Appeal No. UKEAT/0609/12/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
on 29 January 2014
Judgment handed down on 16th May 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

MS G MILLS CBE

MS S M WILSON CBE

DR G KALU — APPELLANT

BRIGHTON & SUSSEX UNIVERSITY
HOSPITALS NHS TRUST & OTHERS — RESPONDENTS

JUDGMENT

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APPEARANCES

For the Appellant	MR AYOADE ELESINNLA (of Counsel) Bar Council's Public Access Scheme
For the Respondents (Mr P Larsen-Disney, Mr A Kelly, Ms J Montgomery and Mr R Bradley)	MR DANIEL MATOVU (of Counsel) Irwin Mitchell LLP Solicitors 40 Holborn Viaduct London EC1N 2PZ
For the Respondent (Brighton and Sussex University Hospitals NHS Trust)	MR ROBERT MORETTO (of Counsel) Capsticks Solicitors LLP 1 St Georges Rd London SW19 4DR

SUMMARY

PRACTICE AND PROCEDURE: ADMISSIBILITY OF EVIDENCE

RACE DISCRIMINATION: INDIRECT, COMPARISON

A black consultant whose previous complaints of race discrimination against him by the respondent Trust had been settled complained of a policy, adopted amongst others by him, designed to meet a staffing crisis in the case of such as a pandemic, which would result in consultants working at the site he did potentially, if improbably, having to cover for the work usually done by registrars whereas white consultants at a sister site would not have to do so. He named the white consultants at that site as comparators. The ET held that they were not in like circumstances, since the two sites had different features which were significant and material to the policy. It also held that the reason for adopting the policy had nothing to do with the claimant's race. It also ruled, at the outset of the hearing, that the Claimant could not rely on some passages in his witness statement as to the substance of which there had been no advance intimation, nor admit a large bundle of documents not earlier disclosed in support of them.

Held that an appeal on the ground that the ET had approached the comparison wrongly failed: although the ET was not logically entitled to regard the differences between the sites as relevant, the conclusion as to the "reason why" the policy had been adopted rendered the decision unassailable – subject only to the second ground as to the admission of evidence. As to that, the majority of the Appeal Tribunal held that although an ET had a discretion to exclude evidence which was only of marginal relevance, and to refuse to accept documents which would disproportionately overburden and significantly prolong the hearing, it was wrong to exclude this evidence in this case since it was important in proving the possible motivation of the Respondents. In their view, the ET did not go through the process of deciding or evaluating the relevance of the evidence to the Claimant's case. This was an error of law.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. Swine 'flu threatened to take hold in 2009. A pandemic was feared. Health Trusts needed to ensure they had contingency plans to deal not only with an affected population, but with the possibility that at short notice their own staff might be unavailable. The Brighton and Sussex University Hospitals NHS Trust needed to ensure that plans were in place. So far as Obstetrics and Gynaecology were concerned, the Trust was an unhappy marriage between the Royal Sussex County Hospital in Brighton ("Brighton") and the Princess Royal Hospital in Haywards Heath ("Haywards Heath"). Four Consultants worked in the Obstetrics and Gynaecology Department at Haywards Heath. Three were of BME ethnicity: the Claimant himself was of Igbo ethnicity and Nigerian origin. Their counterparts worked in Brighton and were largely white. The Claimant had had reason to issue proceedings in the past claiming that the Trust had discriminated against him on the grounds of race. He brought at least three claims which were compromised. The Trust generally had struggled with issues of race discrimination.

2. At a meeting of 21st August 2009 for the consultants from both Brighton and Haywards Heath, at which the Claimant was present, there was discussion as to what should happen if, in the event of a pandemic taking hold, only one of the 16 potentially available registrars could turn out for duty. There was a dispute of fact about that meeting. The Tribunal concluded that there was agreement in principle, to which the Claimant was party, that if there were only one registrar available between the two hospitals he should work at Brighton and a consultant provide cover for what would otherwise have been the registrar's duty at Haywards Heath. When this agreement in principle was set out in writing, and circulated, on 7th November, the Claimant, Dr Ogueh and Dr Bashir (the other two BME consultants at Haywards Heath) objected to it as unfair. Whilst there remained only one registrar available to work in either site, a consultant at Haywards Heath would be required to cover for an absent registrar; there was no reciprocal

arrangement that a consultant at Brighton would be expected to cover for an absent registrar there. The existing practice was that whenever a registrar was unavailable, the consultant on call at that location would step in and cover. Under this approach, the Brighton consultant on call would be expected to cover if no registrar assigned to work at Brighton were available: and similarly in respect of Haywards Heath. The effect of the policy would be to change this, so that the Brighton consultant would not be expected to cover for the absence of a registrar at Brighton, so long as one could be found at Haywards Heath – because the absence of the registrar would be remedied by moving the registrar from Haywards Heath. The Haywards Heath consultant on call would then be expected to cover for the absence at that location, thus created.

3. This aspect of the policy potentially created unfairness. Within a week, the three BME consultants working at Haywards Heath raised a grievance. The policy which had been agreed upon in principle was not implemented: the Trust returned to the status quo previously adopted.

4. On 8th February 2010 the Claimant raised an originating application. He complained of race discrimination, and victimisation for having brought his earlier claims. He brought it not only against the Trust but also against the four white consultants who worked at Brighton.

5. The details of his complaint were brevity itself:-

> **"1. The Claimant is a Consultant in in (sic) Obstetrics and Gynaecology.**
>
> **2. The Claimant is a black man of Igbo ethnicity, Nigerian national origin and British nationality.**
>
> **3. The Claimant has brought previous proceedings and grievances alleging inter alia racial discrimination.**
>
> **4. The First Respondent [i.e. the Trust] has chronic racial discrimination problems. So much so that its Consultants concerned with Obstetrics and Gynaecology are segregated along racial lines.**
>
> **5. On 16 October 2009, Ms Katie Cusick sent an email in relation to an initiative which had been discussed at a Consultants' meeting. The gist of the proposal was that BME**

Consultants would lose their Registrars to the white Consultants if the white Consultants or their Registrars did not turn up for work. In this situation, it was envisaged that the BME Consultants would work as Registrars instead of working as Consultants.

6. Dr Onome Ogueh (BME) responded on 29 October 2009 expressing his disagreement and incredulity at the proposal.

7. On 6 November 2009 the Claimant put on record his disapproval of the proposal and noted that there had been a lack of agreement.

