Appeal No. UKEAT/0233/13/RN

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 November 2013

**Before**

**HIS HONOUR JUDGE HAND QC**

**BARONESS DRAKE OF SHENE**

**MR B WARMAN**

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DR R MANGALORE APPELLANT

LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

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| For the Appellant | MS BARBARA ZEITLER<br>(of Counsel)<br>Bar Pro Bono Unit |
| For the Respondent | MS ANYA PALMER<br>(of Counsel)<br>Instructed by:<br>Pinsent Masons LLP<br>1 Park Row<br>Leeds<br>LS1 5AB |

**SUMMARY**

**VICTIMISATION DISCRIMINATION**

Although allegations of victimisation were made under section 27 of the **Equality Act 2010** the Employment Tribunal had directed itself in terms of a comparator as if the case had been brought pursuant to section 2 of the **Race Relations Act 1976**. Whilst this was an apparently erroneous approach in fact the comparative approach had not really been used and the Employment Tribunal having asked itself why the Appellant had not been appointed had concluded that her rejection had not been because she had previously brought discrimination proceedings against the Respondent. This was a case where despite any misdirection the Employment Tribunal had been plainly and unarguably right as to the outcome (see **Dobie v Burns International Security Services (UK) Ltd** [1984] IRLR 329). Although the misdirection was similar to that in **Woodhouse v West Northwest Homes Leeds Ltd** UKEAT 0007/12/SM the latter was distinguishable on its facts. The appeal was dismissed.

**HIS HONOUR JUDGE HAND QC**

1. This is an appeal against the judgment of an Employment Tribunal comprising Employment Judge Hodgson, Mr Eggmore and Mrs Ebenezer, sitting at London Central over a period of 13 days in July 2012, the written Reasons having been sent to the parties on 24 September 2012.

2. By a very lengthy Judgment running to 69 pages, the Employment Tribunal dismissed claims of direct age and race discrimination and of victimisation and of harassment. The Appellant has been represented by Ms Zeitler of counsel under the auspices of the Bar Pro Bono Unit. When this matter came before HHJ McMullen QC, as part of the sift procedure, the Appellant was represented by Mr Dyal of counsel under the auspices of ELAAS. This Tribunal cannot emphasise too often how grateful it is to those who come to this Tribunal to represent parties who otherwise might not have representation and focus their cases and present them in the best possible light. We are very grateful to Ms Zeitler for her submissions and for the way that Mr Dyal analysed the case before that. The Respondent has been represented by Ms Palmer of counsel, whose submissions have also been of considerable assistance to us.

3. By directions given by HHJ McMullen after a hearing pursuant to rule 3(10) of the Rules of this Tribunal, the hearing being held on 1 May 2013 (see pages 164 and 165 of the bundle), there has been substituted for the Notice of Appeal which was lodged on 5 November 2012 paragraphs 5 to 18 of the skeleton argument submitted by Mr Dyal on behalf of the Appellant at that hearing. That skeleton appears at pages 104 to 106 of the appeal bundle.

4. The Judgment of HHJ McMullen of the same date is at pages 166 to 173. One of the points made by that Judge in that Judgment is at paragraph 8 (see page 169). The paragraph reads:

> **"... I accept Mr Dyal's argument that there are places where the Tribunal misdirects itself on the law, under section 27, and places where it gets it right. He says correctly that no comparator for victimisation is required under section 27, and yet the Tribunal does look for no less favourable treatment and for a comparator. See, for example, paragraph 7.58 and 7.74 of the judgment. This is contrary to section 27 and paragraph 9.11 of the Equality and Human Rights Commission Code of Practice on Employment. It may be rescued by its correct directions elsewhere in the judgment, which Mr Dyal very fairly has pointed out. Of course a tribunal which directs itself correctly in one place but not in another may be upheld. See Jones v Mid Glamorgan. Nevertheless, in a case where the *prima facie* evidence is striking, it is extremely important that there be a correct self-direction and application of the direction. This ground will go to a hearing."**

5. This passage of this judgment is based on paragraphs 5 to 9 of the skeleton argument (see page 104). But as I have said, it is that skeleton argument which now stands as the grounds of appeal.

6. The other grounds that the learned judge allowed to go through are at paragraphs 10 to 15 where it is suggested that the Employment Tribunal has failed to consider its own finding that there was a multi-layered set of reasons or set of circumstances involved in the case.

7. The third point is what has been referred to as "the concession/pleading point", which stems from what is recorded at paragraph 2.27, namely that the Respondent had conceded that the only reason advanced for rejection of the Appellant's application is that she was not suitable for appointment. That is covered by paragraphs 16 to 18.

8. That is the scope of the appeal that is before us. It will be understood from what I have said about the Judgment of the Employment Tribunal that the case originally was much broader than that and covered a great deal of ground. Moreover the case at first instance alleged victimisation in respect of four allegations set out at paragraph 2.25 of the Judgment at page 4

of the appeal bundle. What is now before is an appeal against the victimisation decision but only in respect of allegation 2, namely the failure to appoint the Appellant to a post as a lecturer.

