogue of events that he interpreted as "harassment, bullying, victimisation and intimidation from the HoD … I experienced similar behaviour towards myself from Prof De Fraja during my 3 years as HoD … I would be rather surprised if Milto's and Francesco's cases were exhaustive and if there were no threat of the haemorrhaging of very talented people from the Department if this pattern of behaviour is allowed to persist."**

15. The Tribunal concluded that, whilst the Claimant plainly did refer to experiencing similar behaviour himself, this email could not objectively be interpreted as his bringing a grievance and certainly the Second Respondent did not interpret it in this way. Moreover, the Tribunal found that the Second Respondent – a busy man with a range of responsibilities – operated at a strategic rather than an operational level. He would only have engaged with a clearly expressed grievance.

16. The Second Respondent spent little time on Dr Moscone's complaint himself, forwarding it to Professor Jackson (Dean of the Faculty) to investigate and report his findings. He duly did so, concluding that Professor De Fraja had not acted improperly. The Second Respondent thus responded to Dr Moscone, copying his email into Professor De Fraja and the Claimant, as Dr Moscone had done.

17. On 15 April 2009, the Claimant emailed the Second Respondent, expressing his concern that the response to Dr Moscone belittled him. He then went into detail about what he considered to be Professor De Fraja's "harassment and attempted bullying and intimidation" towards him, stating that he was making "a formal complaint regarding Prof De Fraja's conduct towards me during the 3 years that I was HoD".

18. There was an issue before the Tribunal as to whether that email should have been understood as raising complaints against the Second Respondent himself and/or as a complaint of race discrimination. The Tribunal concluded:

> **"104. The approach the Claimant takes to Prof De Fraja was different to that taken with Prof Burgess. The Claimant asserts that Prof Burgess's email was belittling of him but does not say that he is making a complaint and wants that to be investigated.**
>
> **105. … The Tribunal agrees that the Claimant might have expected a response but not the same type of response to the allegations regarding Prof De Fraja.**
>
> **106. The Claimant recognised that he had taken a major step in making his complaint against Prof De Fraja formal. Indeed he had. He had not however taken the same step in terms of his issue with Prof Burgess. Whilst the Claimant said … that he expected there to be an investigation (and indeed an external one given the Vice Chancellor was the accused person), Professor Burgess recognised no such obligation on the Respondent.**
>
> **…**
>
> **109. … the Claimant expected a response. The Tribunal believes such expectation was reasonable but not an expectation that there would then follow an external investigation …**
>
> **…**
>
> **111. The Tribunal is satisfied that it did not occur to Prof Burgess that this was a complaint of race discrimination. It wasn't. Nor did he believe or suspect that a claim of race discrimination would be brought by the Claimant in the future.**
>
> **112. There is no doubt that Prof Burgess was not someone who would be quick to spot a complaint against himself and he did not spot one here. The Claimant suggests in evidence that Professor Burgess ought to have been aware of the possible racial connotations of Prof De Fraja's behaviour. In all the circumstances, including where the Claimant himself had not identified any racial connotations (to him, as he explained to the Tribunal, Prof De Fraja would pick on people regardless of race), the Tribunal cannot see any basis for that assertion at all."**

19. Having understood the Claimant to be raising a complaint against Professor De Fraja, the Second Respondent referred the matter to be investigated by the Third Respondent. The Tribunal found that this was how he would have dealt with any such complaint.

20. From 21 April 2009, the Claimant was certified as unfit to attend work for health reasons. Notwithstanding that, he agreed to attend a meeting with the Third Respondent into his grievance on 27 May 2009, having submitted further written material on 22 and 25 May 2009. The Third Respondent also met with the Claimant on 17 June 2009, having met with Professor De Fraja on 5 June 2009 and Professor Demetriades on 9 June 2009.

21. When thus meeting with the Claimant, the Third Respondent was not aware that the Claimant had been signed off sick, although the Claimant assumed that he knew this. The Third Respondent saw the Claimant's complaints in the context of them having been made a

number of months after the events in question and after he had ceased to have any contact with Professor De Fraja. The Third Respondent did not go through the emails provided by the Claimant in much detail. He considered the flavour of the emails from Professor De Fraja to be bullish and aggressive and, in some instances, inappropriate but did not feel that they crossed the line into bullying/harassment.

22. Although the Third Respondent did not see himself as dealing with a race discrimination complaint, he did make a reference to the MacPherson report when subsequently interviewing Professor De Fraja. The Tribunal considered that this was a curious reference and must have been made because the Claimant was black, albeit that "there was no context of this being a race discrimination complaint."

23. The Tribunal found that the Third Respondent's interview with Professor De Fraja was "in reality less than challenging". Moreover, it was after putting the point to Professor De Fraja that the Third Respondent took the decision that he would not interview Dr Makris (someone the Claimant considered supportive). On this point, the Tribunal found:

> **"135. He was originally minded to interview Dr Makris but when this was mentioned by him to Prof De Fraja, Prof De Fraja wanted, if that was the case, for all academics in the Department to be spoken to. Prof Thompson felt this would prolong the investigation and it could have taken many months to arrange appointments. He decided not to interview anyone else. This was the evidence Prof Thompson gave to the Tribunal and the Tribunal accepts it."**

24. The issue of work allocation was also raised in the meeting with Professor De Fraja and there was a reference to advice that he should "cover his back" and reassurance given that this matter did not place Professor De Fraja's position within the Respondent at risk.

25. Subsequently the Third Respondent received further written representations from Professor De Fraja but did not disclose these to the Claimant as he did not consider they added anything material.

26. As for interviewing Professor Demetraides, the Third Respondent appreciated that he was not an independent witness but felt that he should be interviewed as the Claimant's case was that he was "in cahoots" with Professor De Fraja in a campaign of bullying.

27. The Third Respondent produced his report into the Claimant's grievance on 10 July 2009. He rejected it: whilst he would not have sent them, the emails from Professor De Fraja were not outside his experience of such communications between academic colleagues and much bad feeling could have been avoided had there been face to face discussions and a functioning senior management group rather than poor communication via email. He further noted that the timing of the Claimant's grievance was curious given the length of time that had passed since the events in question and the Claimant's subsequent study leave.