8. Dr Robert Bradley [i.e. the third Respondent] comments in closed emails between the Respondents (which deliberately excluded the BME Consultants), in pejorative terms about the Claimants.

9. Later on 6 November 2009, another Consultant Dr Tony Kelly [i.e. the fourth Respondent] agrees that the Claimant is right, but nevertheless, urges Dr Peter Larsen-Disney [i.e. the second Respondent and the clinical lead at the time] to implement the racially discriminatory policy.

10. Later still on 6 November 2009, Dr Larsen-Disney promises to push through the proposal.

11. On 7 November 2009, Dr Julia Montgomery [i.e. the fifth Respondent] states the implementation of the of the (sic) racially discriminatory policy cannot wait until a Consultants' meeting.

12. On 9 November 2009, Dr Larsen-Disney promulgated the new policy which purportedly served notice to vary the BMEs' contracts of employment.

13. The Claimant contends that the acts set out above amount to unlawful racially discrimination (sic) and victimisation."

6. No further particulars were given of the claim in respect of victimisation.

7. On 23rd July 2010 there was a case management discussion before Employment Judge Coles at which the issues for the forthcoming hearing were agreed, and the nature of the claim clarified and set out in a schedule containing seven paragraphs. For present purposes it is necessary only to quote 2 to 4. They read:-

"A2 [The Claimant] maintains that the actions of the respondents in relation to the proposal to change the working practices of the Claimant and his BME colleague amounted to less favourable treatment on the grounds of his and their race and therefore direct race discrimination under Section 1 of the Race Relations Act 1976.

A3 The Claimant claims that in addition or in the alternative the actions of the Respondents amounted to victimisation under Section 2 of the Act, the protected act or acts being earlier grievances alleging race discrimination and/or the institution of the Tribunal proceedings alleging race discrimination.

A4 In relation to the allegation of direct race discrimination, the Claimant cites as comparators either Respondents 2 – 5 or in the alternative a hypothetical comparator."

8. We note that although the case concerned a proposal or policy which distinguished between registrar and consultant activity by reference to hospital site, which if it had an adverse impact would on the face of it apply by reference to the criterion of location and not of race, no claim for indirect discrimination was ever raised or argued.

9. Employment Judge Coles ordered a mutual exchange of lists of documents by 20th August 2010, with exchange of documents by 3rd September 2010 and the agreement of a trial bundle by 24th September. He also ordered mutual exchange of witness statements no later than 14 days before the first day of hearing. The case was set to begin on 14th February 2011, to be heard over 5 days.

10. It is common ground the Respondents supplied their list of documents in accordance with the order. After being chased, the Claimant on 23rd September confirmed that his list of documents was the same as the list sent by the Respondents save that he wished a report produced by a Mr Stankiewicz to be added. The hearing bundles were duly compiled by the Respondents and sent to the Claimant by 3rd November. On 19th January of the following year the Claimant wrote asking for the first time that the bundles from his three previous Tribunal cases should be included in the trial bundle, saying that the documents went to the pleaded issue that the culture of racial discrimination pervaded the Respondents' organisation and that the individual Respondents had contributed to that state of affairs. The Respondents objected to the late introduction of voluminous bundles. The documents were not copied to the Respondents. They were made available for the first time on the morning of 14th. February when the hearing began.

11. The Claimant served two witness statements 6 days before the hearing. The Respondent promptly applied in writing to exclude from evidence parts of those statements as relating to proceedings which had previously been settled, which did not go to the issues as they had been defined for the current case, and as in part being irrelevant. The second to fifth Respondents, jointly represented but separately represented from the first Respondent, made the same application.

12. At the outset of the hearing Counsel for the Claimant did not press the application in respect of documents (see Paragraph 12 affidavit of Christopher Tutton, of 28th November 2011), though he had attempted to introduce the files (Paragraph 10, further reasons of the Tribunal). As to the witness statement, the Claimant's case was that he wished to provide background evidence, from which the Tribunal might infer that the actions of the Respondents had been taken on racial grounds against him.

13. The Employment Tribunal at Brighton (Employment Judge Warren, Mr Harris, Mr Spryshute) was referred to the appropriate case law, retired, and decided to refuse to admit evidence as set out at paragraphs 9-17 of the Claimant's witness statement. We shall set out the relevant content later in this judgment. Though it promised to give its reasons for this at the conclusion of the case, it did not in fact do so until asked by the Appeal Tribunal, and that was on 25th June 2012. Its reasons, based on evidence heard over 5 days made after and with regard to that ruling, were otherwise delivered over a year earlier on 13th June 2011, when it dismissed the claims.

14. The central findings of fact were, first, that there had been agreement on 21st August 2009 at the consultants' meeting to adopt the policy later called into question. Secondly there was a significant difference between the Brighton and Haywards Heath sites. The Tribunal recorded at

paragraph 41 that the reason that Brighton was chosen to be the one to remain open, if one site of the two had to be closed through lack of staff, was because it had additional facilities beyond those at Haywards Heath – for example 24 hour emergency operating facilities, and a special department dealing with premature babies born earlier than at 24 weeks' gestation. It was the high risk site. Thirdly, the reason for drafting the prioritisation policy was to cover "the remote situation where it was necessary because of staff shortage and in the case of obvious emergency the need to close a site". Fourthly, the race and ethnicity of the consultants at Haywards Heath had nothing to do with and were not a factor in the decision to make Brighton the priority site (Paragraph 59). Nor was the implementation of the policy anything to do with the Claimant's race, ethnicity or nationality (paragraph 63).

