Appeal No. UKEAT/0487/12/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 October 2013
Judgment handed down on 7 February 2014

Before

HIS HONOUR JUDGE HAND QC

MS K BILGAN

MR T STANWORTH

VEOLIA ENVIRONMENTAL SERVICES UK — APPELLANT

MR M GUMBS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL CLARKE (of Counsel) Instructed by: Reynolds Porter Chamberlain LLP Tower Bridge House St Katharine's Way London E1W 1AA
For the Respondent	MR JOHN DITCHBURN (of Counsel) Instructed by: Pattinson & Brewer Solicitors 4th Floor 11 Pilgrim Street London EC4V 6RN

SUMMARY

RACE DISCRIMIANTION

Inferring discrimination

Burden of proof

The submission that both **Madarassy v Nomura International plc** [2007] ICR 867 and **Hewage v Grampian Health Board** [2012] ICR 1054 support the proposition that an Employer should not have the burden of proof reversed and be required to give a non-discriminatory explanation for its conduct in demoting an employee or denying the employee an opportunity to qualify to do different work where inconsistent explanations as to the reason for demotion had been given and an unacceptable account of knowledge of the ambition to qualify had been given could not be accepted. Whilst the substance of the explanation should be excluded from consideration when deciding whether the burden of proof should be reversed the fact that explanations had been given which were inconsistent could be taken into account. When an account of lack of knowledge as to the employee's ambition to qualify for different work had been contradicted by other evidence that was a factor to be considered in deciding whether the burden of proof had shifted.

HIS HONOUR JUDGE HAND QC

Introduction

1. This is an appeal from the judgment of an Employment Tribunal, comprising Employment Judge Nash, Ms Christofi and Mr Wightman sitting at London South over two days in April 2012 with a day of deliberation in Chambers on 1 May 2012. The judgment was sent to the parties on 18 June 2012. The Respondent to this appeal (he was the Claimant below and we will refer to him as "the Claimant") succeeded in his complaint of direct race discrimination but failed in respect of his complaints of harassment and victimisation. He has been represented by Mr Ditchburn of counsel. The Appellant, the Respondent below (who we will refer to as "the Employer"), has been represented by Mr Clarke of counsel. In November 2012 there was a remedies hearing and the Claimant was awarded compensation of £6.500.00. There has been no appeal against that award.

Issues

2. The broad issues in the case are whether the direct discrimination claim was out of time and whether or not there had been direct discrimination. There are three specific issues. Firstly, this case raises again what continues to be a persistent difficulty in equality cases, namely whether the conclusion reached by the Employment Tribunal that there was sufficient evidence from which an inference of race discrimination could be drawn so as to shift the burden of providing a non-discriminatory explanation to the Employer was sound. This issue was addressed by Mr Clarke in his grounds of appeal and in the oral submissions in terms of misdirection, perversity and inadequacy of reasons. Secondly, whether the Employment Tribunal, in concluding that the Employer had not discharged the burden of proof and had not provided an explanation negating race discrimination in the context of a specific incident relating to the Respondent changing the Claimant's duties, had reached a perverse conclusion.

Thirdly, whether the Employment Tribunal erred in concluding that there was a continuous act of discrimination as opposed to two separate incidents, the first of which would be time barred.

3. Because one possible permutation of the resolution of those issues might be that the appeal would be allowed in part some difficult questions could arise as to the disposal of the appeal. There might also be questions as to how the remedies decision was to be dealt with, given that there was no appeal against it.

The findings of fact

4. The Claimant, who is of black ethnic origin, started working for the Employer in 2003 as an agency worker and sometime after that he became an employee. His job description was that of "sweeper/loader". For most of the time he worked with a driver on a vehicle collecting rubbish. The type of vehicle is described at paragraph 15 of the judgment as "a caged vehicle". The method of work was for the driver and his colleague, apparently called the "loader" or "side hand" to go around the streets collecting sacks of rubbish, which they threw into the caged area. A Mr Billy Rose drove the vehicle.

