Appeal No. UKEAT/0177/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 February 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MS H AZIZ APPELLANT

CROWN PROSECUTION SERVICE RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS HALIMA AZIZ (The Appellant in Person)
For the Respondent	MS RACHEL CRASNOW (of Counsel) Instructed by: Simons Muirhead & Burton 8-9 Frith Street London W1D 3JB

SUMMARY

RACE DISCRIMINATION

VICTIMISATION DISCRIMINATION

VICTIMISATION DISCRIMINATION - Detriment

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

The issue raised by the appeal was whether the Employment Tribunal had dealt with all aspects of the Claimant's case before it. This, in turn, raised two questions: (1) how had the Claimant's case before the Employment Tribunal been put? and (2) had that case been determined by the Employment Tribunal?

Held: dismissing the appeal, the point in issue (that the Respondent's setting too narrow a remit for its investigation, or Mr Lewis, wrongly so interpreting his remit, was itself an act of race discrimination or victimisation) was not a clear part of the case pursued by the Claimant before the Employment Tribunal, although it had been foreshadowed in her ET1 and witness statement and she had not withdrawn the issue. On the basis that it was a point still 'live' before the Employment Tribunal: ultimately, however, the Employment Tribunal's conclusions meant that the Claimant could not have succeeded on this issue in any event. The Employment Tribunal had considered the "reason why" and had expressly found that it was "in no sense whatsoever, even on a sub-conscious level, because of the claimant's race, any other racial ground or any past or anticipated protected act." Although the Employment Tribunal may not have understood that the Claimant was still pursuing every nuance of her pleaded case, that finding was sufficient to answer the issue raised on the appeal in any event.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and Respondent, as below. This is the hearing of the Claimant's appeal against a Reserved Judgment of the Newcastle Employment Tribunal (Employment Judge Garnon, sitting with members, between 13 and 28 June 2013 - "the Garnon ET"), sent, with Written Reasons, to the parties on 4 July 2013. By its Judgment the Garnon ET concluded the Claimant's claims were not well-founded and were dismissed. Before the ET the Claimant appeared in person, as she does before me. The Respondent was represented before the ET by Mr Algazy QC but now appears by Ms Crasnow, of counsel.

2. The Claimant previously appeared before me on 5 June 2014, on her Rule 3(10) application in this matter. For the reasons set out in my Judgment at that hearing, I permitted one of the Claimant's grounds of appeal to proceed to a Full Hearing but dismissed the remaining grounds. The specific point permitted to proceed to a Full Hearing - and, thus, the matter before me today - was identified as follows: whether the Garnon ET erred in failing to address the Claimant's case that the Respondent's setting too narrow a remit for its investigation, or Mr Lewis, wrongly so interpreting his remit, was itself an act of race discrimination or victimisation (see EAT order, seal dated 1 June 2014).

3. To understand this point there has to be an appreciation of some part of the lengthy history to these proceedings. In large part that history was the subject of earlier ET proceedings before an ET under the chairmanship of Employment Judge Dr Watt ("the Watt ET"). I summarise the relevant parts of that history below.

The Background Facts

4. The relevant background goes back to 2001. The Claimant is a solicitor, employed by the Respondent from February 1991. She is of Asian origin, her family originates from Pakistan, and she is of Muslim faith. At the relevant time she was employed by the Respondent as a Crown Prosecutor for its Bradford office.

5. In December 2001 the Claimant made claims of race and sex discrimination against the Respondent relating to its treatment of her in October 2001. Specifically, on 25 September 2001 - two weeks after the events of 11 September 2001 - the Claimant had been involved in conversations with staff at Bradford Magistrates' Court, after (and relating to which), on 5 October 2001, a complaint was made which led the Respondent to suspend her from duty on 10 October 2001. On 17 October 2001, the suspension was lifted, albeit the Claimant still faced potential disciplinary proceedings. She was then transferred to the Respondent's Wakefield office, by which time she was unwell and signed off as unfit to work.

6. There was subsequently an investigation into the events of 25 September 2001, which exonerated the Claimant from any wrongdoing. That led - in April 2002 - to the discontinuance of any disciplinary proceedings against her. Meanwhile the Claimant had brought ET claims, which were heard by the Watt ET in February 2003. The ET held that the Respondent had breached its disciplinary code in several important respects and that it had done so knowingly and because it had made assumptions that the allegations against the Claimant had substance, assumptions that were made because of her race and ethnic origins which would not have been made in respect of a white employee in like circumstances.