28. The Employment Tribunal found there to have been a difference between the Third Respondent's treatment of the Claimant and Professor De Fraja but did not consider that this was on the ground of race. The Tribunal found:

> **"469. […] there was within Professor Thompson a genuine scepticism as to the validity of the Claimant's complaints and in particular the genuineness of his adverse reaction to the emails produced which stemmed from his view that this was effectively just part of the departmental argument which had been going on among senior academics within the Department of Economics. It was not bullying by Prof De Fraja. This was a matter of judgment essentially and that was Prof Thompson's genuine assessment. …"**

29. On receipt of the Third Respondent's report, the Second Respondent accepted its conclusions and determined that matters should be dealt with informally. On 27 July 2009, he forwarded a copy of the report to the Claimant, his covering letter (drafted by Mr Reynolds as

would be standard but signed and 'owned' by the Second Respondent) dismissing the grievance against Professor De Fraja.

30. The Claimant thereafter indicated his intention to appeal against this decision.

31. At around this time, Ms Fitzpatrick took up responsibility for the Claimant's sickness absence. On 29 July 2009, she received an email referring to a recent medical certificate signing the Claimant off work for six months. That was unusual. Ms Fitzpatrick considered that the Claimant should be referred to Occupational Health. As the Tribunal found:

> **"240. She was genuinely concerned that the Claimant might not be well enough to participate in the appeal process or at least that the Respondent would be putting itself at risk of breaching its duty of care if it allowed that process to continue without recognising that there was an issue about the Claimant's fitness to participate. There was no plan to use this as a way of delaying the grievance appeal. There was no wish to do so and no reason to."**

32. The Claimant argued that this decision had involved the Second and/or Third Respondents and the delay that resulted from this referral was intended, designed to discourage him from pursuing his grievance further. The Tribunal disagreed, finding:

> **"242. […] there is no evidence of Prof Burgess and/or Prof Thompson being involved in this decision and the Tribunal finds that they were not. …"**

33. The Tribunal was, however, critical of the way in which the referral to Occupational Health was drafted, particularly the suggestion that the Claimant had been informed of the resultant delay to his appeal when he had not. It also noted the email from Mr Reynolds to Ms Fitzpatrick, in which he suggested an amendment to a letter to the Claimant about the referral as "a bit of spin to appear we are only doing this for his own protection and benefit". This was a remark for which Mr Reynolds expressed regret and the Tribunal concluded that he was seeking (in his HR capacity) to protect the First Respondent:

> **"253. […] the letter was not for the purpose of delaying the appeal but to protect the Respondent from a complaint that it had breached its duty of care to the Claimant by proceeding with an appeal process when he was ill."**

34. Towards the end of November 2009, the Claimant raised two further grievances. The first, dated 27 November 2009, was stated to be against the First and Second Respondents and related to the email to Dr Moscone, which the Claimant complained publicly belittled him, and to what the Claimant considered to be the unreasonable delay in convening his grievance appeal hearing. The second, of 30 November 2009, was also stated to be against the First and Second Respondents but this – for the first time – specified that the treatment complained of was "on the ground of racial discrimination".

35. Prior to the submission of these two further grievances, steps had been taken to try to organise a panel to hear the Claimant's grievance appeal and a legally qualified chair – Ms Jane McNeill QC – appointed. Upon the receipt of the further grievances, Ms Fitzpatrick and Mr Reynolds considered that they should be heard by the same panel.

36. The panel chaired by Ms McNeill QC ("the McNeill grievance panel") subsequently met in March 2010 to consider the issues raised in the grievance appeal. The Tribunal found that it carried out "a detailed and appropriately wide ranging enquiry". It produced a report on 31 March 2010, upholding the Claimant's appeal, the panel having concluded that the tone of Professor De Fraja's communications could not be considered normal in a University context.

37. The McNeill grievance panel then reconvened as a first instance body to deal with the two November 2009 grievances. This took longer but the panel produced its report on 22 October 2010, partly finding in the Claimant's favour but declining to find that he had in any respect been less favourably treated on the grounds of his race.

38. The Claimant appealed from the October 2010 findings of the McNeill grievance panel to an appeal committee chaired by Mr Nigel Grundy, a barrister of some 28 years' experience. By its report of 20 June 2011, the Grundy appeal committee rejected the Claimant's appeal.

The Employment Tribunal's conclusions

39. As part of the Tribunal's case management of the proceedings, the Claimant had earlier produced a 65 page document providing further particulars of his claims. That listed 66 separate acts of allegedly less favourable treatment in respect of the first claim. There were further complaints raised by the second claim, falling under six broad headings. The Claimant's witness statement substantially followed the earlier particularisation of his claims.

40. At the full merits hearing, Ms Mallick (then representing the Claimant but not involved in the earlier case management stages of the proceedings) did not resile from any of the allegations but sought to put the Claimant's case as one of a broader case of discrimination encompassed by those individual complaints. As the Tribunal records:

> **"3. […] The Tribunal has indeed been encouraged to look at the "broader picture" by her rather than to adopt an overly fragmented approach with reference to the 66 allegations and to the others in the subsequent Tribunal application …**
>
> **4. Whilst the Tribunal has done so it has still determined it necessary to look at each of the allegations individually."**

41. Having thus explained its approach, the Tribunal then categorised the individual allegations under the following headline issues:

> **"1. The VC belittling the Claimant in an email and ignoring the Claimant's complaint about this …**
>
> **2. The handling of the Claimant's complaint of bullying against Professor de Fraja …**

3. Rejection of the complaint against De Fraja – the report itself and the time given to appeal …

4. HR going on the offensive whilst the Claimant was sick, the Occupational health referral and the impeding and delay of the appeal …

5. The response to the subject data access request and document tampering …

6. The conduct and decision of the Grievance Committee chaired by Jane McNeill including evidence given to it …

7. The Respondent's reply to the Race Discrimination Questionnaire …

8. The Decision of the Grievance Appeal Committee chaired by Mr Grundy."

42. The Claimant's case was largely put as one requiring a comparison with a hypothetical comparator – a white Professor in circumstances not materially different from the Claimant – but other, actual comparators were identified in respect of particular comparators (albeit without reliance being placed on all those comparators originally cited by the Claimant).

43. The Tribunal also had before it the issue whether the various matters claimed to constitute acts of discrimination had been brought in time.

44. Without replicating every point, on the first headline issue, the Tribunal found:

44.1 The Second Respondent had not seen the Claimant's email of 30 March 2009 as a grievance he needed to respond to. No comparable situation was identified where the Second Respondent had reacted differently. The facts found by the Tribunal were not such that it could conclude that the Claimant's treatment was on the grounds of race. The Second Respondent would only have responded to a complaint in these circumstances if it had been made in very specific terms with a clearly expressed expectation of what he should do with it.