5. In 2008 Mr Kidd became the street cleansing manager. Apparently he did not meet the Claimant until 2009, when there appears to have been a stormy incident. Later there were allegations that Mr Kidd had used racist language. There were differing accounts as to what exactly happened. The Employment Tribunal analysed the evidence carefully and concluded at paragraph 21 of the judgment that Mr Kidd did not use racist language on that occasion.

6. In April 2009, as the Employment Tribunal found at paragraph 22 of the judgment, the Claimant was transferred onto work on a street barrow for three days. There appears to have been no doubt that it was Mr Kidd, who instructed the Claimant to come off the caged vehicle,

and work alone on foot with the barrow as a street sweeper (see below). The more subtle question was whether he was simply communicating a decision made at a higher level or whether he had some direct input into the decision making process. It also appears to have been accepted that there was a budget cut at this time and in particular a cut in the street cleansing budget. The reason advanced by Mr Kidd as to why the Claimant was moved off the vehicle and onto the street was that he was the only "loader" working with a driver. Accordingly, in order to save cost, the Claimant was allocated these other duties.

7. At paragraph 26 of the judgment the Employment Tribunal examined what it characterised as inconsistencies in that reasoning. Firstly, the Claimant's evidence was that in fact Mr Rose was not sent out alone. Although the Employment Tribunal seems to have been prepared to assume that this second man might have been a driver displaced from his vehicle as a result of the budget cut, the truth of this issue was never resolved by the Employment Tribunal. Secondly, the Claimant asserted that Mr Kidd had said there needed to be two drivers on the caged vehicles. Thirdly, the short duration of the Claimant's work with the barrow, namely three days, was explained firstly on the basis that the budget cuts had been cancelled, secondly that the Council was unhappy with the reduction in street cleaning and thirdly, but probably linked to that, there had been complaints from the public and from members of the Council. The Employment Tribunal observed in the last sentence of paragraph 27:

> **"As the Claimant was only moved to the barrow for three days, on the Respondent's case the Council must have changed its mind due to the increased litter in the town centre within three days."**

8. There was a yet further reason advanced by the Employer for the change, namely that the Claimant had been put back onto the caged vehicle on the instructions of a manager "as a favour to a former employee". The Employment Tribunal remark that this was "very odd", although nothing more is said about it. Moreover, there appears to have been an inconsistency

as to who had made the decision to move the Claimant from the caged vehicle and then, three days later, put him back onto the caged vehicle. Mr Kidd had accepted responsibility for this in his written evidence but in his oral evidence he had said that it was another witness, a Mr Ratib, who was responsible.

9. At this point in the factual narrative, the Employment Tribunal make no specific findings of fact as to what had actually happened but at paragraph 55, when discussing the application of the law to the facts, it refers again to the differing reasons for the move and connects that aspect of the case to the other major theme:

> **"The Tribunal then considered the Respondent's reasons for placing the Claimant on a barrow for three days. The Tribunal had found that the Respondent had provided a superfluity of reasons for putting the Claimant onto the barrow and then taking him off again. The Tribunal had noted that not all of these reasons were consistent. Accordingly, the Tribunal was not satisfied that the Respondent had provided any satisfactory evidence for its conduct. The Respondent's evidence was internally inconsistent and the Tribunal found it unconvincing. The Tribunal accordingly found that the Claimant had been taken off the caged vehicle and put back on again - after he had made a further request to be a driver - for no obviously good reason."**

10. The other major theme is that the Claimant had a relatively long-standing ambition to become a driver (see paragraph 16 of the judgment), something which the Employment Tribunal concluded was also in the interests of the Employer (see also paragraph 16 of the judgment). The reference to "a further request to be a driver" in the last sentence of paragraph 55 quoted above addresses a hitherto unresolved factual matter raised at paragraph 23 of the judgment where the following appears:

> **"Prior to this event the Claimant had asked Mr Kidd if the Respondent would fund him to take his LGV licence to permit him to be assessed as a driver. The Claimant's evidence was that Mr Kidd refused him stating money issues. Mr Kidd denied this conversation and his evidence was that he was always unaware that the Claimant wanted to drive. The Claimant's evidence was that Mr Kidd had said words to the effect that "you are sweeper and that's all you are going to be." Mr Kidd denied this conversation. However, the difficulty for the Claimant was that he asserted that this conversation happened in September or October 2010 when, if it happened at all, it must have been April 2009. Accordingly, the Claimant's recollection of this event was imperfect at best and not in line with his pleaded case."**

It might be thought from the last sentence that the Employment Tribunal was not accepting the Claimant's account but it seems to us from the last sentence of paragraph 55 quoted above at paragraph 9 that the Employment Tribunal did accept that a request had been made by the Claimant to be a driver before the barrow incident had occurred and also that the Employment Tribunal regarded the barrow incident and the requests to qualify as a driver to be connected.

11. A thread running through the narrative of this case is the relationship between the Claimant and Mr Kidd and the requests by the Claimant to become a driver were a continuing theme in that relationship. The matter is addressed again at paragraph 31 as follows:

> **"The Claimant's evidence was that in 2010 he again asked Mr Kidd to have the Respondent pay for his taking his LGV licence and Mr Kidd refused on the grounds of financial necessity. Again Mr Kidd denied these conversations and said that he continued to be unaware that the Claimant wished to drive."**

Obviously paying for LGV training or even allowing the Claimant to be trained in-house had cost implications and at paragraph 32 of the judgment the Employment Tribunal accepted that the Claimant or someone on his behalf had also asked a Mr Fontaine, another manager, about being trained for an LGV licence and that Mr Fontaine had refused on financial grounds.

12. But Mr Kidd did not accept that he had ever been involved in any such discussions. It was Mr Kidd's position that throughout the entire period under consideration he had never discussed this with the Claimant. He said that he had been unaware of the Claimant's ambition. The Employment Tribunal rejected that and expressly found that Mr Kidd was aware all along of the Claimant's ambition. This conclusion is expressed in these terms at paragraph 36 of the judgment:

> **"In making this decision, the Tribunal was influenced by the fact that they did not accept Mr Kidd's evidence that he was unaware that the Claimant wanted to drive. The Claimant had stated that he wanted drive on all his annual assessment (sic). Mr Kidd gave evidence that he was unaware of those assessments; however, evidence was given that these assessments went to**

the managers. Further, Mr Kidd stated that all of the sweepers wanted to drive and this was inconsistent with his evidence that he had no idea Claimant wished to drive."

13. The topic arises again at paragraphs 37 to 39 of the judgment where the Employment Tribunal considers what happened at a supervisors meeting in April 2011 when, as we understand it, it is common ground that there was a "discussion of a shortage of assessed drivers". The Employment Tribunal found at paragraph 39 that during the course of the meeting Mr Kidd said that "whilst I still have a hole in my arse" the Claimant would not be trained as a driver.

14. What happened next was that the Claimant was trained in his own time and at his own cost and he passed the LGV test. He then presented his licence to the Employer as a first step to being assessed. The Claimant needed to be assessed because without assessment he could only drive lighter vehicles even though he had an LGV licence. The evidence was that requests for assessment were rarely refused (see paragraph 61 set out below at paragraph 26 of this judgment).

15. Whilst the Employment Tribunal did not accept that Mr Kidd had been become angry when he discovered the Claimant had obtained a licence and was presenting it to the Employer, despite Mr Kidd's denial, it found that the Claimant did ask for an assessment. He did not get an assessment. Mr Ratib, who attended, subject to a witness summons, and gave evidence, said that he had arranged for a Mr Murray in the Refuse Department to give the Claimant an assessment but Mr Murray had been told by Mr Kidd that if Mr Murray assessed the Claimant then he would have to take him into his department. The Employment Tribunal accepted that had happened (see paragraph 35 of the judgment).