9. There is a postscript to the first ground and to paragraph 8 of HHJ McMullen's Judgment. On 22 June 2013 Employment Judge Hodgson issued a Certificate of Correction pursuant to rule 37(1) of the then Employment Tribunal Rules. This provides that clerical mistakes or errors from an accidental slip or omission may be corrected at any time. What is said by the certificate of correction to have occurred in respect of each of paragraph 7.58, 7.59 and 7.74 of the Judgment is a "drafting error". The correction removes the references in 7.58 and 7.59 to a hypothetical comparator and at paragraph 7.74 it removes the mandatory words "have to" and replaces them with the rather more discretionary "we may". It is perhaps worth observing that "a hypothetical comparator" was constructed for the purposes of direct discrimination at paragraph 7.51 of the Judgment, but section 27 of the Act is set out quite accurately at paragraph 6.1 (see page 38 of the appeal bundle). Moreover at 6.12 on page 47 the terms of section 27, previously set out in full, seem us to be quite correctly summarised, and at paragraph 6.13 this is said:

> **"6.13 We have to exercise some caution in considering the cases decided before the Equality Act 2010. However, these cases are helpful. Moreover, whilst it is not necessary to formally construct a comparator or indeed to construct a comparator at all because one is focusing on the reason [for] the treatment, it may be helpful to consider how others may have been treated when analysing the reason [for] the treatment."**

10. This is a matter of considerable significance in this appeal in relation to ground 1. But the parties are agreed that the Certificate of Correction is irrelevant to the arguments in this appeal and can be disregarded. So we propose to say no more about it.

11. As is a commonplace nowadays, the very long decision of the Employment Tribunal is broken up and structured by a series of sub-headings. Ms Palmer in her submissions accurately characterised different parts of the Judgment as really comprising sections. The section headed "The facts" starts at paragraph 5.1 and covers pages 8 to 37 of the appeal bundle. Obviously, we cannot refer to it in great detail or cite it repeatedly, otherwise this Judgment would become overloaded in a wearisome way with the Judgment of the Employment Tribunal. What follows is a brief synopsis.

12. The Appellant was employed by the Respondent for nearly five years until her dismissal on 31 March 2010. She brought proceedings against the Respondent in respect of that dismissal. That claim was settled by a Compromise Agreement in 2011. A central plank of the agreement was the Appellant's appointment to a position without remuneration as an honorary research associate. This was an unprecedented and non-existent post created purely for the purposes of the Compromise Agreement. Predictably enough, it soon created difficulty, but we need not go into that. The scope of the appeal having been restricted by the Judgment of HHJ McMullen in the way that we have just referred to, any further recitation of that aspect of the case would be irrelevant.

13. For the same reason, nor need we concern ourselves with another factual matter that was considered by the Employment Tribunal, namely what is alleged to have been a lack of guidance as to the research proposals which the Appellant wished to put forward.

14. This case, as we have said, is now all about the fact that the Appellant was not appointed by the Respondent to a teaching post. A vacancy for the post of lecturer in Health Economics in the Social Policy department was advertised in about April 2011. The duties of the post, as advertised, included teaching, publishing, research and administration, and the qualifications

that were required were a PhD, a record of research work and the potential for publication of the research in high quality journals. The teaching was at postgraduate level on an MSc course. Other matters are set out in considerable detail by the Employment Tribunal at paragraphs 5.39 and 5.40 of the Judgment, and it is unnecessary for us to go into that greater detail.

15. Not surprisingly, in the case of an institution like the Respondent, there is a mature and detailed appointment procedure, which is described at length at paragraphs 5.42 to 5.55 of the Judgment. That degree of detail was necessary because it was important to decide the nature of the procedure that had been followed in this case. In the end, as we will come to in a moment, the Employment Tribunal concluded that a normal procedure had been followed.

16. The Appellant applied for the post along with 15 other applicants. Although one of the shortlisters who worked outside the Social Policy department favoured putting the Appellant on the shortlist, two members of the Social Policy department who were also shortlisting did not. As we understand to be the usual procedure, written reasons were recorded for not shortlisting candidates or for shortlisting candidates as part of the process. The departmental shortlisters thought that in the case of the Appellant there was insufficient evidence of teaching experience at the necessary level, an absence of publications in the area of Health Economics and an absence of fundraising plans for future research. The Tribunal noted that other candidates were rejected on the basis of an inadequate background in Health Economics, although one person who appeared to have no background in Health Economics was shortlisted on the basis that he "should be adaptable" (see paragraph 5.64 of the Judgment).

17. Without going into further detail, it should be obvious from what we have just said that the Tribunal made the most careful investigation of this shortlisting process. Indeed the Employment Tribunal explored, against the background of the Appellant's CV and of her

application letter, the reasoning of the shortlister who had put the Appellant on her shortlist and the reasoning of the other two who had not. This, again, was in very considerable detail and covered paragraphs 5.69 to 5.83 of the Judgment. We can summarise these by saying that although the shortlister in favour of shortlisting the Appellant had some reservations, she felt that there were sufficient positives for the Appellant to be interviewed, whereas the other two did not.