15. The law that applied was that in the **Race Relations Act 1976**. Racial discrimination was defined by Section 1(1) materially as follows:

> **"A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if – (a) on racial grounds he treats that other less favourably than he treats or would treat other persons."**

By Section 3(4) was provided:

> **"A comparison of the case of a person of a particular racial group with that of a person not of that group under Section 1(1)… must be such that the relevant circumstances in the one case are the same, or not materially different, in the other".**

16. Paragraph 55 of the decision dealt centrally with the comparison necessary in the light of these provisions:-

> **"Dealing with the claim of direct race discrimination. The Claimant has relied on the four named Respondents as being the comparators in this case. The Tribunal does not accept that those are acceptable comparators. A comparator has to be someone who is in similar circumstances save for their race. In this case the named Respondents are not Consultants at [Haywards Heath] but Consultants at [Brighton]. The Tribunal has therefore deliberated on this case relying on a hypothetical comparator i.e. a Consultant in the Obstetrics and Gynaecology Department [at Haywards Heath] who is white and not from the Igbo tribe or Nigerian."**

Having at Paragraph 58 accepted the reasons for preferring keeping Brighton open if one of the two had to be closed, the Tribunal concluded that in the light of this at Paragraph 59:

> **"We therefore find that the prioritisation policy was drafted with the view to cover the remote situation where it was necessary because of staff shortage and in the case of obvious emergency need to close a site. The race and ethnicity of the Consultants at [Haywards Heath] had nothing to do with and were not a factor in the decision to make [Brighton] the priority site. The Claimant cannot show the comparator at [Haywards Heath] who was white would have been treated any differently. An actual comparator was Mr McKenzie-Gray who it was accepted was nearing retirement from the Trust at around this time but a hypothetical white Consultant comparator working at [Haywards Heath] would have been treated in exactly the same way. So we do not consider that the Claimant has shifted the onus of proof in this matter. But if we are wrong then it is very clear that the proposed policy and its attempt at implementation had nothing to do with the Claimant's colour, ethnicity or nationality."**

The Appeal Proceedings

17. This is, perhaps unusually, a case in which the appeal history is of particular relevance. It has significantly limited the scope for any argument by the Claimant. The appeal (which at first included allegations as to the way the tribunal had behaved) initially came before HHJ Clark on the Sift. In October 2011 he stayed it pending the Claimant making an affidavit setting out details of bias or improper conduct by the Tribunal, and the receipt of comments from the Employment Judge and Members, and in April 2012 when the stay was lifted described the appeal as being wholly devoid of merit and an impermissible attempt to re-try the case on appeal. A fresh notice of appeal was put in. Wilkie J rejected it under Rule 3.9. It consisted of twelve grounds. At a hearing in front of HHJ McMullen under Rule 3.10 all but six were abandoned. Of those six, HHJ McMullen rejected four. What were left were Ground 1, which challenged the exclusion of evidence at the outset of the hearing, and Ground 7, as it was, which related to the appropriateness of the choice of comparators. No reasons had been given in respect of the first, so HHJ McMullen asked for them. The Judge supplied those, as we have noted, in June 2012. That led to a preliminary hearing before HHJ Shanks and Members. That directed a full hearing upon both of the remaining two grounds.

18. Those two grounds are:-

> **"1. The ET prevented the Claimant from adducing background evidence to demonstrate the preconceived hostility towards him by the Respondents on racial grounds in a legal ruling at the commencement of the hearing which is not even referred to at all in the reserved judgment or reasons. That ruling flies in the face of the well established authorities and principle at EAT and Court of Appeal level. Anya *v Oxford* [2001] IRLR 377 is an exemplar of this trend of judicial authority.**
>
> **2. Paragraph 55 amounts to an error of law. The comparison is between the BME Consultants and the white Consultants who are all employed on the same terms and conditions and do the same job. The fact that one set of employees are based at [Haywards Heath] and the other at [Brighton] is not a material difference. If it is, the ET has failed to explain why it is. Furthermore, the self-direction is wrong and not in accordance with section 3 (4) of the RRA which talks about the same or not materially different."**

19. It is important to note what was ***not*** the subject of appeal, and had been ruled out:

(a) any issue with the facts found by the Tribunal;

(b) any question of perversity;

(c) any challenge to the finding that the reason for the policy had nothing whatsoever to do with the Claimant's ethnicity or race;

(d) any suggestion of bias or procedural irregularity (other than in relation to the admission of evidence).

20. It must follow, as the minority (the judicial member) sees it, that even if the Claimant were to succeed on the 'comparator' point on its own, the appeal would have to be dismissed, unless the "exclusion of evidence" ground succeeded. The identification of less favourable treatment, in which process it is necessary to identify a comparator, does not get a Claimant home unless it can be established that the act of which he complains, said to be less favourable treatment, is done on the grounds of race. Whether viewed as a stand-alone question or whether (as passages in **Shamoon v Royal Ulster Constabulary** [2003] ICR 337, HL suggest) closely intertwined with the reason for the treatment, such that a separate finding, by reference to a comparator, of less favourable treatment is unnecessary since "the reason why" question is a sufficient answer

in itself, the claims simply could not succeed. The Tribunal addressed the "reason why", and in doing so excluded race as a reason. Since that finding has not been challenged on appeal, it must be accepted as a finding of fact which it was within the competence of the Tribunal to make. It makes any appeal on the comparator point academic, even if – despite **Shamoon** – it actually can be viewed as separate from "the reason why".

21. On this view, we would not need to deal with the argument as to comparators addressed to us. However, in deference to Mr Elesinnla's submissions on behalf of the Claimant, and because the matter has been fully argued, we shall briefly set out the submissions and our conclusions.

22. Mr Elesinnla pointed to the similarities between the positions of a Consultant at Brighton and one at Haywards Heath. Each worked for the same organisation, in the same department, on the same terms and conditions, doing the same work. The fact that they were based at different sites could not, he argued, amount to a material difference.

23. The enquiry called for by Section 3(4) of the **1976 Act** was into (a) what were the relevant circumstances and (b) whether they were "the same, or not materially different". "The circumstances" is not confined to personal characteristics: indeed, much of the law on discrimination seeks to ensure that personal characteristics which are of no relevance to a decision or an action should not be taken into account. Circumstances are deliberately left undefined except by the word "relevant". This provides a very wide scope for the identification by a Tribunal of that which is relevant. Much depends on context. The distinction between a supervisor and a shop floor worker may be relevant in some circumstances, but not in others; as may be the fact that one employee has different qualifications from another. So too, as it seems to us, may be the fact that one works away from home, or overseas, whilst another does not, such that they may be treated differently by their common employer, and one (or both) argue this is

less favourable. In principle, therefore, the fact that work is performed at one location, rather than another, is capable of being a relevant circumstance. In **Hewage v Grampian Health Board** [2012] ICR 1054, the Supreme Court made it clear that the question whether situations are comparable is a question of fact and degree (Paragraph 22, in the speech of Lord Hope, with whom all the other members of the Court agreed). The Supreme Court upheld the view of the Inner House of the Court of Session, restoring the decision of the Employment Tribunal, that unless the Employment Tribunal's judgment could be said to be absurd or perverse it was not for the Appeal Tribunal to impose its own judgment on the point.