16. Eventually in early May 2011 whilst Mr Kidd was on holiday, a man called Andy Churchill, who was both an assessor and a trade union representative, assessed the Claimant and passed him "with flying colours". The Employment Tribunal noted that there was a contemporary e-mail from Mr Churchill about Mr Ratib, who had asked him to do the assessment, in these terms:

> **"J Ratib asked me to do a driving assessment on Marlon Gumbs. J said thanks but please do not tell Dave Kidd I raised this or asked you to do it because he will have a go at me because he does not want him to drive."**

17. The upshot of all this is the finding of fact at paragraph 41 in these terms:

> **"Based on all the evidence above, the Tribunal made a finding of fact that Mr Kidd did know that the Claimant wanted to drive, if not from the moment that he started work with the Respondent in 2008, then certainly by November 2010 and very probably before then. The Tribunal was bolstered in its conclusion by the fact that many witnesses made reference to the fact that it was widely known that the Claimant wanted drive."**

18. So, armed with his LGV licence and an approved assessment, the Claimant started to drive. When Mr Kidd discovered this there appears to have been a confrontation, although the Employment Tribunal accepted that it was the Claimant who was rude. He raised a grievance. It was dismissed on 29 June 2011 by a manager, Mr Beach, who had the unenviable record of not having upheld any one of the forty grievances that he had heard. The Claimant's appeal was turned down on 16 November 2011; we know nothing as to the success/failure rate of appeals. The Claimant had by then commenced proceedings in the Employment Tribunal; his complaint was presented on 8 September 2011.

19. During the course of its examination of the factual history relating to these two incidents the Employment Tribunal made a number of findings, which rejected aspects of the Claimant's account. Furthermore it had considered a number of other incidents, put forward by the Claimant as evidence of direct discrimination but it did not regard any of them as significant in

terms of race discrimination. We have not set them out but we have kept in mind that the Claimant's account on a number of matters was rejected.

The ET's self direction as to law

20. At paragraphs 49 and 50 of the judgment the Employment Tribunal directed itself in terms of the "two stage" approach identified by the Court of Appeal in **Igen Ltd and others v Wong** [2005] ICR 931 and **Madarassy v Nomura International plc** [2007] ICR 867. It said at paragraph 49 that it "*must consider whether a Claimant has proved facts from which in the absence of any other explanation the Tribunal could decide that the employer has discriminated contrary to the statute.*" This meant that in order for the claim to succeed the Claimant must get beyond the first stage of proving "primary facts from which an inference of discrimination could be drawn" and thus shift the burden to "the employer to provide a non-discriminatory explanation for the treatment in question".

21. The Employment Tribunal also reminded itself (at paragraph 50) that "the burden of proof does not simply shift where a Claimant can show a difference in race … and a difference in treatment ; this only indicated possibility of discrimination which is not sufficient to shift the burden". Something more is required namely that there must be facts which could potentially amount to an act of discrimination. All the evidence is relevant in considering this, including evidence adduced by the employer. Both parties accept, as so do we, that this is a perfectly correct statement of the law.

The Employment Tribunal's reasoning

22. The Employment Tribunal rejected the Claimant's case that he had been discriminated against as a result of allegations made about items of furniture; this seems to have been principally because there was no difference in treatment as between the Claimant and another

employee against whom the same allegation was made and who was of white ethnic origin (see paragraph 56). Nor did the Employment Tribunal find any discrimination in relation to the Respondent's refusal to train the Claimant or pay for him to be trained to obtain an LGV licence. There was no business need for this and the Employment Tribunal did not think that it was advantageous to the Respondent to bear the cost of the Claimant being trained (see paragraphs 57, 58 and 59).

23. Nor did the Employment Tribunal find that the Claimant's treatment during the grievance procedure or its outcome amounted to adverse or different treatment. The Employment Tribunal concluded that there had been a thorough grievance investigation and hearing and no evidence that any person from a different ethnic background would have been treated differently. Moreover Mr Beach had never upheld any grievance for anyone. Therefore, there was also no difference in treatment on that basis.