7. The CPS successfully appealed to the EAT, but, upon the Claimant's subsequent appeal to the Court of Appeal, the Watt ET's Judgment was restored. The matter then returned to the Watt ET for the Remedies Hearing, which made further findings adverse to the Respondent when awarding the Claimant aggravated damages. The Respondent unsuccessfully sought to review and appeal that decision.

8. Meanwhile, immediately after the Court of Appeal Judgment, the Respondent appointed Mr Peter Lewis - then one of its directors, later its Chief Executive - to investigate the implications of the Judgment. It is the report subsequent to that investigation that is at the heart of the ET proceedings with which this current appeal is concerned.

9. Mr Lewis' report concluded (in summary) that racial grounds had played no part in the decision to suspend the Claimant at the earlier stage and that no disciplinary action should be taken against those involved because, in his view, there was no evidence of racism. Mr Lewis' report had featured in the Watt ET's decision in respect of aggravated damages and, at paragraph 34, of its Remedies Judgment the Watt ET had stated as follows:

> **"… Because the acts of discrimination were central to the judgment against the Respondent Mr Lewis's conclusion clearly calls for an explanation but, unfortunately, none was forthcoming either in his report or at this Hearing. The only possible implication of these words [and here the Tribunal is citing "I can find no evidence of racism in their conduct nor that of people providing the direction and guidance in Personnel 2"] is that Mr Lewis has dismissed the judicial findings of fact, upheld by the Court of Appeal, that the Respondent unlawfully discriminated against the Claimant and the only reason given is that Mr Lewis found 'no evidence'. Therefore it would seem that judicial findings of fact do not constitute 'evidence' in the world Mr Lewis inhabits. …"**

10. The Claimant issued separate ET proceedings in relation to the Lewis report, contending that this in itself amounted to an act of race discrimination; alternatively of unlawful victimisation. In particular she complained that Mr Lewis should never have been appointed to investigate because he had been one of the persons instrumental in the decision that she should be suspended. Moreover, she contended everything she had said had been ignored by Mr

Lewis; his investigation was a sham; his remit was too brief; he had reached a predetermined decision to exonerate the discriminators and he had not been interested in getting to the truth.

The Garnon ET's Findings

11. Before the Garnon ET the issues arising for determination were identified as follows: (1) whether it was an act of discrimination (whether victimisation and/or direct race discrimination) to appoint Mr Lewis in view of his past involvement with the Claimant; (2) whether there was discrimination in the way the investigation was conducted and the conclusions it reached; (3) what detriment was caused to the Claimant.

12. On the appointment of Mr Lewis, the Garnon ET found there was no evidence that he had been consulted about the allegations relating to the Claimant other than on or around 10 October 2001 (paragraph 3.38). It further found that he had not been appointed with a brief to "cover up anything". It rejected the Claimant's contention that there was no need for an investigation because the Watt ET's Judgment had found people guilty of serious race discrimination; that was not a fair reflection of the earlier Judgment, and the Garnon ET rejected the argument that no investigation was called for (paragraph 3.40). It also found no basis to suggest that the Respondent was seeking a cover up and opined that, if that had been so, then appointing Mr Lewis was plainly picking the wrong person as his report had in fact caused the Respondent further trouble and expense (paragraph 3.42). Ultimately Mr Lewis was an appropriate investigator and he had not been appointed with a brief to cover up (3.44).

13. The Garnon ET had regard to the fact that there had been findings made at the earlier Watt ET Remedy Hearing that the Claimant's injury had been aggravated by a report which had said there was no evidence of racism. It observed, however, that the Watt ET had not had to

address the reason why Mr Lewis wrote what he did. That was a different question, and it fell to be determined by the Garnon ET itself.

14. Accepting that the Claimant had been discriminated against because of her race, as the Watt ET had found, and proceeding on the basis that the burden of proof had shifted because of the earlier findings of that ET, as upheld by the Court of Appeal, the Garnon ET was satisfied that Mr Lewis had provided explanations which were in no sense whatsoever because of the Claimant's race or any prior protected act. Her claims, therefore, failed.