44.2 In his email of 8 April 2009, the Second Respondent did not belittle the Claimant by failing to refer to his academic title. The email disparaged the Claimant

in the reference to financial impropriety but the Second Respondent was repeating what he had been told by Professor Jackson, without thinking how this might come across. The Tribunal could not conclude that this repetition amounted to less favourable treatment of the Claimant on grounds of race. The Second Respondent acted as he did because in matters of this nature he did not take care to consider the feelings of those with a sense of grievance; he neither had the time nor the inclination to seek to "soften the blow".

44.3 The allegation that Dr Moscone was treated less favourably because of the Claimant – part of the Claimant's overarching complaint of a conscious conspiracy to discriminate against him – was rejected by the Tribunal: no facts were found from which such a conspiracy could be inferred.

44.4 Whilst it was unreasonable for the Second Respondent not to at least acknowledge the Claimant's 15 April 2009 email, Dr Moscone was not an appropriate comparator (he had resigned from his employment and had made a number of very specific complaints; his more generalised complaints against Professor De Fraja were also effectively ignored). The Tribunal found no primary facts from which it could infer race discrimination. The reason for the Second Respondent's lack of response was that he would not respond to anything other than a specific complaint (see earlier findings) and he saw the issues raised by the Claimant as bound up in and related to a history of Departmental "spats".

44.5 There was no complaint made by the Claimant at this stage against the Second Respondent; thus it was not "ignored". There was no less favourable treatment, still

less facts from which the Tribunal could conclude less favourable treatment on grounds of race. The reason for the non-action was unrelated to race.

45. On the second headline issue (again, without descending into the detail of each finding under this head), the Tribunal concluded:

45.1 The Third Respondent was sceptical as to the genuineness of the Claimant's complaints. He considered that these were just part of the on-going argument between senior academics within the Department of Economics. He was not aggressive or adversarial in his treatment of the Claimant but reasonably pressed him as to why he was raising a grievance at that point in time; it being curious that it was raised a significant time after the events had occurred, only at a point when another senior academic had raised separate grievances. There was a difference in the Third Respondent's treatment of the Claimant and Professor De Fraja but the Claimant was the one raising the grievance and the Third Respondent was sceptical as to the genuineness of this for the reasons summarised above. There was no basis for finding less favourable treatment on grounds of race but, in any event, an explanation had been provided that was wholly untainted by considerations of race.

45.2 The Tribunal gave particular consideration to the Third Respondent's reference to the MacPherson report but did not conclude that he suspected that the Claimant's treatment by reason of his race might be an issue of complaint either at that point or in the future.

45.3 To the extent that the Third Respondent gave reassurance to Professor De Fraja during the grievance investigation, the Tribunal again found that this was due to

the view taken by the Third Respondent that the Claimant's grievances were stale and were part of the on-going dispute within the Department. There was no basis for inferring that the Third Respondent would have done anything different had the grievance been brought by a white Professor or that his conduct related to a suspicion that the Claimant might bring a claim of race discrimination.

45.4 The reason for Third Respondent's decision not to pass on Professor De Fraja's written representations to the Claimant was unrelated to the Claimant's race and there was no suspicion of a protected act. The Third Respondent was not concerned with the detail of the allegations; he took the view the representations added little and he could raise matters with the Claimant himself. There was no detriment to the Claimant from this decision.

45.5 The Third Respondent did create an impression that he was bowing down to Professor De Fraja's view in deciding not to interview Dr Makris but the reason for this was because he did not want to allow Professor De Fraja an opportunity to start to call more people to give evidence, with the inevitable additional work and time that would require of the Third Respondent. That was unfavourable to the Claimant but not on the grounds of his race.

45.6 The decision to interview Professor Demetriades was not comparable to the Third Respondent's decision regarding Dr Makris. Professor Demetriades seemed, on the Claimant's grievance complaint, to be a party to the harassment allegedly pursued against him by Professor De Fraja. Moreover, the decision in respect of Dr Makris was reached at a later stage, when the Third Respondent was hoping to bring the

investigation to a close. There was no basis on which the Tribunal could conclude that there was discrimination on the ground of race/any protected act.

45.7 As for the failure to investigate the Claimant's late additional complaint regarding work allocation, the Third Respondent responded as he did because he wished to keep his enquiries as narrow as possible and not spend further time on additional issues before completing his report. This was neither on the ground of the Claimant's race nor any protected act (or suspicion of such).

45.8 As for the First Respondent's treatment of the Claimant at this time, the Tribunal did not find (contrary to the Claimant's case) that any "detailed care package" had been offered to Professor De Fraja. There was more favourable treatment of Professor De Fraja, in terms of his welfare, when he complained of the lack of concern but that was because the Claimant had not reacted in the same way. In any event, the more favourable treatment was limited to an expression of concern and apology for delay and that would have been extended to the Claimant if he had made similar complaints. There was no basis for concluding it was treatment on grounds of race or a suspicion of a protected act.

46. On the third headline issue, the Tribunal concluded (again in general terms):

46.1 That the Third Respondent took an unreasonable view in dismissing the Claimant's complaint but that he did so for reasons that were not related to race or any protected act, but were due to his view that the grievances arose out of Departmental disagreements and the lack of face to face communication. That was also the explanation for his "harsh" and "dismissive" tone.

46.2 The Third Respondent did not address the "belittlement" complaint because it was not part of the grievance he was required to investigate, it was nothing to do with race or any protected act.

46.3 He did not respond to the further complaints made by the Claimant because these were effectively attempts to appeal against the findings before the conclusions had been published and the Third Respondent's failure to engage with such further complaints was understandable.

47. The fourth headline issue related to the involvement of Human Resources, in respect of which the Tribunal concluded:

47.1 There were delays in the process and sometimes no, or less than full, responses to the Claimant's enquiries but this was at a time when no appeal was imminent given the legitimate concerns regarding the Claimant's health and the view that no progress could be made until he was fit.

47.2 There was no evidence of any deliberate act taken to increase the Claimant's anxiety and no evidence of involvement on the part of the Second Respondent.

47.3 Without the racist conspiracy postulated by the Claimant, there was nothing which could lead the Tribunal to conclude that any delay amounted to less favourable treatment on the ground of race. The Tribunal was satisfied that there was no racist conspiracy. The initial delay was entirely due to concerns about progressing an appeal when the Claimant appeared to be unfit.

47.4 Although the Tribunal approached Ms Fitzpatrick's evidence with some caution given that it did not accept her statement that she did not know the Claimant was black, there were no other facts from which race discrimination could be concluded and, in any event, other non-discriminatory reasons were demonstrated for the content and manner of the Occupational Health referral.