24. However, care must be taken to approach the identification of a comparator correctly, if the identification of one class of persons as appropriate and another not is to be upheld as a finding of fact. Focus must be on the statutory words: at the time relevant to this case, that "the relevant circumstances are the same, or not materially different" as between claimant and comparator[1]. The concept of "*relevant* circumstances" requires identification of that to which the circumstances in question are relevant: there must be a sufficient link in logic between the two if the Tribunal's conclusion of fact is to stand. Thus, in a case concerning applicants for a job which requires developed intellectual skills, it may relevant to know that one candidate has a good degree, and the other poor GSCE results: but the same would not be true if the job each had applied for involved physical skills (such as might be used in lifting shifting and carrying), or physical and life-style attributes, for instance if the job were to model clothing. A comparison of intellectual skills would be of little if any relevance to the latter two cases. The purpose of making the comparison thus needs to be understood before a comparator may properly be identified. It may often be convenient to address selection of the relevant circumstances by asking what proposition the comparison is intended to address. Where, for instance, it is that one of two candidates was favoured by discrimination over another for a job, the circumstances will

be those which relate to suitability for employment in it. If one is shown to live miles away from the intended place of work, and the other close by, this may be a relevant circumstance if, for instance, the job may involve a rapid out-of-hours response from the appointee. It may not be so if the "place of work" is in reality a base from which to travel to assignments. As the judgments in **Shamoon** articulate, if the reason for the appointment is because of the ready availability of the successful candidate, compared to the travel difficulties that would be suffered by the disappointed one, it would be unnecessary to address whether this was a relevant circumstance (it would almost certainly not be related to any protected characteristic), and whether it was different as between the claimant and the proposed comparator – if so there would be an answer to the claim. But if not approached by that route, and if instead the identification of a comparator is relied on to help the Tribunal decide what was the reason that one candidate succeeded and the other did not, the answer would be that in the context of the particular issues before the Tribunal it would be a relevant circumstance, and the position of the two could not properly be compared. The disappointed candidate would have to ask – how would the hypothetical comparator, someone with my personal characteristics, save for the one in question, but living miles away from the intended place of work have been treated?

25. Here the case which the Tribunal was examining was, put in crude terms, whether the introduction of a policy which may have been designed to favour those who in fact were white, and at Brighton, discriminated against those who in fact were black (save for one, shortly to retire) and at Haywards Heath, when otherwise they were in materially the same circumstances. As we have set out above, the policy appeared unfairly to operate in that way. The comparison called for to help determine whether this was because of race could not logically include as "a relevant circumstance" a factor which was itself relevant only by reference to the disadvantage potentially to be suffered, for this would be to deprive it of any use as a comparison: if asking

[1] S.3(4) RRA 1976, now replaced by "there must be no material difference between the circumstances relating to

why someone is a victim, rather than another, it is self-defeating to point to the fact that one is a victim, and the other not, and therefore suggest their relevant circumstances are not the same. Once the policy here was in operation, the Claimant could say that he (and his two black and one white colleagues) were victims – and that it was illogical to deny a comparison with those who were not by saying that the one (a victim) was at Haywards Heath and the other (not a victim) was not there when the policy being applied and said to be discriminatory made location the central distinction. It was also a significant distinction when it came to the race of those concerned. Very crudely put the argument was that the location was a surrogate for race, such that saying that two otherwise equal persons were in different circumstances because one was to work in Haywards Heath and the other in Brighton amounted in effect to saying that two people were not in comparable circumstances for testing whether one had been discriminated against on the grounds of race, because one was white and the other was black.

26. The purpose of the enquiry must be borne in mind: it was to illuminate whether someone who was black was less favourably treated because of the introduction and application of a policy disadvantaging consultants at Haywards Heath than was someone who was white, but otherwise in similar circumstances. To consider whether the policy has a discriminatory effect on different groups cannot be answered by saying: "well, under the policy X loses out – so he is not in the same position as Y, who does not" when the very question is why one group, of which X is part, suffers and the other, of which Y is said to be part, gains.

27. In the light of this, we would reject the argument advanced by Mr. Moretto and Mr. Matovu that the identification of a true comparator is a matter of fact for the tribunal, and therefore its conclusion that the difference in location as between the Claimant and consultants at Brighton must be respected unless shown to be perverse. This is true in general, but in its

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each case": s. 23, Equality Act 2010

application to the present case assumes that the correct approach was taken, and here it was not, since we are satisfied that if the Tribunal had asked what circumstances were relevant for the inquiry in the context of the present facts into whether a consultant at Haywards Health had been discriminated against on the grounds of race, because of a policy adversely affecting those who were there, it would not have regarded location as a relevant material circumstance.

28. Mr Moretto, and Mr Matovu, respectively appearing for the Trust on the one hand and the four named Consultants on the other, raised a further reason for arguing that this ground must fail. The ultimate question to be addressed in the case of unfavourable treatment said to be discriminatory is to ask why the treatment was as it was. It may be that an answer cannot be given directly to that question. There may be room, in such a case, for inferring what the true reason was – and the burden of proof provisions would generally lead to a conclusion that the Respondent could not satisfy the Tribunal that there has been no discrimination of the type alleged. Where, however, the reason for the treatment is established, on balance of probability, to the satisfaction of the Tribunal it becomes unnecessary to ask for a real or an hypothetical comparator. The comparison they provide may illuminate the answer to the ultimate question, but does not itself supply it. As was explained in **Islington Borough Council v Ladele** [2009] ICR 387 by Elias J (President) at Paragraph 36:

> **"Take a simple example. A Claimant alleges that he did not get a job because of his race. The employer says that it is because he was not academically clever enough and there is evidence to show that the person appointed to the job had better academic qualifications. The Claimant alleges that this was irrelevant to the appointment; it was not therefore a material difference. The employer contends that it is a critical difference between the two situations. If the Tribunal is satisfied that the real reason is race then the academic qualifications are irrelevant. The relevant circumstances are not therefore materially different. It is plain that the statutory comparator was treated differently. If the Tribunal is satisfied that the real reason is the difference in academic qualifications, then that provides a material difference between the position of the Claimant and the comparator."**

29. Lord Nicholls of Birkenhead recognised in **Shamoon v Chief Constable of the RUC** [2003] UKHL 11, at Paragraph 8, that sometimes the 'less favourable treatment' issue cannot be

resolved, without at the same time, "deciding the reason why" issue. He thought the two issues were intertwined. He went on at Paragraph 9 to point out that whether a factual difference between the positions of a Claimant and her alleged comparators was in truth a material difference was an issue which could not be resolved without determining why she was treated as she was.