18. Those other two departmental shortlisters were both professors in the Social Policy department, namely Professor Newburn and Professor McGuire. Whilst the former knew of the Compromise Agreement, he had no knowledge of the background to it. Professor McGuire, on the other hand, knew a great deal of the history, including the fact that it was alleged the Appellant had had an affair with a professor in the department, something which may or may not have been connected to an altercation and at least the allegation of a physical confrontation between them in his office in 2008. The non-departmental shortlister was not aware of any of the history at the time of the shortlisting and remained unaware until after the interview when during a conversation with others some aspects of that history were mentioned to her. As the Employment Tribunal observed at paragraph 5.170 of the Judgment, the only relevance of this is that, whilst not known to everybody, the history of the Appellant's previous employment in the department was known to some people. As the Tribunal put it, "something of the claimant's history was known in the department".

19. In accordance with the procedure, both professors gave a reasoned account of their reservations. This was initially done on an individual basis, but later they combined it into a joint document. This was not said by the Employment Tribunal to be in any way unusual or significant. The professors took the view that the Appellant was not well qualified to teach an MSc in Health Economics, did not have an impressive record of publication, and had no

detailed proposals about raising money for research in the future albeit that was a deficit noted in several other candidates.

20. Because there was this difference between the departmental shortlisters on the one hand and the external shortlister, on the other, a Professor Stevenson, who was the vice-chair of the appointments committee and the chair of this particular appointment panel, had to resolve this matter under the procedure. He appears to have been very conscious of a number of factors; about equality of opportunity, about gender and race imbalance, the risk of victimisation and the risk of subsequent litigation. Despite reservations about the Appellant's suitability in terms of teaching, he resolved the difference by adding her to the shortlist probably some time in early June 2011. There is a careful examination of his reasons for doing so at paragraphs 5.88 to 5.92 of the Judgment. The shortlisting of the Appellant provoked what might be described as an adverse response, although we hasten to add the Employment Tribunal does not put it that way. Professor McGuire expressed concerns about "relationships having broken down between colleagues so much so that there is no reasonable expectation that a working relation will be possible" (see paragraph 5.94 of the Judgment). He expressed anxiety about the likelihood of further application for posts in the future from the Appellant. He suggested that the appointment might be delayed, although, as the Employment Tribunal observed, it was not clear whether that related to the appointment process generally or simply to the interview dates. In correspondence between Professor Newburn and Professor McGuire, the former described what had happened as being "very unsatisfactory" and the latter remarked "What a foul-up".

21. Professor Gaskell, the Deputy Director of the Respondent, regarded it as a possibility that it should be concluded none of the applicants met the requirements for the post and that an LSE Fellow should be appointed for one year, and the post then be re-advertised at senior lecturer level. In the course of this communication or set of communications, the Appellant was

described as “you know who”. The Employment Tribunal regarded this as “by implication encompassing the shared knowledge of the total history of the relationship” (see paragraph 5.96 of the Judgment). That is another way of putting what had been said earlier: “something of the Claimant’s history was known in the department.”

22. In the end the Respondent decided to continue with the normal appointment process, including personnel taking part in that process who would normally take part in it notwithstanding the fact that they knew something of the history to which we have referred. In the meantime, however, the background conversation continued. Professor Gaskell questioned whether the post required a depth of experience in teaching postgraduates. Professor Newburn replied, agreeing with that proposition but pointing out that what he called “promising youth” might be excluded and that “pandering to one individual would rule them out” (see paragraph 5.98). The Tribunal do not say so in terms, but plainly this was an explicit reference to the Appellant.

23. It appears that Professor McGuire and Professor Newburn approached Professor Gaskell with a view to appealing against his having confirmed the shortlist. Professor Stevenson, very properly in our view, recorded a number of the conversations, including the view of Mr McClelland, the Deputy Director of HR, that the Respondent must not employ the Appellant and the content of a meeting between Professor McGuire, Professor Newburn and Professor Stevenson on 15 June 2011 at which Professor McGuire went into the history of the matter, revealing details of incidents and allegations of which the other two had not been aware. Professor Stevenson had met Mr McClelland on 20 June 2011 and they had agreed on the desirability of proceeding to interview the Appellant. Professor Stevenson was concerned, firstly, as to whether Professor McGuire should be on the interview panel at all and, secondly, whether other members of the panel who knew something of the history of the Appellant’s

previous employment with the Respondent should be there either. Nonetheless, as we said a few moments ago, the decision was reached, and it seems largely to have been that of Professor Stevenson, that there was no alternative but to go ahead with the interview under the normal procedure with the panel as it would usually be constituted. It was, to quote the remark made with reference to the commission to paint a portrait of Oliver Cromwell, a "warts and all" approach.

24. The interview took place on 20 July 2011, apparently against the background of a statement from Mr McClelland, possibly made very shortly before the interview, that if the Appellant was ranked ahead of the other candidates then any decision as to appointment should be suspended pending further advice being sought. Ms Palmer submitted that the Employment Tribunal had concluded that was an indication the Respondent was prepared for the outcome to be that the Appellant might be ranked above the other candidates, something which Ms Palmer suggested was a virtue in the process and not a vice; this is how the Employment Tribunal put it:

> **"Indeed, the fact that Mr McClelland suggested that if the claimant were found to be the most suitable candidate, there should be adjournment would indicate that Mr McClelland also took the view that the panel, including Professor Stevenson, may conclude the claimant was the most suitable candidate for appointment. This would suggest that Prof Stevenson was maintaining an independent and open mind."**

Both Professor McGuire and Professor Newburn were already unhappy about the delay and appear to have rejected any suggestions that the matter should be further postponed.