15. The Garnon ET was not necessarily in agreement with Mr Lewis' conclusions (see the first part of paragraph 4.6 of its Reasons) but found he thought "with the instincts and training of a criminal prosecutor" and had understood his remit to be to conduct an investigation under the disciplinary policy against three people and, as those people could not be proven guilty, they were entitled to be viewed as innocent (see the second part of paragraph 4.6).

The Appeal

16. The question underlying the Claimant's appeal is why, given the findings of the Watt ET (as upheld by the Court of Appeal), did Mr Lewis make no findings of race discrimination? Although, at the Rule 3(10) Hearing before me, the Claimant accepted that she could not simply assert that only one conclusion was permissible in Mr Lewis' investigation, she remains at a loss to know how he could have overcome the finding of race discrimination made by the Watt ET. To put that into the framework adopted by the Garnon ET: a question arose as to whether there was discrimination in the way the investigation was conducted and the conclusions it reached. Specifically the Claimant says she had contested before the Garnon ET that Mr Lewis had either been given an unduly restrictive brief or had interpreted that brief in an unduly

restrictive manner; either way, that rendered his investigation meaningless and itself constituted an act of race discrimination or victimisation.

17. Thus two separate questions now arise: (1) Was this properly part of the Claimant's case before the Garnon ET? The ET will not have committed an error of law if it failed to adjudicate upon a case that was never before it. (2) If so, did the ET fail to determine the issues arising from this part of the case?

Submissions

The Claimant's Case

18. The Claimant makes the point that there were three parts to her complaint of unlawful discrimination in the original ET proceedings: that relating to her suspension, that concerning the transfer and then that relating to the Saturday work rota. Mr Lewis had basically accepted that he had not dealt with all three parts of her complaint, let alone all the details raised therein. On his own case Mr Lewis had only dealt with two breaches of the Respondent's procedure, and that could not be sufficient to address all the matters raised by the Claimant's case before the Watt ET and the Court of Appeal. Those matters raised far wider issues of race and required consideration of wider racial issues, not just of breaches of procedure. Asking (rhetorically) how could Mr Lewis could conclude there was no race discrimination when he had not dealt with all the racial issues in his report, the Claimant suggested that he had done so by focussing simply on procedure and then holding the Human Resources advisors to blame for the breaches in the procedure: he had unduly restricted his remit and that required scrutiny. In making that submission the Claimant draws comfort from the various criticisms of the Lewis report to be found in the Watt ET Remedies Judgment.

19. In support of her contention that this was how she had put her case before the Garnon ET, the Claimant relied on paragraph 11 of her witness statement, which stated as follows:

> **"With regard to the Peter Lewis Report, his alleged Remit is far too brief as to be meaningless: his Findings and Conclusions are based on his, (and that of the CPS hierarchy), pre-determined decision to exonerate the discriminators and overturn the ET/CA's findings of race discrimination, rather than the 'so called evidence' presented to him. He deliberately does not probe or ask for blatantly obvious details, and his desire to exonerate the discriminators blinds him to the fact that he makes quite a few contradictory statements, alleging ambiguities when there are none."**

20. She further contended that this point had also been trailed in her ET1 when she talked of Mr Lewis having accepted the evidence of the discriminators without further probing:

> **"10. … I believe the formal investigation to be a sham; everything I stated was ignored; what the discriminators said was accepted without further probing; there was no attempt to put questions that should have been asked; not all matters and persons that should have been interviewed were; the findings of the LET [that is, the Watt ET] and the CA were ignored; etc."**

21. As the Garnon ET had failed to properly deal with her case on this issue, it was the Claimant's contention that it had equally failed to ask the reason why the remit had been set too narrowly or interpreted too narrowly; whether, perhaps subconsciously, that had been because of considerations of the Claimant's prior protected act or of her race.

22. At paragraph 4.9 of its Reasons the Garnon ET had seemed to recognise that this was part of the case raised before it. It expressly referred to paragraph 11 of the Claimant's witness statement but then went on to state that this was not part of the Claimant's case. On this appeal, however, the Claimant says, on the contrary, this was very much part of her case before the Garnon ET. She tells me she put in a wealth of documentation before the Garnon ET, which demonstrated that Mr Lewis had unduly restricted the remit of his investigation; the ET had failed to address this. She asks (again, rhetorically) why would she have restricted her case before the Garnon ET? She questions whether it might have been because the ET had itself reached a predetermined decision adverse to her and hence ignored the substance of her case.