30. Thus in **Chondol v Liverpool City Council** [2009] UKEAT/0298/08 the Appeal Tribunal, presided over by Underhill J (President) said:

> **"…it is now well recognised that in many cases debating the correct characterisation of the comparator is less helpful than focussing on the fundamental question of the reason why the Claimant was treated in the manner complained of** (he then made reference to the same passages in **Shamoon** and **Ladele** as we have cited). **In the present case the Tribunal made an explicit finding at para. 19 of the Reasons that "it was not on the ground of his religion that he received this treatment rather on the ground that he was improperly foisting it on service users". That distinction between on the one hand the Appellant's religious belief as such and, on the other, the inappropriate promotion of that belief is entirely valid in principle (though of course in any case in which such a distinction is relied on it would be necessary to make clear that it reflects the employer's true reason). That being so, the question of how to define the comparator becomes academic. It necessarily follows that the Council would have treated "other persons" in the same circumstances in the same way."**

Here, the Tribunal did make a clear finding as to the "reason why". As we have pointed out, its factual conclusion that the race of the Claimant had nothing to do with the adoption of the policy is a finding of fact which excludes his claim.

31. Mr. Matovu and Mr. Moretto would go further (though they do not need to) and argue that in any event the reason for the policy was that the Brighton site was to take priority if there was a staffing crisis as a result of Swine Flu because of the particular features of that site which the Tribunal accepted as materially different from those at Haywards Heath. However, this argument would miss the feature of which the claimant centrally complained, which had little on the face of it to do with the effects of a pandemic, even if the policy as a whole was intended for just that purpose. The lay members point out that it was not necessary for the policy to provide

that a consultant at Haywards Heath would have to cover for a registrar, in order to keep Brighton going, when a consultant based at Brighton was available to cover for the very absence of a registrar there which would have caused the transfer, and the consequent need for a Haywards Heath consultant to cover for the absent registrar there. Consistent treatment, without affecting the ability of Brighton to function, would have been to ensure that in either location a consultant there covered for the absence of a registrar there: this aspect of the policy had the result that in effect a consultant at Haywards Heath would be called upon to cover for the absence of a registrar at Brighton. The reason for this may have nothing to do with race, as the Tribunal found, but it does not logically follow that it was necessary for the policy to operate successfully. A good reason for the policy generally is thus not necessarily a good reason for this aspect of it, to which in particular the claimant took exception.

32. Although we do not regard the Tribunal's approach to comparators as sound, and would have upheld the appeal on the "comparator" ground had it been determinative, nonetheless the Tribunal's finding of fact, having heard the witnesses and considered the challenges to their testimony, that the reason for the alleged discriminatory act had nothing to do with race is unaffected, and is in the view of the judicial member and in the light of the case-law cited above a complete answer. It would only be assailable if the first ground were made out, because that might call into question whether the finding was properly reached.

We therefore turn to that ground, argued second before us.

Exclusion of Evidence

33. The evidence which the Claimant was stopped from advancing was this:

> **"9. The first Respondent [the Trust] is a racist organisation for a very long time it has used its servants and agents to commit repeated acts of racial discrimination against its BME employees. In recent times, the first Respondents BME employees have engaged the first Respondent in litigation to its racist acts. There are a number of**

race discrimination claims working their way through the judicial system as I write my witness statement.

10. Doctor Vivienne Lyfar-Cisse, a black bio-chemist, chair of the BME in Edinburgh, has felt constrained to bring a substantial number of claims of racism and victimisation against the first Respondent over the last few years. In 2007, an Employment Tribunal… sitting in Brighton ruled against the first Respondent…. None of those responsible for the racial discrimination of Doctor Lyfar-Cisse were subjected to, have ever been the subject of any of the first Respondent's policies or procedures. In essence, after the ET ruling it was business as usual.

11. After the above mentioned ET ruling, the first Respondent and its servants and agents re-doubled their efforts to continue to discriminate and victimise Doctor Lyfar-Cisse. As a result of this victimisation and further racial discrimination Doctor Lyfar-Cisse was constrained to commence further proceedings against the first Respondent. Those proceedings were settled on the basis that the first Respondent publically admitted liability for racial discrimination and victimisation and tendered an abject apology for the same. None of the perpetrators of the racial discrimination complained of by Doctor Lyfar-Cisse have ever faced any sanction whatsoever from the first Respondent.

12. The BME employees of the first Respondent are routinely treated with contempt, disrespect and derision. Around April 2007 Mr Onome Ogueh, a black Consultant complained of racist bullying by a white Consultant, Mr Barry MacKenzie-Gray to his mentor a chief executive of another NHS Trust, because he had very little faith that his concerns would be acted upon within the first Respondent. His mentor then reported the matter to the first Respondent's chief executive (at that time, Mr Peter Coles). Despite this high level communication, the first Respondent conspicuously failed to address Mr Ogueh's concerns (sic) with the result that his career and professional reputation were seriously undermined as the racist bullying continued unchecked. Mr Ogueh was subsequently targeted for racial victimisation including suspension from his clinical duties with the active involvement of the third Respondent. Mr Ogueh subsequently commenced proceedings. At the departmental meeting of 2 October 2009, the second Respondent provided an update on a race discrimination case during which he discussed its possible impact on staffing and the hopes of the settlement. He also provided an update on his involvement in dishonestly signing off the clinical excellence awards of a white Consultant. Despite these and other acts of racial discrimination within the Obstetrics and Gynaecology Department admitted by the first Respondent and involving the second, third and fifth Respondents, they still claimed to be "unaware that there is a chronic racial discrimination problem" at the first Respondent…"

13. It was in this environment that I was appointed to position of Principal Lead Consultant ('LPC')… while I was the lead Consultant for Gynaecology I raised concerns about the way Clinical Risk was being run by the third Respondent, who was the lead Consultant for Obstetrics.