25. The four shortlisted candidates were invited to make a presentation during which nine members of the interview panel would be present to consider the presentation and, if we have understood it correctly, other members of the department might be present as observers. After the presentation there was, in accordance with the usual procedure, a discussion. None of the

nine members of the interview panel concerned with the presentation regarded the Appellant as appointable after that presentation had been made. The Employment Tribunal make this finding at paragraph 5.127:

> **"In general we do not find there is objective evidence that the claimant was treated differently to anyone else in the presentation. The claimant has alleged that at the interview, Ms Jennings, who was not involved in the decision not to appoint the claimant, stated that the claimant's presentation 'was brilliant'. Ms Jennings has denied this. On balance we think that the claimant must be mistaken as we accept Ms Jennings' evidence that it is not something that she would have said to anyone. Ms Jennings was the HR employment relations adviser and not a member of the department and therefore it would be difficult to understand why she would form a strong view about what was largely a technical presentation."**

The Employment Tribunal examined the contents of the questions put to the candidates by the interview panel and concluded that they did not disadvantage the Appellant nor, having regard to the way the case had been put, had they been conceived so as to expose her weaknesses (see paragraph 5.130).

26. In the Judgment there follows on from that paragraph a detailed examination of the reasoning of each panel member (see paragraphs 5.134 to 5.141). That reasoning resulted in all the panel members concluding that the Appellant was not appointable, concluding that two candidates were appointable, and being left with some disagreement as to the appointability of the third. There was a practical difficulty about the best candidate in that she was not able to start when the new course started in November. She would only be available from the New Year. This appears to have provoked a discussion about whether two people could be appointed, and ultimately the outcome was that it was decided a second person was justifiable. So in the end the top two candidates were each offered a post. As the Tribunal say at paragraph 5.171 of the Judgment, that was not common for the Respondent, but it was certainly not unheard of.

27. As part of this detailed examination by the Employment Tribunal of the appointment process, which of course was made in relation to other allegations as well as those that are before us, the Employment Tribunal noted that the Appellant was critical of the behaviour of two members of the HR team, who were present either at the presentation or at the interview. She alleged that Ms Jennings, the same Ms Jennings who the Appellant had said commended her on the brilliance of her presentation, was particularly affectionate towards one of the candidates during the course of the presentation. Ms Jennings gave evidence. She denied that that was so. The Tribunal accepted her account (see paragraph 5.126). The Appellant also alleged that there had been communicative gestures between Ms Welch from HR and Professor McGuire during the interview. The Employment Tribunal concluded that there was no objective evidence on which they could find that assertion was true (see paragraph 5.156 of the Judgment). It is only necessary for the reader to go back and note the number of sub-paragraphs that we are quoting from to realise what a thorough forensic examination of the selection, presentation and interview process this was by the Employment Tribunal.

28. It is right to say that some parts of the Judgment of the Employment Tribunal are perhaps less easy to understand than others, that some parts of the Judgment appear difficult to connect in some instances to other parts of the thread. That is entirely to be expected in a long judgment of this kind. Sometimes it is not possible even with the most careful attention to detail to be absolutely transparent and lucid at every point of a long judgment. And of course the pressures upon the Employment Tribunal, and in particular upon Employment Judges to produce these judgments amongst the other work that they have to do, are well known. We mention these things because some part of the criticisms that have been addressed to us on behalf of the Appellant suggest that the Tribunal has stopped short, or fallen short, of carrying through its extensive factual material to a reasoned conclusion. It is to that that we now turn.

29. The Appellant's case before the Employment Tribunal was the interview had been a sham, as was the feedback she was given after it, which was to the effect that she had not demonstrated an inability to teach on the MSc, did not have a clear and viable strategy for future research, and in her presentation had not addressed how her research and teaching would contribute to the department's profile. The case was put in terms of age discrimination, race discrimination, harassment, and victimisation. We are only concerned with the latter. It is, however, not completely irrelevant to the issue of victimisation that the Tribunal was unable to discern any facts that supported allegations of direct race discrimination or, for that matter, age discrimination.

30. In the context of victimisation, the Appellant was critical of the procedure adopted and, in particular, of the participation of Professor McGuire and Professor Newburn in the appointment process. She also complained about Professor Stevenson. Various shortcomings in his role were pointed to, in particular the failure to consult the non-departmental member of the shortlisting team. Be that as it may, and it seems difficult to be too critical, since Professor Stevenson did actually put the Appellant on to the shortlist, the Tribunal in the face of these allegations gave itself extensive directions as to the law, starting at paragraph 6.1 at page 37 and continuing to paragraph 6.29 at page 64.

31. As will be understood from remarks we made at the start of this judgment, at least part of the self-direction on victimisation might be regarded as unsound. This is what forms the basis of what is now ground 1 of the grounds of appeal. The long paragraph 7 of the Judgment, which is headed "Conclusions", is a mixture of findings of fact, some of which are inferential, and of some reasoning, which might properly be regarded as conclusions. Having regard to the narrow scope of this appeal, it is by no means necessary to consider all of them. In one sense the fundamental finding is at paragraph 7.60, where the Tribunal say:

> **"We should note that the explanations in relation to all the allegations apply equally to the direct discrimination and harassment claims as they do to the victimisation claim. For the reasons we will confirm, the explanations advanced were in no sense whatsoever because of race or age, or related to race or age, or related to the protected act."**

It is both necessary to emphasise that and also not lose sight of it amongst the many points of detail raised on this appeal.