47.5 The treatment of Professor De Fraja was not a suitable comparison. In any event, there were no facts from which race discrimination could be inferred.

47.6 Whilst Mr Reynolds' internal email included an inappropriate comment, that simply betrayed the reality, that HR was there to protect the First Respondent. This was not evidence of any intention to delay other than for legitimate reasons.

47.7 When the Occupational Health advice was received, it conflicted with the medical certificate and it was reasonable for an attempt to be made to resolve that. This was not a delaying tactic and there was no basis on which the Tribunal could conclude that there was less favourable treatment on the ground of race.

47.8 Subsequent delay in dealing with the Claimant's complaints was explicable by reason of Ms Fitzpatrick's own absence and other work commitments. There was a period of inactivity which was difficult to excuse, from mid-October to late November 2009. This was due to inefficiency and work pressures and an understandable desire to keep things in proportion. There was nothing to found a conclusion that this was on ground of race or due to a suspicion of a protected act.

48. On the fifth headline issue, the Tribunal did not find that there had been document tampering or that there had been deliberate delay in the response to the Claimant's extensive DPA requests.

49. On the sixth headline issue (concerning the evidence before, conduct and decision of the McNeill grievance panel), the Tribunal considered the issues regarding the evidence given but concluded that any errors or evasiveness arose from reasons (detailed by the Tribunal) other than race or a protected act. It rejected the assertion of bias or impropriety in the choice of Ms McNeill QC to chair the committee and concluded that the process adopted was as full and transparent as possible. There was no basis on which the Tribunal could infer discrimination on ground of race or any protected act and the reasons for the McNeill grievance committee's decisions were clear from its report and completely untainted by considerations of race/any complaint of race discrimination.

50. The Tribunal was not prepared to draw any adverse inference from a late reply to the Race Relations Act Questionnaire (headline issue seven): there was no substantial delay (8 days, including the Easter break); the questionnaire had been long and detailed and the response would have taken considerable time and work from a number of people to complete.

51. On the eighth headline issue, the Tribunal found that there was nothing in the complaints made against the grievance appeal panel.

52. Having gone through each of the individual allegations in some detail, the Tribunal reminded itself of the cautionary warning in **Rihal v London Borough of Ealing** [2004]

EWCA Civ 623 of the danger of an over fragmented approach. It, therefore, stood back "to ensure that the bigger picture is exposed". It did so: "firstly in respect of the major themes of the allegations" and then "in terms of the total picture which these themes make up":

> **"Having done so, the Tribunal sees instances of unreasonable treatment of the Claimant, of delays and poor practice. It does not however find facts from which a conclusion of race discrimination could be drawn. Furthermore and in any event it has found explanations for the Claimant's treatment which are unrelated to his race or colour or him having brought or it being suspected that he might bring a complaint of race discrimination."** (see paragraph 625)

53. Having thus concluded, the Tribunal found that all the Claimant's complaints of race discrimination, against all three Respondents, must fail.

54. Although the Tribunal had already determined – and dismissed – the claims on the merits, for completeness it went on to consider the issue of time limits in any event. The first claim had been lodged on 21 January 2010 and the second on 27 June 2011. It was common ground that, for the complaints to have been brought in time, there would need to be a continuing act. On the Claimant's case, this arose from the overarching conspiracy driven by the Second and Third Respondents. The Tribunal rejected that case and found that there was no act of discrimination let alone any continuing act (see paragraphs 627-8).

55. The Tribunal also considered whether it would be just and equitable to extend time but concluded that it would not: the burden was on the Claimant and he had provided no explanation for the late submission of his claim (see paragraph 629).

56. Given the way in which the Claimant's case has been argued on appeal, we further note that the Tribunal specifically observed that the complaint of victimisation arose only under the second claim and, to the extent that it related to matters occurring before 28 March 2011, was out of time (see paragraph 629).

The appeal

57. The Notice of Appeal was initially considered on the papers to disclose no reasonable basis for appeal. The Claimant duly exercised his right to an oral hearing under rule 3(10) of the EAT Rules 1993 and ultimately the matter was permitted to proceed on some of the proposed grounds of appeal, as follows (adopting the same numbering as appears in the consolidated Notice of Appeal):

57.1 Ground 2: that the ET erred (paragraphs 472-474) in holding that the Third Respondent did not suspect that the Claimant intended to do a protected act for the purposes of the victimisation protection under section 2(1) **RRA 1976**.

57.2 Ground 3: here the Claimant takes issue with the Employment Tribunal's suggestion (in particular at paragraph 625) that it had stood back and looked at the picture as a whole. The Claimant further contends that the Tribunal failed to properly apply the burden of proof and provide inadequate reasons. There were sufficient findings of unreasonable treatment, delay and poor practice - in the findings relating to events on an individual basis - to give rise to the inference that this treatment must have been by reason of race.

57.3 Ground 5: the Employment Tribunal erred in law in failing to draw inferences from the Respondents' responses to the Claimant's statutory Questionnaire.

Submissions

The Claimant's submissions

58. The focus of the Claimant's submissions before us has been on the second of the above grounds (Ground 3). Ms Mallick submitted that the Employment Tribunal had taken a fragmented approach to the claim: it had failed to adopt the thematic approach urged on behalf of the Claimant.

59. Referring to the principles laid down in **Igen v Wong** [2005] ICR 935, Ms Mallick contended that the Tribunal erred in law by apparently considering that the inference at the first stage had to demonstrate that the Claimant had been treated less favourably on grounds of race. That was the question at the second stage; not the first. This was setting the hurdle too high. Further, at the second stage, the Tribunal had erred in failing to ask whether the Respondents had shown that the reason had nothing to do with race.

60. In developing this ground, Ms Mallick took us through the detail of some of the Tribunal's findings on the individual complaints. We return to her arguments in this regard in our discussion and conclusions section below.

61. On Ground 2, Ms Mallick submitted that the protected act had been made out either on the basis that there was (contrary to the Tribunal's finding) a racial element in Claimant's complaint, alternatively on the basis that the Third Respondent suspected that the Claimant was going to bring a complaint of race discrimination against Professor De Fraja (hence the advice that he should cover his back). The Tribunal's finding that there was no protected act (at paragraph 472) failed to take into account the possibility that the Third Respondent suspected a possible complaint of race discrimination. The Tribunal erred in looking at what was in the Claimant's mind, which was not relevant. The finding that the Third Respondent was "mindful" of a possible allegation of race discrimination should have been sufficient for

a finding of suspicion of the performance of a protected act in the future. The Tribunal should have considered the various acts of less favourable treatment found against the Third Respondent in the light of this suspicion.