24. But the Employment Tribunal concluded that in relation to being required to work on a barrow for three days the Claimant had suffered a detriment within the meaning of that concept as explained in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337. This was because the Employment Tribunal accepted that working with Mr Rose was "a more congenial environment for the Claimant personally" than working on the street with a barrow. At paragraph 55 (set out above at paragraph 9 of this judgment) the Employment Tribunal reached a conclusion that despite a number of explanations, not all of which had been consistent, given by the Respondent for requiring the Claimant to work on the street with a barrow, there was "no obviously good reason" as to why that had happened.

25. The Employment Tribunal then turned to the question of assessment in the period between November 2010 and May 2011. Having already found that the Respondent and Mr

Kidd were well aware of the Claimant's wish to drive, at paragraph 61 the Employment Tribunal summarised the factual position as follows:

> **"The Claimant was prevented or failed to be assessed to drive despite the fact that most witnesses accept that a driving assessment was rarely refused. Mr Kidd in effect prevented Mr David Murray from assessing the Claimant. Mr Kidd stated at the April 2011 supervisor's meeting the Claimant would not be permitted to drive as long as he had "a hole in his arse."**

26. This led the Employment Tribunal to the conclusion at paragraph 62 that "Mr Kidd actively prevented the Claimant from being assessed … between November 2009 and 10 May 2011". The Employment Tribunal went on to say that the Claimant was not subjected to any detriment after May 2011, from which we would infer that the Employment Tribunal had concluded that to have prevented the Claimant from being assessed did amount to a detriment. At paragraph 63 the Employment Tribunal said:

> **"… The Respondent's failure to have the Claimant assessed made no sense. The Respondent had a shortage of drivers, as shown by the supervisor's meeting in April 2011 and their having on their books a number of agency drivers. Further, it did not make operational sense for the Respondent to fail to assess a member of staff as a driver as he could then not be as useful to them as cover for overtime, sickness, holiday and general unforeseen circumstances. Put simply, it was in the Respondent's interest to have as many assessed licensed drivers as possible to increase the flexibility of their workforce."**

27. What then was the reason for the difference in treatment? The Employment Tribunal concluded at paragraph 65 of the judgment that in respect of each incident there was no good reason and that "*indeed the evidence suggested the opposite*". In relation to the Claimant being taken off the caged vehicle, put onto the barrow to do street work and then put back onto the caged vehicle within the space of three days, the Employment Tribunal rejected the explanation put forward by the Respondent. Likewise in relation to the failure to assess the Claimant as a driver the Employment Tribunal had found Mr Kidd knew about the Claimant's wish to drive. Indeed, at paragraph 66, the Employment Tribunal found his denial of any knowledge of the Claimant's ambition to be untrue. Nor was the explanation of the failure to assess being due to

the lack of any business need made out. Nor had the case been argued on the basis that this was irrational dislike (the Employment Tribunal use the words "*caprice or malice*" at paragraph 67 of the judgment) of the Claimant by Mr Kidd but not race discrimination. Nor had any evidence been adduced to demonstrate that Mr Kidd had behaved in the same way to others. During the course of this discussion at paragraph 67 the Employment Tribunal gave itself this reminder:

> **"… if the reason for differential treatment is a reason which is to the employer's discredit but is not is (sic) itself unlawfully discriminatory, this may constitute a good defence to a discrimination claim."**

28. But if there was no such contention and no "*good evidence of the reasons for differential treatment*" then the Employment Tribunal concluded (also paragraph 67):

> **"… that in respect of the barrow demotion and the failure to refuse or assess the Claimant to drive, the burden of proof shifted to the Respondent. One of the factors that the Tribunal took into account in reaching this conclusion was that Claimant had been subjected to two separate acts of differential treatment for which there was no good reason and, indeed, in respect of which they had rejected the Respondent's evidence."**