The Respondent's Case

23. For the Respondent, Ms Crasnow first identified the documentary evidence before the ET which addressed the issue of the remit of Mr Lewis' investigation. For its part, in its ET3, the Respondent had identified the remit of that investigation as "to consider the implication of the [Watt ET and Court of Appeal] judgments." At paragraph 11 of her witness statement for the Garnon ET, the Claimant had merely said that Mr Lewis' alleged remit was far too brief as to be meaningless. In her earlier remedies statement, in the proceedings before the Watt ET, the Claimant had said that "the investigation remit was very narrow and did not cover the conduct of the CPS witnesses and the findings of the Tribunal".

24. The Garnon ET had also heard evidence from Mr Lewis himself. For his part he considered:

> **"24. …**
>
> > **(vi) … I was able to make a proper determination of whether disciplinary action should have been taken and I was able to get to grips with the problems and make clear recommendations."**

25. The documentary evidence of the Claimant's own investigatory meetings with Mr Lewis had not appeared to raise any challenge to the scope of his enquiry.

26. Having thus walked through the evidence before the ET on this point, Ms Crasnow then turned to the approach the Garnon ET adopted.

27. The issue before the ET was whether there was discrimination in the way the investigation was conducted and the conclusions reached. No issue was taken as to the Garnon ET's self-direction on the law: it reminded itself of the burden of proof and of the lack of any need for conscious motivation on the part of a discriminator.

28. In analysing the way in which the Claimant put her case, the Garnon ET relevantly identified its core as follows, that Mr Lewis' remit was so brief as to be meaningless, his decision was predetermined, he carried out no probing enquiry because of his desire to exonerate discriminators, and all of this amounted to race discrimination and/or victimisation.

29. The ET expressly considered the possibility of Mr Lewis discriminating not just on a conscious level but whether:

> **"… Mr Lewis in a search for the truth came across evidence which triggered a subconscious decision on his part … to go no further in case he found race discrimination and would have to admit it. *That was not how* [the Claimant] *put her case.* … she set the bar higher. She was alleging a deliberate "cover-up" …" (Tribunal's emphasis) (paragraph 3.54)**

30. The ET was not uncritical of Mr Lewis' investigation, but it was equally clear that the Claimant was putting her case not on the basis of possible subconscious discrimination but on the basis that all discrimination had been conscious. Specifically, she had not sought to suggest that Mr Lewis' hands were tied by the narrow remit he was working within, but argued that he conducted the investigation in the way that he did to ensure his outcome would not bring charges against any of those questioned. The ET did not agree with many of the main planks of the Claimant's case in this regard (see paragraph 3.83): Mr Lewis did not carry out a sham investigation; he did not ignore everything the Claimant said; he did not help the discriminators with their answers and he did not ignore the findings of the ET and the Court of Appeal.

31. Where the ET parted company with Mr Lewis' approach was in his failure to consider the question of subconscious discrimination. It accepted, however that this was because he approached the investigation from the stance of a criminal investigator. It specifically concluded that he did not thereby discriminate, either directly or by victimising the Claimant.

32. At paragraph 4.7, the ET set out Mr Lewis' understanding of his remit. It accepted he believed he could not take steps against the individuals in question; one reason for this being that he believed them when they said they acted on advice. He did not take steps against the source of that advice because, as the ET accepted, he did not believe that was part of his remit.

33. At paragraph 4.9 of its reasoning, the ET had considered two possible points which it did not understand to have been taken by the Claimant. First, whether there had been unintentional discrimination. Second, the setting of too narrow a remit for Mr Lewis. Those observations as to what was *not* part of the Claimant's case were made after the ET and the Respondent's counsel had checked that they had correctly understood her case (see paragraph 4.8 of the ET's Reasons and paragraph 40 of the Respondent's closing submissions).

34. If the Claimant did not argue something before the ET she could not complain if the ET failed to address that point (it was not an error of law). In any event the ET had answered both questions itself. First, in paragraph 4.9, it had concluded that it was "understandable" why the Respondent had set the remit of the investigation as it did. More generally, at paragraph 4.11, it concluded that Mr Lewis had:

> **"… conducted his investigation as he did and reached the conclusions he did … in no sense whatever, even on a sub-conscious level, because of the claimant's race, any other racial ground or any past or anticipated protected act. …"**

35. That was a conclusion open to the ET on its findings on the evidence in this case, specifically the evidence of Mr Lewis, which it approached with due scrutiny making clear in what respects the ET agreed with him (see paragraph 3.83) and in what respects it gave only qualified agreement (see paragraph 3.84). It provided a complete answer to the appeal.