62. On the time limit issue, although there was no specific ground of appeal in this regard, Ms Mallick submitted that if the EAT was with the Claimant on the merits of his substantive points, that would be sufficient to disturb the Tribunal's findings on time limits. If the Tribunal had erred on the merits, its judgment on the time issue would have to go as well.

63. On Ground 5, the Tribunal erred in failing to draw inferences from evasive answers as permitted by section 65(2) of the **Race Relations Act 1976**. The examples given in the skeleton argument were the most important. It was not enough for the Tribunal to have simply referred to the Questionnaire in general terms. At paragraph 382, the Tribunal failed to identify the specific discrepancies and inconsistencies it had apparently found. Although there were some specific references to the Questionnaire responses later on, the most important points (as identified in the Claimant's skeleton argument) were missing.

The Respondent's submissions

64. For the Respondent, it was noted that there was no criticism made of the Tribunal's self-direction as to the law, only of what was said to be the application of the law to the facts of this case. In truth, this was a perversity or lack of adequate reasons appeal.

65. The approach adopted by the Tribunal followed that laid down in **Shamoon v The Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337. In particular, having regard to the often cited guidance given by Lord Nichols:

> **"No doubt there are cases where it is convenient and helpful to adopt this two step approach to what is essentially a single question; did the claimant on the prescribed ground receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. … employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment afforded to the claimant on the proscribed ground, was less favourable then was or would have been afforded to others."**

66. In this case, the Tribunal repeatedly focussed on the "reason why" question. Unless the Claimant could attack the findings made as to the real reason for the treatment complained of, those findings were a complete answer to the case. The Tribunal repeatedly made the point that it did not think that the burden of proof had shifted but went on to state its conclusion that, even had the burden shifted, it did not consider that the reason for the act in question was race or a protected act.

67. On the "holistic approach" point (Ground 3), the difficulty for the Claimant was that his "holistic case" was dependent upon his assertion of a conspiracy that the Tribunal found did not exist.

68. This was a case where the Tribunal was faced with a mass of allegations and material. It was scrupulous in addressing each of the complaints separately but was also aware of the need to deal with matters as a whole and to see the bigger picture. It did not take a fragmented approach (and expressly recognised the danger of doing so) but looked both at the detail and at the broader themes. The Claimant criticised the general summary of the Tribunal's broader approach at paragraph 625 but the Respondent would question what inferences the Tribunal was meant to draw when it had expressly found against the Claimant on each of the individual allegations.

69. On Ground 2, the attack on the Tribunal's approach to victimisation, the allegation seemed to be that, because of the reference to the MacPherson report, the Tribunal ought to have found that, in his handling of the grievance investigation, the Third Respondent victimised the Claimant. The short point here was that the Tribunal expressly made findings as to why the Third Respondent acted in the way that he did (including when that was found to be less favourable treatment of the Claimant) and the reasons found were nothing to do with any suspicion that the Claimant might raise a complaint of race discrimination.

70. Furthermore, it was only in the second ET claim that the Claimant had raised victimisation (the first claim was limited to direct race discrimination and/or harassment) and the issues regarding the Third Respondent arose under the first claim (in respect of which, the Claimant had confirmed that he was not pursuing any complaint of victimisation). If it was suggested that this could be treated as falling under the victimisation complaint of the second claim, it related to matters prior to 28 March 2011 and had thus been held to be out of time – a finding from which there was no appeal.

71. Finally, the complaints made in respect of the responses to the Race Relations Act Questionnaire (Ground 5) were matters of detail, attempting to displace the Tribunal's findings of fact. The Court needed to have regard to the detailed nature of the Questionnaires and the very thorough answers. The Employment Tribunal was entitled to take the view that some inaccuracies would be unsurprising in this case.

Legal principles

72. As will be apparent from the above summary of the submissions before us, this was not a case where there was any disagreement as to the correct legal principles. The issues raised by the appeal related solely to the application of those principles.

73. We have reminded ourselves of the well-rehearsed guidance as to the drawing of inferences and the application of the burden of proof in discrimination cases, in particular: **King v Great Britain China Centre** [1991] IRLR 513; **Anya v University of Oxford** [2001] ICR 855; **Qureshi v Victoria University of Manchester** [2001] ICR 863; **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] 337; **Bahl v The Law Society** [2004] EWCA Civ 1070; **Igen v Wong** [2005] ICR 935; **Network Rail Infrastructure Ltd v Griffiths-Henry** [2006] UKEAT/0642/05; **Laing v Manchester City Council** [2006] ICR 1519; **Madarassy v Nomura International plc** [2007] ICR 867; **Doherty v The Training and Development Agency for Schools** [2009] UKEAT/0394/09 and **Komeng v Sandwell Metropolitan Borough Council** [2011] UKEAT/0592/10. We return to some of the observations in those cases when addressing the particular issues in this case below.

74. Given the focus of the Claimant's case before us, we have been particularly mindful of the various cases which have placed emphasis upon the need to look at the broader picture when considering a discrimination complaint built upon multiple allegations. In such cases, whilst the Tribunal would need to make the relevant findings of fact in respect of the individual complaints made, it must also adopt a holistic view of the case, seeing the wider picture that may not be apparent from an overly fragmented approach, see **Qureshi** (supra); **Fearon v Chief Constable of Derbyshire** [2004] UKEAT/0445/02; **Rihal v London Borough of Ealing** [2004] IRLR 642; and **X v Y** [2013] UKEAT/0322/12.

Discussion and conclusions

75. As we have observed, it is common ground that the Employment Tribunal correctly directed itself as to the legal principles laid down by the statute and the case-law. The issue is whether it then erred in its application of those principles to its findings of fact.

76. The Claimant's central criticism is that the Employment Tribunal erred in law in failing to adopt a holistic approach: it looked at the individual matters of complaint and failed to step back and see the overall picture.

77. We consider this to be an unfair characterisation of the Tribunal's approach. The Tribunal took particular note (see paragraph 421) of the injunction in **Rihal v London Borough of Ealing** [2004] IRLR 642 that it must look at the total picture; that where allegations of discrimination are over a substantial period of time, it would be wrong for a Tribunal to treat the individual incidents complained of in isolation from one another. This Employment Tribunal expressly recognised that adopting a fragmented approach would overlook the relevance which the wider profile may have to the decisions to be reached on individual complaints. It made clear:

> **"The Tribunal accepts that such a risk could exist in this case and whilst it has spent significant time on each individual allegation, the Tribunal has been mindful of the wider picture and context."**

78. Having correctly directed itself in this way, it is apparent to us that the Tribunal went on to apply that approach; both looking at the allegations made thematically and overall.