29. Then at paragraph 68 the Employment Tribunal reached its conclusion on whether that burden had been discharged and it did so in these terms:

> **"The Tribunal considered the Respondent's explanation. The Tribunal had found these explanations wanting. The Tribunal had not accepted the Respondent's reasons for demoting the Claimant to the barrow and then changing its mind. The Tribunal had rejected the Respondent's reasons for failing to assess the Claimant to drive. Accordingly the Tribunal found that the Respondent was unable to discharge the burden placed upon it."**

This led to the conclusion at paragraph 69:

> **"… that the Respondent had discriminated directly against the Claimant because of his race in that it had demoted him to work on a barrow for three days in 2009 and had prevented him from being assessed for LGV driving between November 2010 when he had obtained his licence and May 2011."**

30. In relation to whether or not the claim had been made in time the Employment Tribunal noted that neither of the incidents had occurred within the three-month period ending with the date of presentation of the claim form on 8 September 2011. Thus the Employment Tribunal had to decide whether these were two separate incidents or whether they represented:

> **"… an ongoing situation or continuous state of affairs as opposed to a succession of unconnected or isolated specific facts as set out in *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96."**

In both instances Mr Kidd had been involved. The Employment Tribunal concluded that this was a continuing act for the purposes of section 123(3) of the **Equality Act 2010** ("the Act"):

> **"… because the same person was responsible for them and because they both related to the status of the Claimant's work and the Claimant's requests to drive."**

31. But that did not solve the limitation problem because the Claimant was driving by 10 May 2011, at the latest, and therefore his claim should have been presented by 9 August 2011 or earlier. So the filing of the claim was still one month after the expiry of the statutory time limit. The Clamant had argued that the Employment Tribunal should exercise its discretion under section 123(1) of the Act to extend time on the basis that it was just and equitable to do so. The Employment Tribunal reminded itself at paragraph 74 of the judgment that time limits "*are intended to apply strictly*". Guided by **British Coal Corporation v Keeble** [1997] IRLR 336 the Employment Tribunal set out the factors that are relevant in any consideration under section 33 of the **Limitation Act 1980** and directed itself in those terms at paragraph 75 of the judgment.

32. Having done so the Employment Tribunal reached the conclusion (at paragraph 76 of the judgment) that the delay of one month was unlikely to affect the cogency of the evidence. The Employment Tribunal accepted that most of that evidence had already been assembled and

considered in the grievance hearing and in the subsequent internal appeal hearing so any difficulties over the lapse of time had already occurred by May 2011. The earliest that a claim could have been made would have been in late 2010 when he was first refused an assessment to drive and, therefore, given that the barrow incident had already occurred, it had to be accepted that the Claimant knew the facts giving rise to the cause of action. But the Employment Tribunal was minded not to be critical of the Claimant because he had attempted "to solve his problems by continuing to seek an assessment rather than immediately starting legal proceedings" (see paragraph 77).

33. So far as taking advice was concerned he had placed the matter in the hands of his trade union. It had been assumed by the union that the time limit ran from the date of the rejection of the grievance rather than from the time that the Claimant had started to drive in early May 2011. The Employment Tribunal considered the case of **Chohan v Derby Law Centre** [2004] IRLR 685 and concluded that the trade union error should not "be visited on the Claimant" and that it was therefore just and equitable to extend time. The Employment Tribunal also took into account that the Claimant had attempted to solve matters by an internal grievance procedure. The Employment Tribunal also took account of the merit of the case and that in the case of a meritorious claim the prejudice to the Claimant was likely to be greater than to the Respondent.

The submissions

34. In relation to the shifting of the burden of proof Mr Clarke made three submissions; firstly, that the Employment Tribunal had misdirected itself; secondly, that it had reached a perverse decision; thirdly, that the decision on this point was inadequately reasoned.