32. Another important finding is in the first sentence of paragraph 7.65, where the Employment Tribunal accepts that the burden of proof shifted to the Respondent in respect of the failure to appoint the Appellant to the post of lecturer. That paragraph is worth quoting in full.

> **"As regards allegation 2, which concerns the failure to appoint the claimant to the position, we do accept that the burden shifts. There is ample evidence of Prof McGuire, Prof Newburn showing concern about the appointment of the claimant. They did not want her to be shortlisted. It is not possible to escape the fact that they had in mind the background relevant to the claimant, this is illustrated by the reference to the breakdown of trust. This shows that the history was in their minds. Part of that background included a protected act. It is a possibility, therefore, that the protected act was something that they had in mind. On that basis we could draw an inference. We could conclude that part of the conscious or subconscious reason was the protected act. We could conclude that it was more than a trivial part. It would be difficult to say that we could conclude that it was the entire reason. Nevertheless, it need only be a substantial reason and that is possible, the burden shifts."**

33. The Employment Tribunal then embark on a reflection on the situation, which starts at paragraph 7.66 with the statement that the situation is unusual. Then the Tribunal says in the second and third sentences of paragraph 7.66:

> **"The respondent's employees were entitled to conclude that there had been a serious breakdown of the relationships within the department such that further employment in that department by the claimant could prove problematic. We do not have to, and the respondent witnesses did not have to, reach any conclusion as to the reason for the breakdown or the truth behind any allegations in order to acknowledge that there were such genuine and legitimate concerns."**

34. There, we think the Employment Tribunal must be taken to have accepted that there was a genuine and honest belief in a serious breakdown in relationships. The further discussion at paragraph 7.67 and 7.70 relates to the difficulty of constructing any alternative selection procedure not involving members of the department, who would know nothing of the history.

35. At paragraph 7.71 there is a discussion about "the perceived breakdown of trust". As the Employment Tribunal concluded, that did not arise in this case within the confines of an employment relationship, because that had ended in 2010. The lack of trust was making it difficult for the employment relationship to be resumed. Also, the Employment Tribunal was prepared to accept that there might be "a fear of litigation in a situation where there has been previous litigation." The Employment Tribunal directed itself at paragraph 7.72 that it needed to consider what the reasons for non-appointment were and ask whether a part of those reasons was that the Appellant had done a protected act, namely brought proceedings alleging discrimination against the Respondent. The Employment Tribunal concluded at paragraph 7.73 that the failure to be appointed would amount to a detriment so far as the Appellant was concerned.

36. At paragraph 7.74 this appeared:

> **"...For the allegation of victimisation we consider someone in the same circumstances as the claimant but who had not undertaken a protected act. In such circumstances there would still be concern about appointing someone where there had been an apparent breakdown of trust. What could be different potentially would be the question of the concern about future litigation. It is difficult to resolve this question in isolation from the third question which is the reason for this behaviour. What we have to ask is why the alleged discriminator acted as he or she did. What was the reason conscious or unconscious of the relevant employee or employees. It is a subjective test; causation is the legal conclusion."**

37. The Employment Tribunal then makes this single sentence statement at paragraph 7.75:

> **"As regards the second allegation what we are concerned with is the reason for not selecting the claimant."**

38. Then, at paragraphs 7.76 and 7.77 they go on to stand back and consider the Claimant's case. They say:

> **"When standing back and considering this, what the claimant is asking us to find is that there was a set intention not to employ her and that this then dictated the respondent's actions. It is said it is illustrated by the wish not to shortlist by Prof McGuire and Prof Newburn and thereafter it was illustrated in a pre-judged and sham recruitment procedure."**

The following paragraph, 7.77, reads:

> **"We do accept that the respondent considered various options including pulling out of the appointment process altogether. However, the chair of the selection committee [Professor Stevenson] and the department members [Professor McGuire and Professor Newburn] took the view that the appointment must proceed. In the end, the respondent followed its normal procedure."**

39. Then, at paragraph 7.8, the Tribunal concluded that it had been reasonable to follow the normal procedure, that a fair process had been applied, that there had been "no manipulation specifically designed to demonstrate weakness of the claimant", that the Appellant had performed badly in the interview, that she did not meet the "relevant essential selection criteria", and that she was "demonstrably unappointable." All that is set out at paragraph 7.79.