79. We have some sympathy for the Tribunal in the way it had to approach its task in this regard. The Claimant had made some 66 separate complaints in his first ET1. In the second, a further six matters were raised (albeit that there was some overlap). The Tribunal was

scrupulous in addressing each of the complaints separately but also to see the bigger picture (as Mr Pitt-Payne QC put it: to see both the wood and the trees).

80. For the Claimant, the big picture was one of conscious conspiracy emanating from the very top. The Tribunal rejected that case, finding "no facts from which such conspiracy against the Claimant could be inferred" (paragraph 443). Before us, Ms Mallick has sought to link the individual allegations in a more neutral way (without expressly relying on a conspiracy as such), and criticises the Tribunal for failing to adopt a thematic approach when determining the complaints of discrimination made.

81. Again we consider this to be an unfair criticism. It is apparent to us that the Tribunal made general findings which provided answers to the complaints made under the broad headings identified at paragraph 19. In truth, we consider that the Claimant's real complaint is that he does not agree with the Tribunal's conclusions in respect of the broad themes identified and has thus sought to descend back into the detail of the individual allegations in this appeal in an attempt to re-argue the points.

82. Before following those submissions into the detailed complaints, we note the following general answers given by the Tribunal on a thematic approach to this case. We limit these observations to the allegations that remain in issue on this appeal.

83. First, the Second Respondent did not deliberately ignore the Claimant's complaints. He was a busy man with neither the time nor inclination to descend into the detail of every email. Unless the Claimant's email had expressly stated that he was pursuing a complaint, the Second Respondent would not have seen it as such. The Claimant's race was irrelevant; the

Second Respondent would have responded in the same way regardless of race. Prior to November 2010, none of the Claimant's complaints raised any issue of race discrimination and the Second Respondent did not anticipate such a complaint.

84. Second, the Third Respondent's conduct in investigating and reporting on the Claimant's grievance relating to Professor De Fraja was explained by his view that the complaint really arose out of the internal disagreements within the Department and his desire to limit the amount of his own time and energy that needed to be devoted to this investigation. There was a background of dysfunctional relationships and internal disputes, of which the Third Respondent was aware. The Claimant was raising issues relating to his own period as Head of Department (i.e. when he might have been expected to deal with matters himself) sometime after the event and after he had been absent from the Department (and thus from dealings with Professor De Fraja) for some period of time on study leave. The Third Respondent's perception of this background coloured his view of the complaint and informed the way in which he dealt with the investigation. That perception was, however, wholly unrelated to the Claimant's race or to any suspicion that he might bring a complaint of race discrimination.

85. Third, the delays in organising the grievance appeal largely arose from a genuine concern on the part of members of the First Respondent's Human Resources team about progressing such an internal process when the Claimant had been signed off on long-term sick leave with stress (this being the reason for the referral to Occupational Health). That concern might have arisen (at least, in part) from a desire to protect the First Respondent from potential complaint that it had breached its duty of care towards the Claimant, but it was still a genuine concern and unrelated to the Claimant's race or any suspicion that he might be

complaining of/might in future complain of race discrimination. Other delays in the process and failures to respond to the Claimant were properly tested by the Tribunal (as required, see **Komeng**) and found to be explained by various other factors: Ms Fitzpatrick's own period of sick leave and the fact that she found it stressful to deal with the Claimant's case (factors that were not unrelated); work load (the Claimant's was not the only case Ms Fitzpatrick had to deal with) and more general inefficiencies, which (as the Claimant's own trade union representative had confirmed) were not unusual.

86. We come to this matter afresh and these answers – dealing with the allegations in a thematic way – were readily apparent to us from the Tribunal's Reasons. We tentatively suggest that the reason why the Claimant is unable to see the broader canvasses painted by the Tribunal is that they do not reveal the image he already has in mind; he thus continues to focus on the individual brush-strokes of the allegations in an attempt to re-paint the picture.

87. If one stands back from the detail and adopts a holistic approach (per **Qureshi**; **Fearon**; **Rihal**; **X v Y**), the Tribunal's answer to this case is clear: the Claimant's complaints were seen as arising from the history of dysfunctional relationships and departmental disputes existing in the Department of Economics and were not identified in any way with race or with any possible complaint of race discrimination. This history informed the perceptions and conduct of the Second and Third Respondents, who responded as they would have done in the case of any senior academic (regardless of race) in like circumstances. Those involved on the administration side (Ms Fitzpatrick; Mr Reynolds) were concerned to protect the First Respondent but on the basis of the duty of care owed to an employee signed off on long-term sick leave not in respect of complaints of race discrimination. Otherwise their actions (or

inactions) were entirely consistent with how they would behave in similar (in terms of weight of documentation etc) cases.

88. Having urged that the Tribunal had erred in failing to take a holistic approach, Ms Mallick indeed then took us into the detail of the allegations the Claimant continued to rely on in this appeal (some 17 of the 66 raised in the first ET1; there was no appeal regarding the complaints in the second ET1). In so doing, she made the general submission that the Tribunal failed to adopt a two-stage approach to the burden of proof and set too high a hurdle for the Claimant at the first stage by requiring him to demonstrate that the reason for the matters complained of was race or a protected act.

89. On the general submission in this regard, we again disagree. In respect of each complaint, it is apparent that the Tribunal applied the correct test by asking whether the Claimant had established facts from which it *could* conclude that the reason for the treatment in question was discriminatory (the first stage; and see the language of the statute, here section 54A(2) **Race Relations Act 1976**, and the guidance provided in **Igen** and **Madarassy**). In so doing, it was entitled to take into account the explanation given by the Respondent (see **Laing**). It is apparent that it also looked to see what inferences it might draw from the primary facts found (per **Anya**; **Qureshi**). The Tribunal did not, however, stop at this first stage but went on, in any event, to ask what reason the Respondent had established for the behaviour in question. That was not putting an additional onus upon the Claimant but acknowledged that very often the answer to a case of discrimination lies in the examination of the "reason why" (**Shamoon**). That effectively put the spot-light on the Respondent, requiring it (notwithstanding the Tribunal's conclusion that the burden of proof had not

shifted) to establish a non-discriminatory reason for the action or omission in issue. There was no error of law in this approach.