The Claimant in Reply

36. Responding to the Respondent's submissions the Claimant observed that she had cross-examined Mr Lewis before the Garnon ET for a whole day on the basis that all the matters that should have been investigated were not investigated. If the ET's finding was that Mr Lewis had provided an explanation for everything, then where was that investigation?

Discussion and Conclusions

37. The question raised by this appeal can be seen to be part of the second issue identified by the Garnon ET: whether there was discrimination - either direct race discrimination or victimisation - in the way the investigation was conducted; specifically, in the remit either as set by the Respondent or as interpreted by Mr Lewis. Before I can turn to that question, however, I need first to resolve whether this was actually an issue that remained before the ET; it is common ground between the parties that the ET will not have erred in law if it did not determine a point that was not taken before it.

38. I have already set out the relevant passage from the Claimant's ET1 upon which she places reliance in this respect. She says it was obvious that that remained her complaint. Why else would she cross-examine Mr Lewis for a day before the ET on the scope of his investigation? Why did she even co-operate with the investigation if it was simply her case that it was unnecessary?

39. It is also right to say that the ET acknowledged that the core of the Claimant's case included the matters set out at paragraph 11 and 14 of her witness statement, which included the allegation that the "alleged remit is far too brief as to be meaningless" and that there were matters that Mr Lewis should have addressed but did not (paragraph 3.33).

40. That said, when addressing the second issue in its Reasons, the ET's summation of its understanding of how the Claimant was putting her case before it does not readily disclose this point, see paragraph 3.54 of the Reasons:

> **"The claimant says the conduct and/or conclusions of the Investigation were a 'sham' and 'always *intended to exonerate* the discriminators by its conclusions'. We explored whether her case included that Mr Lewis in a search for the truth came across evidence which triggered a subconscious decision on his part not to go … further in case he found race discrimination and would have to admit it. *That was not how she put her case.* To borrow Mr Algazy's metaphor, she set the bar higher. She was alleging a deliberate "cover-up" …" (Tribunal's emphasis)**

41. More specifically, when reaching its conclusions, the ET plainly spent some time seeking to explore how the Claimant was really putting her case on this issue. Contrary to what she has said today, it clearly understood her to be arguing that the entire investigation was unnecessary, rather than that its remit was too narrow (see paragraph 4.9). It may be that the difficulty in understanding how the Claimant was putting her case arose from the very firm conviction that she has that - given the findings made by the Watt ET, upheld by the Court of Appeal - any investigation had to start on the basis of those findings and thus to assume race discrimination. That remains the Claimant's position at this hearing; essentially a failure to find race discrimination must itself result from an act of discrimination or victimisation.

42. Moreover, although not a point still live before me, it remained apparent that the Claimant cannot accept that the appointment of Mr Lewis to carry out the investigation was anything other than itself an act of discrimination or victimisation. For the Claimant the outcome of the investigation should have been obvious; there had to be a finding of race discrimination, but it was always equally obvious to her that the Respondent's investigation carried out by Mr Lewis would not make that finding. The very certainty of the Claimant's world-view in these respects might mean that some of the more nuanced aspects of her case simply got lost. That is not to say that the ET did not try to explore with her how her case was put. It clearly did; as did the Respondent's counsel. That, however, simply confirmed the

Claimant's case as being put at its highest, apparently not permitting of the possibility of a lesser alternative finding.

43. The ET was alive to this difficulty - the problem for the Claimant of expressly accepting the possibility of a lesser alternative way of putting her case - but ultimately took the view that it could not run her case for her in this respect, see paragraph 4.8:

> **"… we must never say to a claimant, even if we think it, that she would stand a better chance if she put her case differently from the way she had chosen."**

44. The most that I think can be said is that the Claimant's case on the narrowness of the remit as a potential act of discrimination or victimisation in itself was identified in her grounds of complaint attached to her ET1 and her witness statement and she had not expressly conceded or withdrawn that issue from the ET. Although I am far from convinced that the ET actually made any error of law in its attempt to clarify the Claimant's case and in its understanding of the issues that thus remained before it, I will proceed on the basis that this was an issue that, at some level, remained before the ET. The question then arises as to whether the ET failed to determine the issue thus raised: that is, whether the Respondent's setting too narrow a remit for the investigation (or Mr Lewis wrongly so interpreting his remit) thus gave rise to a separate act of race discrimination and/or victimisation.