40. The Tribunal say that "unappointability" was the reason for her detrimental treatment at paragraph 7.83. It is lengthening this Judgment, but we think it is essential to quote paragraph 7.83 in full:

> **"The fact that the department members did not wish to shortlist her and had reservations about the effect of a breakdown in trust, and the fact that there may have been other individuals in the school who felt she should not be appointed at all, does not lead us to conclude that the selection process was anything other than transparent and fair. It is unclear what the respondent would have done if the claimant had been appointable. It would no doubt have had to consider the matter. However, she was not appointable and that is where the matter ended. Therefore, the reason why she was not appointed was because she was unappointable having regard to the objective evidence obtained in a fair procedure. In our view, that is an answer to the allegation of victimisation. If it were not, then it would be difficult to see how a respondent could proceed in a case such as this without going to the extreme of ensuring that the entire process was conducted by individuals with no knowledge**

> **of any background. We think that would be going too far and would present its own difficulties. There must be a balance in a case of this sort where the claimant applies to work in a department where her history will be known, the respondent must still be able to draw on the expertise of that department to ensure that the most appropriate candidate is appointed as if it cannot, there is a serious risk of unfairness to candidates in general."**

41. They go on at paragraph 7.84 to say this:

> **"Having members on the panel who know of the relevant history and who have concerns about the appointment may lead to the burden shifting, but it does not prevent the respondent showing that the reason for failing to appoint was the proper and legitimate outcome of the competitive process."**

42. That, so far as we can see, is the decision that the Employment Tribunal made on the issue of victimisation. It is that decision which Ms Zeitler attacks on behalf of the Appellant. Her first ground, set out in paragraphs 5 to 9 of the skeleton argument that Mr Dyal put before Judge McMullen and in her own skeleton argument, which expands on it whilst at the same time adopting and embracing Mr Dyal's skeleton argument/grounds of appeal essentially is that the Employment Tribunal has erred by adopting a three-step approach, as might have been regarded as necessary by the wording of the **Race Relations Act 1976**.

43. Under that statutory regime, the approach dictated by Parliament in section 2 of the **Race Relations Act 1976** requires consideration of the circumstances relevant for the purposes of the Act, requires less favourable treatment than in other circumstances the employer would treat or does treat other persons, and all of that must be by reason that the victim has done a series of things that now we call protected acts and which included in the 1976 Act bringing proceedings under that Act. So, submits Ms Zeitler, the concept of less favourable treatment and a comparator could be regarded as an essential component of the previous law. It is arguable, as this Tribunal suggested in **Woodhouse v West Northwest Homes Leeds Ltd** UKEAT 0007/12/SM, looking at paragraph 83, that what Lord Nicholls had to say in the case of **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 1 meant that

well before 1 October 2010, when section 27 of the Equality Act took effect, Tribunals were placing less and less emphasis on comparison, but now, since section 27 has been enacted, Ms Zeitler submits that there is no room at all for a comparative exercise. Section 27 is, as we have said earlier, accurately set out by the Employment Tribunal and its effect, as we have explained earlier, is accurately summarised at paragraph 6.12 and 6.13 of the Judgment. The Tribunal then go on to cite **St Helens Metropolitan BC v Derbyshire** [2007] IRLR 540 in the House of Lords at paragraph 6.14 of the Judgment and in the quotation select paragraphs 37, 40 and 41 of the Judgment, which refers to what Ms Zeitler described as a three-step approach. Paragraph 40 of the Judgment identifies the second question as focussing upon how the employer treats other people. This is where things start to go wrong, submits Ms Zeitler.

44. At paragraph 7.57 of the Judgment, the Employment Tribunal have constructed a hypothetical comparator for the case of direct discrimination. That of course is unexceptionable, but at paragraph 7.74they have come back to the concept of a comparator in the context of victimisation under section 27. They do so in the first sentence, directly echoing the first sentence of paragraph 40 of the judgment in **Derbyshire**. They say:

> **"The second question we have to ask is how the employer would treat other people."**

They then go on to consider "someone in the same circumstances as the claimant but who had not undertaken a protected act." They go on to discuss that, ending up, as will be remembered from the earlier citation of this passage, with the statement that the test is subjective and causation is the legal conclusion.

45. Having introduced the concept, Ms Zeitler points out that at paragraph 7.89 they in effect end with it by saying this:

> **"Having regard to the reasons given above, and the identification of the explanation given by the respondent, there is no need for the tribunal to revisit the question of the relevant comparator and we take the view the comparator is adequately identified as above."**

This, submits Ms Zeitler, is a manifest error and that we should consider paragraph 84 of the Judgment of this Tribunal in **Woodhouse**. There this Tribunal said:

> **"We wonder to what extent a comparison might ever illuminate the question posed by section 27 of the [Employment Act] as to whether an employee has been subjected to a detriment by the Respondent because s/he has done a protected act?"**

46. That, in a sense, is a rhetorical question and in the course of argument we pointed out that in the rest of paragraph 84 of what was said by this Tribunal in **Woodhouse** there emerges a distinction between this case and **Woodhouse**. In the latter, the Tribunal had focussed clearly on a comparator but had fallen into the trap identified by Lord Scott at paragraph 72 of his speech in **Khan v Chief Constable of West Yorkshire** [2001] UKHL 48 of making a comparison between groundless complaints of race discrimination and groundless complaints of a different variety. It was therefore the case in **Woodhouse** that the Employment Tribunal had used what was described as an "analytical tool" of "an unhelpful comparison to answer a question that required no comparative analysis in any event". Here, the Employment Tribunal have not, it is true, as Ms Zeitler accepted in the course of her submissions, focussed very clearly on the characteristics of the so-called comparator, but they have introduced the species, and having introduced it, she submitted they have thus confused their thought process. This is, submitted Ms Zeitler, not a case of the kind referred to by HHJ McMullen at paragraph 9 of his Judgment on the preliminary hearing quoted above, and we are not in the territory identified by the Court of Appeal in **Dobie v Burns International Security Services (UK) Ltd** [1984] IRLR 329 where one could say that the Employment Tribunal had been plainly and unarguably right as to the outcome. What we have here, she submitted, is a plain misdirection. Whether the Tribunal is plainly and unarguably right in its conclusion is the right question. Only if it is