90. Descending then into the detail. In respect of complaints 1 and 3, regarding the Second Respondent (paragraphs 428-434 and 445-460 of the Tribunal's Reasons), the Claimant submitted that the Tribunal erred by ignoring evidence that he failed to respond to the complaints of black academics (the Claimant and a Dr Abimbola). But this criticism fails to engage with the findings of the Tribunal. As to Dr Abimbola, that the Tribunal had no primary evidence from which it could make findings of fact or draw inferences regarding his case (see paragraph 380). As to the Claimant, that the Second Respondent engaged with those matters expressly identified as complaints and not with matters that were not (see, e.g., paragraphs 72-73, 85, and 88-89; and 106 and 111-112) – a course he would have followed regardless of race (paragraphs 428-434 and 445-452). The Claimant would need to demonstrate that these findings were perverse but his case did not begin to meet the burden of doing so.

91. It is convenient to address the Claimant's case on complaint 61 at this stage, as it also involved an allegation against the Second Respondent; that he denied or was evasive about the Claimant's achievements. As Ms Mallick acknowledged, the Tribunal's conclusion (paragraph 605) was that, although the Second Respondent "was indeed reluctant to praise the claimant", there were "no facts from which it could conclude that [he] would have expressed his views differently had the Claimant been a white Professor". Her submission was that the Tribunal failed to see the bigger picture: the reluctance to praise the Claimant was supportive evidence that would have enabled it to draw an inference of race discrimination had it had regard to this finding when considering the other complaints.

92. We disagree. We do not accept that the Tribunal adopted a fragmented approach in this regard. Indeed, it expressly referred to the Second Respondent's attitude in its primary findings of fact (see, for example, paragraphs 77 and 87) and made findings relating to his demeanour and approach that underpinned its conclusions in respect of all the allegations involving this Respondent. The way in which the Second Respondent answered questions relating to the Claimant was seen by the Tribunal as another facet of his personality: "He is not someone who will simply accept what is put to him." That was consistent with the view the Tribunal had formed of this witness generally. On the specific allegation, the Tribunal observed that very specific matters had been put which the Second Respondent did not wish to accept. To the extent that those matters related to the Claimant's performance as Head of Department, the Tribunal plainly considered that the Second Respondent was entitled to be cautious in his response given the scope for debate on the issue. The Tribunal's approach to the assessment of the Second Respondent cannot be faulted: it took a holistic view and reached conclusions on the evidence that were entirely open to it.

93. Before moving to the next of the individual matters addressed on appeal, we noted that the findings relating to the Second Respondent show the Tribunal taking a broad view of his conduct and his reasons for acting/failing to act. Having found no evidence of conspiracy, however, it is hard to see how there would be a ready read-across from these findings into the Tribunal's consideration of the complaints (for example) against the Third Respondent.

94. On complaint 6, Ms Mallick first submitted that the Tribunal was bound to compare the treatment of the Claimant with that of Professor De Fraja. The difficulty for her is that, whilst the Tribunal did not accept that their circumstances were truly comparable, it did make that

comparison (see, e.g., paragraph 467). She further contended that it was not sufficient to then find that any difference in treatment arose from the Third Respondent's scepticism as to the Claimant's complaints. That reason itself (she submitted) "could have resulted from less favourable treatment of the Claimant". This, however, ignores the earlier findings of fact as to the history of the Department, as was known to the Third Respondent. These were findings of fact based on the evidence. The Tribunal was guilty of no error of law in its approach.

95. On complaints 8, 10-13 and 22 – all relating to allegations of less favourable treatment on the part of the Third Respondent - Ms Mallick argued that the Respondents had not discharged the burden of proof when the Third Respondent had referred to a breakdown of proper communication in his report, not to an on-going dispute. Here it seems to us that Ms Mallick is doing precisely what she has criticised the Tribunal for doing, that is to look at specific matters in isolation, without having regard to the broader picture. The Tribunal's reasons refer to the Third Respondent's scepticism (and the reasons for that) at various stages. That in part records the evidence he gave before the Tribunal itself (see, for example, paragraphs 135, 137, 149, 151, 172 and 174-5), the Tribunal's own findings relating to the background history (of which the Third Respondent was aware) and also to references in the documentation, including the Third Respondent's report. We again consider that the Tribunal approached its task correctly and reached conclusions entirely open to it on the evidence.

96. Ms Mallick next took us to complaint 25, which related to Ms Fitzpatrick and the referral of the Claimant to Occupational Health. In respect of Ms Fitzpatrick, Ms Mallick submitted that the finding that she had not told the truth to the Tribunal about knowing that the Claimant was black was significant. The Tribunal was required to make a finding as to why she had lied as that would have enabled an inference to be drawn. The difficulty we see

with this complaint is that the Tribunal expressly approached Ms Fitzpatrick's evidence with scepticism but found as a fact that the referral to Occupational Health was for a reason untainted by race. Again, unlike the Claimant, we consider it important to see the Tribunal's finding on this complaint in the light of the other findings relevant to Ms Fitzpatrick. We note, for instance, the rejection of the "going on the offensive" allegation (complaint 21) and the express finding (paragraphs 520-521):

> **"520. … Ms Fitzpatrick was genuinely and understandably concerned about progressing a grievance appeal in circumstances where the Claimant had submitted a sick certificate signing him off work for a substantial period of six months due to stress related issues. …**
>
> **521. She was not seeking to "go on the offensive". Primarily she was seeking to protect the Respondent's position in case it was ever suggested that the Respondent had pushed the Claimant through a stressful process knowing that he was not in a fit state to engage with it. Also, at this point when she made her very immediate, almost "knee jerk", reaction to the six month sick note she was not aware that the Claimant was black. …"**

97. On the Tribunal's finding, whatever the reason why Ms Fitzpatrick failed to tell the truth about knowing of the Claimant's colour, it could raise no inference of discrimination on the issue of the referral to Occupational Health, for which a non-discriminatory reason had been established. As for informing the Claimant of the referral, the Tribunal found as a fact that she had and that it was not significant that she did not then discuss the content of the referral form with him. The other criticisms made in respect of the referral are minor in nature and the Tribunal again (having already found that Ms Fitzpatrick had not gone "on the offensive") found nothing untoward.