45. The ET certainly asked itself the correct question in general terms in respect of the second issue before it (see paragraph 3.45). Turning to the more specific question of the remit of the investigation, the evidence before the ET as to the scope of Mr Lewis' investigation was that it was twofold: (1) in line with the Respondent's disciplinary policy, to establish the facts and determine whether disciplinary action should be recommended in relation to any of those involved; and (2) to consider the implications of the Judgment of the Court of Appeal for the

Respondent more broadly and to make recommendations. As the ET agreed with the Claimant, this remit, as set by the Respondent, was not as broad-ranging as it might have been (paragraph 4.9). Equally, however, it did not see this as absent explanation, concluding that it was:

> **"… understandable [that the Respondent] should set a narrow remit of asking Mr Lewis to find if any of the three should be disciplined (which he saw as equivalent of "charged with being a racist"), and, if not, what lessons could be learned to prevent recurrence of over hasty suspension. …"**

46. The understandable nature of that remit arose from the fact that the Watt ET had already made its findings, which had been upheld by the Court of Appeal. In any event, of course, the ET had understood the Claimant's case not to be that the Respondent should have commissioned a wider inquiry but that it needed to have conducted any investigation at all.

47. As for Mr Lewis himself, the ET scrutinised how he conducted his investigation and concluded (paragraph 4.6 and 4.7 of the Reasons):

> **"4.6. … Mr Lewis thought … with *the instincts and training of a criminal prosecutor.* He saw the three had a "defence" of following "advice" which was so robustly given by Personnel 2 that even a CCP would be brave to defy it. Thus Mr Lewis wrote he had "no basis" to conclude [that] they were "motivated by improper considerations". His remit was, first and foremost as he saw it, to conduct an investigation under the Disciplinary Policy against three people. To a criminal lawyer they could not be proven guilty, so were entitled to be viewed as innocent.**
>
> **4.7. … For a man with the *instincts and training of a criminal prosecutor* to make such error is entirely credible, as witness the several examples of experienced ET's falling into the same error. Believing he had no remit to take steps against Mr Clark, he did not consider whether his advice was "on racial grounds"." (Tribunal's emphasis)**

48. The Claimant says that the Garnon ET simply accepted Mr Lewis' assertions without evidence but that is not a fair characterisation of the Judgment. It gives detailed consideration to the evidence, which precedes its conclusions, and is entitled to expect that its Judgment will be read as a whole and that its conclusions will not be analysed in a vacuum absent all the earlier findings. Moreover, paragraphs 4.6 and 4.7 do not represent simply a blanket acceptance of Mr Lewis' evidence. They reveal, on the contrary, a proper scrutiny of his reasoning by the Garnon ET. It is this that leads to the ET's final conclusion at paragraph 4.11,

which (I agree with Ms Crasnow) is the ultimate answer to the Claimant's case (even if the full scope of that case got lost in argument):

> **"… We have not fallen into the trap identified in *Anya* of accepting that because Mr Lewis came across credibly, he cannot have discriminated. We pressed him as much as we properly could to explain his thought process. His replies convinced us the reason why he conducted his investigation as he did and reached the conclusions he did, was in no sense [whatsoever], even on a sub-conscious level, because of the claimant's race, any other racial ground or any past or anticipated protected act. …"**

49. Thus, even if the Garnon ET to some extent lost sight of each nuance of the way in which the Claimant was putting her case, it answered the point in any event. I cannot see any other way of understanding the Claimant's case, which would not be met by the conclusion set out at paragraph 4.11. Ultimately the Claimant cannot overcome or avoid the conclusions that the ET reached in that regard. So, for those reasons, I dismiss this appeal.

50. Having given my Judgment in this matter, Ms Crasnow asked me to note that, although it considered the Claimant had acted unreasonably in certain respects in seeking to broaden the scope of this appeal beyond that which she had permission to pursue, as an act of good will the Respondent was not making an application for costs. It would, however, wish that position to be noted and a record kept should that be necessary for future purposes. Miss Aziz did not wish to respond in any way to those observations and I merely record them at this stage.