34. Of those paragraphs from his witness statement, the Tribunal in its reasons given in June 2012 regarded Paragraph 9 as a general allegation that the first Respondent was racist, as to 10 and 11 that the named Respondents had no involvement in the claims by Doctor Lyfar-Cisse, that Paragraph 12 related to Mr Ogueh and not the Claimant, and Paragraph 13 was wholly irrelevant to the claim. In using that expression of Paragraph 13 it might be thought that it

accepted that there was some possible relevance in Paragraphs 9-12, where it had not said the same. It further confirmed this view for us in what it said in Paragraph 17:

> **"The Tribunal was satisfied that the "background" evidence which the Claimant was attempting to bring did not provide *material* assistance to the Tribunal in deciding the issues we had to decide; i.e. whether or not the recommendations as to how the Obstetrics Department would be run and managed in the event of a Swine 'Flu outbreak were unfavourable treatment of the Claimant on racial grounds." (our emphasis)**

35. We therefore start by accepting that the excluded evidence might have been of some relevance. A Tribunal should pause to think long and hard before it excludes any evidence which is of some relevance. However, the rule that evidence may not be admitted at all unless it is relevant does not have the corollary that if it is relevant it may not be excluded. In **Noorani v Merseyside Tec Ltd** [1999] IRLR 184, CA the Court of Appeal regarded it as a proper exercise of discretion by a Tribunal to refuse to issue witnesses with witness summons which went to issues which were collateral and subsidiary, taking into account the likelihood that those subsidiary issues would affect the outcome. At paragraph 35, Henry LJ, with whom Thorpe and Beldam LJJ agreed, observed:

> **"Such proactive judicial case management in the law courts becomes more and more important now that it is generally recognised that unless the Judge takes on such a role, proceedings become over long and over costly, and efforts must be made to prevent trials being disproportionate to the issue at stake, and thus doing justice neither to the parties, to the case at point or to other litigants.**
>
> **36. The position in relation to Employment Tribunals is a) fortiori since they are intended to be relatively informal and inexpensive."**

The Court emphasised that the decision was discretionary. It is of the nature of discretions that they are entrusted to the Court at first instance. Appellate Courts must recognise that different courts may disagree about whether a discretion should be exercised or not without either being wrong, far less having made a mistake in law. A decision to exercise a discretion can be set aside only if the conclusion reached is outside the generous ambit within which a reasonable disagreement is possible.

36. **Chattopadhyay v Headmaster of Holloway Schools** [1982] ICR 132 EAT, was an earlier example of a case in which a Tribunal decision was nonetheless overturned when it refused to admit evidence of events subsequent to a decision to offer a teaching post to another member of staff with less qualifications and experience than the applicant, but of a different race. The Appeal Tribunal thought that evidence of hostile acts other than the alleged discriminatory acts was admissible if they were logically probative that the central act alleged was discriminatory, and showed that the person involved was treating the Applicant differently from other people. Hostility after the event was as probative as hostility demonstrated before the event. However, there was a note of caution (at 139F – 140A):

> **"In our judgment, this evidence ought to have been admitted. Having said that, we are very conscious of the great dangers of opening too widely the ambit of an enquiry under the Race Relations Act 1976. If this is done and not controlled, Industrial Tribunals will be faced with numerous issues on matters only indirectly relevant to the main issue. This in turn would lead to long and complicated hearings and great expense and inconvenience to the respondents. It is not in the best interests of those who are being racially discriminated against that the protection of their rights before Tribunals should become a matter of great expense and complication. The end result of so doing would be to render the legal redress they have difficult and expensive to obtain. In the circumstances there is a very heavy burden on legal advisors, the Commission for Racial Equality and the Equal Opportunities Commission to ensure that matters of the kind that we have had to consider today in this case are not introduced into a case, except where they are satisfied that there is a real probability that they will affect the outcome. This judgment should not be treated as a charter for wholesale allegation of subsequent events."**

Though Mr Elesinnla takes comfort from the finding, the Respondents draw particular attention to those cautionary words.

37. The principles in **Anya v University of Oxford** [2001] EWCA Civ 405 [2001] IRLR 377 are well known. The Tribunal had failed to draw any conclusion as to where the truth lay in respect of events prior to an interview for a promotion at which Doctor Anya, a black Nigerian permanently resident in the UK, was rejected, and a white candidate appointed. The Applicant's case had been that the evidence showed that there was a pre-conceived hostility to him and a

racial bias against him evinced by that hostility. The Tribunal needed to consider that evidence if it were to reach a fair conclusion on the facts before it. The Court echoed the approach of the Appeal Tribunal in **Chattopadhyay** (Paragraph 9) that there was a temptation for a complainant to introduce as many items as possible as material from which a Tribunal might make an inference that racial grounds were established – and that the result of that exercise might confuse the relevant with that which was not. It was a legitimate comment that in some cases of race discrimination so much background material of marginal relevance was introduced that focus on the foreground might be obscured or even eclipsed. It was emphasised that:

> **"…there is a tendency where many evidentiary incidents or items are introduced, to be carried away by them and to treat each of the allegations, incidents or other items as if they were themselves the subject of a complaint. In the present case, it was necessary for the Tribunal to find the primary facts about the allegations. It was not, however, necessary for the Tribunal to ask itself in relation to each such incident or item, whether it was itself explicable on "racial grounds" or on other grounds. That is a misapprehension about the nature and purpose of evidentiary facts. The function of the Tribunal is to find the primary facts which they will be asked to draw inferences and then for the Tribunal to look at the totality of those facts (including the Respondent's explanations) in order to see whether it is legitimate to infer that the acts or decisions complained of in the originating applications were on "racial grounds". The fragmented approach adopted by the Tribunal in this case would inevitably have the effect of diminishing any elements that the cumulative effect of the primary facts might have on the issue of racial grounds."**

38. The most recent decision on the principle relevant to admission of evidence was that of Underhill J. (President) in **HSBC Asia Holdings BV and Another v Gillespie** [2011] ICR 192. In his view the law was reasonably clear, and he summarised it in ten propositions set out at Paragraph 13. There is, rightly, no challenge before us to the correctness of any of the principles which he identified. Those of greatest relevance to the present case are-

(a) (Principle 2) Relevance is not an absolute concept: it may be "logically" or "theoretically" relevant but nonetheless too marginal, or otherwise unlikely to assist the Court for its admission to be justified;

(b) the question was really whether the evidence was of "sufficient relevance"

(c) accordingly (Principles 4 and 5) in a number of cases, decisions by an Employment Tribunal that evidence was insufficiently relevant to be admissible had been upheld.