plainly and unarguably right, notwithstanding the misdirection, can the decision survive. In this case, Ms Zeitler submitted that the Tribunal's Judgment on this issue cannot be characterised as plainly and unarguably right in its conclusion notwithstanding the fact that they never really constructed a comparator, as is demonstrated by paragraph 7.20 and 7.21, the fact they say they are focussing on the reason why, both in those paragraphs, 7.20 and 7.21, and in answering the question what was the reason why at paragraph 7.83, and concluding that the burden had shifted, as they note at various points of the Judgment. They are reaching those conclusions through a confused thought process, which has been obscured by the introduction of a comparator.

47. Ms Palmer submitted that it was quite clear that although they had, as it were, flirted with the concept of a comparator, they had never really used that as an analytical tool in this case. They had in paragraph 7.20 and 7.21 looked at the issue from the point of view of what was the reason why the decision not to appoint had been made. That, above all, is exemplified by paragraph 7.83, submitted Ms Palmer, and by 7.84 where they are in effect saying the burden has shifted but the Respondent has shown that the reason was a proper and legitimate outcome of the competitive process.

48. We accept Ms Palmer's submissions on this point. In our judgment this is not a case like **Woodhouse** where the Tribunal went wrong, and severely wrong, on the question of introducing a comparator to the point of actually using a comparator that was of no utility whatsoever and reached a conclusion from it. In any event, as will be understood from a broader reading of the **Woodhouse** case, that was but one of a number of points in the case and in the end the case turned on the question not of the comparator but whether the conclusion as to grievance was a conclusion that was sustainable on the facts of the case. None of that is relevant to this case, which depends upon the Tribunal having gone wrong in relation to a

comparator. At paragraph 85 of **Woodhouse** the division of this Tribunal presided over by me deals with the submission that had been made by the respondent in an effort to defend the Employment Tribunal's decision. It was said that the findings of fact of the Judgment had transcended any difference in concept as between the two statutory provisions and that the correct destination had been reached even if the route might have wandered slightly off course. Whilst of course that was what counsel had said there, it seems to us a reasonable way to view the current case. Does the Judgment at paragraph 7.83 in particular transcend any difference in concept as between the two statutory provisions? We take the view that it does. On the factual material, has the Tribunal reached the correct destination? In our judgment, it has. Even if there was a wobble somewhere along the route, it did not prevent them from concluding that the reason why this had happened was that it had happened because of the outcome of the competitive selection procedure, which had been conducted in good faith. Accordingly, the first ground of appeal cannot succeed.

49. The second ground relates to the Tribunal having stopped short of considering all the possibilities. At paragraphs 14 and 15 of Mr Dyal's skeleton argument at page 105, he had asked whether a logical way of approaching the task would be to pose the hypothetical question: if the Appellant had been deemed to be the strongest candidate, would she have been appointed and, if not, why not? He said that the Tribunal had refused to engage with this question at 7.83. He acknowledged at paragraph 15 it was a difficult question to answer, but that what had happened is that the Tribunal had run away from it. Ms Zeitler, in our judgment very wisely, did not seek to pursue that analysis. It seems to us that it founders on the findings of fact made by the Tribunal. It would be no help in this case at all to ask what might have happened if she had been appointable when, on the facts, it was found that she was not appointable. Ms Zeitler therefore stepped back from the way that it is put in this second ground of appeal in the skeleton argument/grounds of appeal to what I think she regarded as the firmer

ground of arguing that what had happened is that the Tribunal had stopped short of considering the possibilities. The possibilities, she said, sprang from paragraph 7.20 and 7.21. 7.20 ends with the sentence "The possibility, therefore, arises that the protected act was part of the conscious and/or subconscious reasoning or thought processes of all or some of those individuals who knew about it." And the last sentence of paragraph 7.21 is "We do accept that their conclusion was multilayered as described above." Her complaint was that the Tribunal had never followed that up. They had been rather tentative at paragraph 7.65 where they had referred on three occasions to the possibility of drawing an inference: "On that basis we could draw an inference."; "We could conclude that part of the conscious or subconscious reason was the protected act."; "We could conclude that it was more than a trivial part." In our judgment, the Employment Tribunal there are simply doing no more than expressing the very well known approach to the shifting of the burden of proof, namely that there must be not simply a difference of treatment, but the potential for an inference to be drawn that the reason for that treatment was an unlawful discriminatory reason. This is set out both in **Igen v Wong** [2005] IRLR 258 and in **Madarassy v Nomura International Plc** [2007] IRLR 246. The emphasis is placed, particularly by Mummery LJ in the latter case, on the use of the word "could". There is no warrant, we think, for going back into those cases to look at well established principle, but paragraph 6.3 of the Judgment sets out the Annex to **Igen v Wong** and paragraph 5 emphasises the word "could".