98. Complaint 28 relates to Mr Reynolds' email to Ms Fitzpatrick, in which he sought to ensure that a "bit of spin" was provided so as to ensure greater protection for the First Respondent. Ms Mallick submits that this – taken with the other matters complained of - was such as to give rise to an inference in this case. There is, however, a real difficulty with this assertion. As the Tribunal records, at paragraph 233, there was no basis for concluding that Mr Reynolds knew that the Claimant was black (and, by further inference, still less for

concluding that he had any protected act in mind). Given that position, it is hard to understand the basis any inference of race discrimination. In any event, in our judgment, the Tribunal addressed this matter head on at paragraphs 545-547. It did so taking into account the broader picture – hence the reference to "the legitimate health reasons already described" – and concluded that it established no primary facts from which it could conclude that there was any race discrimination or victimisation. Those were conclusions open to the Tribunal on the evidence. It adopted an entirely proper approach to this issue; we find no error of law.

99. Ms Mallick next took us to complaints 30-31, 37, 40 and 43, which related to the more general allegations of delay and failures of communication from Human Resources. She submitted that the Tribunal too readily accepted inefficiency as an answer to these complaints; per His Honour Judge Serota QC in **X v Y**, "Simply saying it was all the result of poor management … is insufficient."

100. We do not dissent from the view expressed in **X v Y**, but we do not read this Tribunal as falling into the same error. Here the Tribunal was careful to scrutinise the explanations given for the delays, particularly (and thereby avoiding a fragmented approach) in light of its earlier finding relating to Ms Fitzpatrick. The period of delay requiring explanation was found by the Tribunal to be from mid-October to late November 2009 (see paragraph 571). The Tribunal found that earlier delay had been due to the Occupational Health referral and to inefficiency and workload issues (see, e.g., paragraph 551). In mid-October, the Tribunal found:

> **"563. … The evidence in fact is that in this period she [Ms Fitzpatrick] had been absent for a time on annual leave and had other work commitments. There is a tendency in the Claimant's case … to presume that everything will receive immediate attention and that indeed his is the only matter with which Human Resources staff in particular have to deal. Clearly that was not the case."**

101. Thereafter, the Tribunal found that inefficiency and work pressures (not entirely unusual, see the reference to the trade union representative's evidence at paragraph 573) were coupled with the fact that Ms Fitzpatrick found the Claimant's case to be difficult for reasons unrelated to his race but because it was not straightforward and because of the sheer volume of information (see paragraphs 571, 573 and 575). Any bluntness in Ms Fitzpatrick's style was also apparent from the start and so could not have been related to the Claimant's race (which she did not know at the outset), still less any suspicion of a protected act (see paragraph 576). In our judgment, these are all conclusions properly open to the Tribunal on the evidence before it. No error of law is disclosed in the approach adopted and it would not be open to this Court to seek to interfere with the findings reached by this Tribunal of fact.

102. Having considered the arguments raised under Ground 3, for the reasons set out above, we conclude that this ground of appeal is not made out. That poses real difficulty for the remaining grounds: even if the Tribunal erred in the ways contended, what difference would that make given the sustained findings as to the non-discriminatory reasons for the matters complained of? We have, however, gone on to consider the remaining grounds and the additional issues raised by the Respondent's response to this appeal.

103. Ground 2 was concerned with the Tribunal's finding (particularly at paragraph 472) that the Third Respondent's reference to the MacPherson report did not provide a basis for concluding that he suspected a potential protected act on the part of the Claimant. Ms Mallick submitted that the Claimant had in fact made good his case in this regard, either on the basis that there was a racial element to his complaint or on the basis that such a complaint was suspected by the Third Respondent and thus explained his advice to Professor De Fraja.

104. The first part of this submission does not, in our judgment, begin to make good a challenge to the Tribunal's conclusion given its earlier finding of fact that the Claimant had not made a complaint of race discrimination at this stage and (even more significantly) that the Third Respondent did not understand him to have done so.

105. The second part of the submission – effectively based on the argument that the finding that the Third Respondent was "mindful" that a black complainant might make an allegation of race discrimination was sufficient for a finding of suspicion in this context – seemed to us to have greater merit. That said, we also saw force in the Respondent's submission that the Tribunal clearly intended to draw a distinction between its use of the different terms: being mindful that someone might make a complaint could be said to fall short of suspecting that they would do so. Ultimately, we felt it unnecessary to reach a final conclusion on this point. On either case, there would need to be a connection between the suspicion found and the treatment of the Claimant and the Tribunal clearly found as a fact that the Third Respondent did not take any action on this basis (see, for example, paragraphs 489, 494 and 497). For the reasons we have already set out in respect of Ground 3, those findings are not susceptible to challenge.

106. Further, however, this ground of appeal was doomed to fail as: (1) it related to actions that were the subject of the first Tribunal claim, in which the Claimant had expressly eschewed victimisation as a cause of action; (2) there was no appeal before us against the second claim (in which victimisation was raised) so we would have no jurisdiction to determine it in any event; and (3) even if we were entitled to consider this as part of a general victimisation complaint raised in the second claim, it would have been out of time and the

Tribunal had clearly made a finding that it would not be just and equitable to extend time – a finding against which there was no appeal.

107. We then turn to Ground 5 and the criticism of the Employment Tribunal for failing to draw inferences from what were said to be evasive or inaccurate responses to the Race Relations Act Questionnaire. In our judgment the submissions made in this respect were impermissible attempts to re-argue the points on the Questionnaire response. Having heard the Claimant's arguments on specific issues on this appeal, we do not agree that the Claimant necessarily made good the criticisms but these were, in any event, matters of weight for the Tribunal of first instance. An error of law is not disclosed simply because the Claimant considered such matters should have been given greater weight. It is plain that the Tribunal had regard to the detail of the Questionnaire responses and referred to such detail when it considered appropriate to do so (see, e.g. paragraphs 261, 500, 561).

108. We agree here with the Respondents: this was a very lengthy and detailed Questionnaire and the Respondents were plainly attempting to provide full answers under pressure of time. The detail of the criticisms made in submissions before us (and the potential ambiguity of those points) simply underlined to us the difficulties facing the Respondents. In the circumstances, we can see why the Tribunal (having properly directed itself as to the law in this respect) concluded that it would not be appropriate to draw any adverse inference. In any event, that was a matter for the Tribunal and no error of law is disclosed.

109. Finally, we observe that there was no appeal before us against the findings of the Tribunal in respect of the application of time limits and its decision that it would not be appropriate to extend time in this case (see paragraphs 627-629). We understand the

Claimant's point that, if he had succeeded on the merit of his case under Ground 3, there might have been scope for argument as to whether the Tribunal would need to reconsider its findings on the time points. Given our conclusions on the substantive grounds of appeal, however, the point simply does not arise.