(d) (Principle 6) the observation of Langstaff J in **Krelle v Ransom** (unreported) 27 January 2006, EAT, adopted by HHJ Clark in **Digby v East Cambridgeshire District Council** [2007] IRLR 585 was correct, where he said that:

> **"A Tribunal has a discretion, in accordance with the overriding objective, to exclude relevant evidence which is unnecessarily repetitive or of only marginal relevance in the interests of proper modern day case management",**

(e) In most cases the cost and trouble involved in a pre-hearing ruling as to admissibility would not be justified, and if there was room for argument about admissibility a Tribunal at a Preliminary Hearing might be less well placed than it would be during or at the end of the hearing to make the necessary assessment (Principle 7), but

(f) (Principle 8) there will be cases where there is a real advantage in terms of economy, in the broadest sense of that term, in ruling out irrelevant evidence before it was sought to be adduced and more specifically, in advance of the hearing. Discrimination claims may (Principle 9) fall within that class. Underhill J commented:

> **"It is notorious that there is a tendency in such cases for Claimants to adduce evidence of very many incidents of alleged ill-treatment often extending over long periods of time and that this can lead to very long hearings which put an enormous burden both on the parties and on the Tribunal and carry the risk of the essential issues being obscured in a morass of detail."**

Finally:

(g) whether a pre-Hearing ruling on admissibility should be made in any particular case depends on the circumstances of that case, though caution should be exercised:

> **"In the context of discrimination claims in particular, Tribunals will need to bear in mind (so their relevance will depend on the particular case) the observations of Lord Steyn and Lord Hope of Craighead in *Anyanwu v South Bank Students Union (Commission for Racial Equality Intervening)* [2001] ICR 391 to the effect that such cases are generally fact sensitive: see paras. 24 and 37… Prior incidents which are not complained of in their own right (typically because they are out of time) may still be important as shedding light on whether the acts complained of occurred or constituted discrimination. This point was made most clearly by the Court of Appeal in <u>Anya v University of Oxford</u> , notwithstanding that the Court had a clear appreciation… of the problems to which reliance on a long history of alleged prior incidents could give rise. But each case is different and caution should not be treated as an excuse for pusillanimity. If a Judge is satisfied that the facts of a particular case that the**

> **evidence in question will not be of material assistance in deciding the issues in that case and that its admission will (in Hoffmann LJ's words) "cause inconvenience, expense, delay or oppression", so that justice will be best served by its exclusion, he or she should be prepared to rule accordingly."**

39. Turning to the facts of the present case, there had been no indication until service of the witness statement that the Claimant intended to rely upon any event earlier than the attempt to introduce the policy in October and November 2009. His ET1 did refer to there having been previous proceedings, and alleged that the Consultants in Obstetrics and Gynaecology were "segregated along racial lines", accusing the first Respondent of "chronic racial discrimination problems", but these complaints gave no hint of anything which specifically bore upon a decision which, on the Tribunal's findings of fact had been agreed, amongst others by the Claimant, in October.

40. For our part, we agree that paragraphs 9-13, and paragraphs 17 (an assertion of segregation on racial lines) were matters which the Tribunal was fully entitled to exclude. We observe, however, that the exclusion was not total: the general allegation against the first Respondent, and the suggestion of racial segregation, were nonetheless actually made at the hearing. The Tribunal heard, and were fully aware of, those assertions.

41. Paragraphs 14, 15 and 16 need further consideration. In those, the Claimant described how the four personally named Respondents had written a letter of no confidence in the Claimant when he occupied a role as lead Consultant. Their actions had been accepted by the first Respondent as giving rise to liability for racial discrimination. At Paragraph 16, the Claimant set out the reasons advanced by the Consultants for seeking his removal from the PLC role.

42. As to those Paragraphs the Tribunal said this:

> **"9.5 Paragraph 14 – the events in this Paragraph led to the Claimant bringing a race claim against the Respondent which was compromised. That fact was known to the**

> **Tribunal. It was not proportionate to explore all of the matters which led up to that claim and would not have been proportionate and the Tribunal did not see how it could have assisted the Tribunal to answer the allegation before it.**
>
> **9.6 Paragraphs 15 and 16 - to have had to explore the allegations at Paragraphs 15 and 16 would have involved a detailed consideration of the Claimant's conduct back in 2007."**

43. One of the difficulties which the Claimant faced was that he had not pressed his application for documents, and had demonstrated by advancing the request in the first place that there were a very considerable number of documents which might be relevant to the issues he wished to explore. The Respondents had not seen the documents. They had provided their witness statements upon the basis that what was in issue was the policy in respect of registrar cover. At Paragraph 16 of the Note of June 2012, the Tribunal said that the evidence which the Claimant sought to introduce would have led to a very long hearing, placing enormous burdens on both the parties in the Tribunal. That would not have assisted the Tribunal in deciding the issues. It was disproportionate in the circumstances. The background evidence did not provide material assistance to the Tribunal. It observed (at Paragraph 18) that much of the past history of alleged unfavourable treatment that the Claimant and his colleagues had suffered had no relation to the five named Respondents, such that the admission of documents in evidence would be likely to cause inconvenience, certainly additional expense, and delay. Justice would best be served by its exclusion. Significantly (in the view of the minority), the Judge indicated that the boundaries of the exclusion were carefully placed. He said:

> **"The Tribunal did not exclude the Claimant from producing any evidence of actual acts by the Respondent complained of and the subject of the proceedings but the Tribunal did conclude that the matters which the Claimant was attempting to adduce were not sufficiently relevant to the pleaded issues to be admissible. The Claimant was permitted to give evidence that he had brought claims in the past which had been compromised. Similarly Mr Ogueh was not excluded from giving that evidence although he was precluded from giving evidence of the details of the claims he had brought."**

44. These paragraphs show clearly that the Tribunal had in mind the principles from the decided cases which we have set out. It correctly thought the material was potentially of

relevance. But it did not regard the admission of it as proportionate, given the very limited advantage it was likely to give the Tribunal in reaching its decision.