50. In our judgment, contrary to Ms Zeitler's submission, as we have possibly foreshadowed in an earlier part of this Judgment, we regard paragraph 7.83 not as a point of departure but as a terminus. It is the end of the reasoning process of the Employment Tribunal. They have reached a conclusion that the reason why she was not appointed was because she was unappointable having regard to the objective evidence obtained in a fair procedure. In our view that is an answer to the allegation of victimisation. What led to paragraph 7.83 and for that

matter 7.84, which we think is very much to the same effect, is, as Ms Palmer has submitted, a very full analysis of the selection procedure.

51. It is, we accept, an unrealistic criticism of the Judgment of the Employment Tribunal to say that it had not considered other alternatives, particularly since no other alternative has been postulated either before the Employment Tribunal or both this Tribunal. 7.83 was the end of the journey. It was a conclusion arrived at after a careful analysis of the material and it was, in our judgment, an entirely correct destination, one that is beyond challenge in this appeal. Accordingly the second ground of appeal will be dismissed.

52. The third ground is that covered by paragraphs 16, 17 and 18 of Mr Dyal's skeleton argument, now standing as the grounds of appeal. It is entitled "the concession/pleading point". The submission made by Ms Zeitler in this context has a similarity to the submission that she made in relation to the second ground of appeal. There is, she submits, an intrusion of this concept of a breakdown in trust and confidence into the thought process of the Employment Tribunal, which reveals them wandering off point and being confused as to what it is they are actually supposed to be deciding. This is an error that betrays itself, submits Ms Zeitler, in paragraph 7.66 where we have, in the context of the shifting of the burden of proof, what is, at first sight, an unconnected remark about this being an unusual situation, and then, in the second sentence, the conclusion that the Respondent's employees were entitled to conclude that there had been serious breakdown of relationships within the department.

53. It is difficult, perhaps, to place that into context. Ms Palmer's submissions did, however, set an overall context for the way which this aspect of the case had come into it. As can be seen from paragraph 4 of the Judgment, on the first day of the hearing there started to emerge an issue about what the scope of the case was to be. By the time that oral evidence had started on

the third day of the hearing, it had proceeded no further than the first question asked in cross-examination, when the problem emerged as something that the Employment Tribunal had to deal with. It was dealt with by a Judgment which is quite properly very briefly identified in paragraph 4, but which we understand to have been a full oral Judgment. No written Reasons have ever been asked for and therefore we have no record of what happened. Nor do we need one. The concession, as it has been called, appears to have been that whilst it was not accepted there was predetermination of the Appellant's application, no non-discriminatory reason was being put forward to justify any predetermination were such to be found. It is recorded at paragraph 4. It is set out in a shorter form in paragraph 16 of the skeleton argument as being "The only reason advanced for rejection of the Appellant's application is that she was not suitable for appointment".

54. The context was that there had emerged on disclosure all of the communications passing between various employees of the Respondent, to which we have referred above and from those communications, it had become apparent that there was, if not a determination that the Appellant should not be appointed, at least a strong sentiment to that effect from at least one person and, arguably, as we have set out earlier in this Judgment, from more than one person. The issue before the Employment Judge and his colleagues was whether the Respondent might be allowed to explain that. Apparently, it was submitted by the Appellant that she could rely upon the material that had emerged and that the Respondent should not say anything about it. Not surprisingly, the Employment Tribunal did not accept that. The outcome was that the thinking of the employees, who took a strong view that the Appellant should not come back to work in the department, could be explored.

55. Thus it was that this so-called trust and confidence aspect of the case came into it. In short, what the Tribunal was doing, particularly at paragraph 7.65 and 7.66, was exploring the

Respondent's reasons, on the one hand, and the Appellant's argument that certain of the employees were acting in bad faith, on the other. We have commented that it is perhaps, at some points in the Judgment, not always easy to understand what it is that is being said. Paragraph 7.66 might be thought to be one of them. But paragraph 7.66 can be explained on the basis that the Employment Tribunal was simply finding, in the context of the shifting of the burden of proof, that, in particular, Professor McGuire and Professor Newburn, and, to a lesser extent, others such as Mr McClelland, had a genuine and honest view that it would be a bad thing for the employee to come back to work in the Social Policy department from the point of view of working relationships in that department. Looking at the matter overall, we accept that is what the Tribunal are getting at there.

56. It is therefore, in our judgment, not a fair criticism to say that the Tribunal allowed this to intrude to the extent that it confused the issue and that it involved some sort of conflation of two different concepts. Indeed, on the contrary, it seems to us that the Tribunal had it very much in mind that what they had to do was to decide the reason why the Appellant was not appointed. They concluded that it was not because Professor McGuire or anybody else associated with the appointment was acting in bad faith and was deliberately seeking to exclude the Appellant because she had brought proceedings against the Respondent. The Employment Tribunal found that was not the reason. In our judgment that is what is said in terms at paragraph 7.83 and 7.84 and that is also an answer, not simply to the second point, but also to this third point. We will also, therefore, dismiss the third ground of appeal, and the result is that the whole appeal will be dismissed.