45. We may upset its decision only if the claimant can show there to be an error of law. Since the Tribunal was aware of the correct legal principles, and purported to apply them, in exercising a discretion, as the cases recognise it to be (they were not challenged before us), it is necessary for the Appellant to show that the exercise of the discretion was perverse.

46. So far as the minority can see, no relevant feature was left out of account nor irrelevant one taken into account. The eventual decision did not fly in the face of reason. Peversity is a high hurdle: the minority cannot see that the claimant has surmounted it. He suspects that the application was made by the Claimant to the Tribunal on a far broader basis than strictly focussed relevance would require. The involvement of the second to fifth Respondents personally, in a letter of no confidence, might demonstrate that a policy supported by those Consultants and thereby by the Trust, was intentionally hostile toward the Claimant and any of those at Brighton who also were non-white. However, this point, simply stated, is of little greater weight than that which the Tribunal recognised was already before it – the previous complaints which the Claimant had made that he had been racially discriminated against, coupled with the recognition that his complaint had sufficient substance to merit compromise. The application to admit evidence was not however carefully focussed so as to limit it to the letter. Nor could the allegations made have been explored easily without reference to documents, the admission of which was no longer pressed. The Claimant's own view of the real relevance of the matters sought to be introduced was arguably demonstrated by the fact that it had not been seen as critical to, or intrinsic in, his claim at any stage until almost the last moment prior to the hearing, for if he had viewed it as critical it would surely have been relied on then.

The Judge was undoubtedly right in thinking that if it had been introduced, the hearing would have been very considerably extended.

47. Given that the judgment recognises in a number of places that there was a difficult background of race relations, and the Claimant himself had been affected by this, and the approach taken by the Tribunal set out at paragraph 37 above, the exclusion of the material did not mean the Tribunal was unaware of the potential motivation of the Respondents: it knew this, and said as much. It is difficult to see that the degree of critical suspicion which it would in those circumstances apply to the Respondents' evidence would have been much greater if the intimate details of the rights and wrongs of the earlier incidents had been explored at length. Underhill J's injunction that a Judge should be prepared to grasp the nettle and rule out matters the admission of which would cause inconvenience, expense, delay or oppression – all of which could be said of the amount of material sought to be introduced on this occasion - has as its consequence that an appeal court should not interfere too lightly with the exercise of a discretion to do so.

48. He accepts the submissions of the Respondents' Counsel that it would be necessary for the Claimant to satisfy us that the Tribunal decision not to admit the material sought to be introduced was perverse. Notwithstanding that its effect was to a limited extent to constrain Mr Elesinnla in the way he would otherwise have wished to advance the Claimant's case, he could not go so far.

49. He would add that this case, like others in the same general territory, is very much one which turns upon its own particular facts. It should not be seen as a decision which invites one party to seek to strike out passages in the witness evidence of the other. To do so would be to risk satellite litigation, the expense, time and trouble which it is the very purpose of the exclusionary rule to avoid. The Tribunal in **Gillespie** was wise to suggest that it would be rare

for admissibility to be determined in advance of a hearing. There may be cases in which a Tribunal is entitled, as it was here, to exercise its discretion, but they are likely very much to be the exception than the rule, and litigants who waste the time of Tribunals in making applications to exclude documents or evidence, rather than turning their energies and focus onto the central issues in the case to be determined, run the considerable risk of adverse costs decisions in which we acknowledge reliance may be placed upon these words of ours.

50. The majority consider that whilst the Tribunal had a discretion to exclude the bundles of documents submitted on the day of the hearing, the claim here is one of direct race discrimination and victimisation. So far as victimisation was concerned, the protected act relied on was a previously compromised race discrimination claim. His witness statement containing some of the relevant details was supplied to the Respondent and submitted in advance of the hearing. He should have been allowed to give evidence about the case and the subsequent alleged victimisation on racial grounds contained in his witness statement. Whilst paragraphs 9 – 12 might not be directly relevant to his case of direct discrimination, paragraphs 13 – 18 were. The respondents here were also players in the previous case, and the claimant's representative should have been permitted to cross-examine them on this background. It would not have necessitated the admission of the entire case bundles which would not have been proportionate, but the tribunal excluded all the evidence leading up to the latest dispute, and then in effect concluded that the claimant had failed to present any evidence of racial discrimination. That must be an error of law.

51. The majority view on the evidence point is that the underlying principle for the Tribunal is the relevance of the evidence before it.

52. The Tribunal has wide discretion and was entitled to exercise its discretion in the instant case. However, it is important that the Tribunal sets out clearly the basis of how this discretion is exercised and show in its analysis and judgment how this was exercised. It is unclear from the Tribunal's reasoning how this discretion was exercised.

53. The Tribunal refused to allow the Claimant to adduce evidence set out in sections 14-18 of his witness statement and concluded that the Claimant was unable to put forward any evidence at all in reaching its conclusion. The Tribunal failed to assess the relevance of the evidence before it before reaching its conclusion. The question for the Tribunal to consider was whether the evidence was of "sufficient relevance" and materially relevant. This was an important step in the process in considering the relevance of the evidence and in exercising its discretion on whether the evidence should be excluded. The Tribunal had to decide what evidence was of "sufficient relevance" and materially relevant to the claim before it. It was not open to the Tribunal to reject all the evidence before it and to conclude that the Claimant had not adduced any evidence - as the ET had not gone through the process of deciding or evaluating the relevance of the evidence to the Claimant's case. This was an error of law.

54. If disabled by excluding relevant evidence from reaching a conclusion that the disadvantage caused by the aspect of the policy of which the claimant complained was because of his race that overall conclusion cannot stand.

55. It follows that the error of law in refusing to admit relevant and material evidence vitiates the conclusions to which the tribunal came and on this basis the appeal must be allowed.

Consequence

56. The appeal is allowed on Ground 1. As to consequences, there is much to be said for the parties seeking to conciliate their differences, given that the aspect of the policy of which the claimant complained was never put into effect, its potential to operate was very short-lived, and that the time spent litigating may detract from the focus most senior healthcare professionals would usually wish to have upon the demands of their specialties: but though we recommend this, it is a matter for the parties. If they cannot accommodate their differences, then the claim must be determined afresh by a different tribunal, since the present panel has expressed a concluded view on the merits of the claim from which it might be difficult to depart.