35. As to misdirection, Mr Clarke submitted that although the Employment Tribunal had correctly directed itself at paragraph 50 of its judgment it had then failed to apply that direction

correctly to the factual situation. He relied on paragraphs 30 and 31 of the judgment of Lord Hope in **Hewage v Grampian Health Board** [2012] ICR 1054 and on paragraphs 57 and 58 the judgment of Mummery LJ in **Madarassy v Nomura International plc** as supporting the correctness of the Employment Tribunal's self direction at paragraph 50 of the judgment. Having reminded itself that a difference of race and a difference of treatment were not, of themselves, sufficient material from which to draw an inference of race discrimination the Employment Tribunal had ignored that self direction and proceeded to regard them as sufficient. It had concluded the burden of proof shifted to the Respondent without there being any material from which an inference of discrimination might be drawn in the absence of further explanation. There were no "primary facts" either in relation to the barrow incident or in relation to refusal of, or delay in, giving a driving assessment to the Claimant from which the Employment Tribunal could have reached the inferential conclusion that race discrimination was potentially an explanation.

36. What is needed, submitted Mr Clarke, is some explicit evidential material that potentially explains the difference in race and that difference in treatment in terms of discrimination on the grounds of race. He submitted that a good illustration of evidential material upon which an inference leading to the shifting of the burden of proof could be founded was provided by considering the facts set out in paragraph 19 of the judgment; if, instead of finding that no such words had been used, the Employment Tribunal had concluded that Mr Kidd had called the Claimant a "black c---" that would be a primary fact from which such an inference could be drawn. The approach that should be taken was illustrated by the judgment of the Inner House of Session in **Fire Brigades Union v Fraser** [1996] IRLR 697 (particularly the factors set out at paragraph 6) and the judgment of a division of this Tribunal in **B (and another) v A** [2010] IRLR 400 (particularly paragraphs 22 to 25).

37. In relation to the barrow incident the primary facts relied on by the Employment Tribunal were the ethnicity of the Claimant, the fact that he had been moved to other work, the fact that he had been moved back to this work on the caged vehicle within three days, that the Respondent's explanation for that transfer and its reversal had been rejected and that this was one of two acts under consideration, both of which appeared to involve Mr Kidd. Accepting (without prejudice to his position on perversity, as to which see below) all these matters as well founded, Mr Clarke submitted that the Respondent's explanation should not have been relied upon at "Stage 1" and that a finding on a balance of probability of race discrimination could not arise as an inferential conclusion from them.

38. Likewise, in relation to the refusal of an assessment or the delay in providing an assessment, a finding of "caprice or malice" on the part of Mr Kidd was not sufficient. There must be some factual material that could potentially give rise to the inferential conclusion that the reason for Mr Kidd's conduct was not simply dislike of the Claimant but might be by reason of race discrimination. Moreover the fact that he had been involved in both incidents either taken by itself or together with the other factual aspects of this course of conduct could not form a basis for drawing the inference. Mr Clarke accepted that a proper inferential conclusion in respect of one of the two incidents might be cross-referenced to the other incident, at least in theory. But if no such inferential conclusion could be drawn in either case, then the fact that there were two instances and not one instance was not a basis for an inferential conclusion; two times zero is zero not two.

39. He submitted that paragraphs 99 to 101 of the judgment of a division of this Tribunal presided over by Elias J (then the President) in the case of **Bahl v The Law Society** [2004] IRLR 799 had firmly disposed of the argument that unreasonable conduct by itself can lead to the drawing of an inference. Mr Clarke accepted that unreasonable treatment can be part of the

analysis but submitted it cannot licence an Employment Tribunal to move from unreasonableness to race discrimination without some other dimension. Perhaps there need not be very much more in some cases; in **Igen v Wong** itself the additional factors identified in paragraphs 44 and 49 of the judgment might not have been very pronounced but Mr Clarke submitted that the Court of Appeal had not supported the concept that an inference of discrimination might arise from only a difference of race and a difference of treatment. There needed to be something else.

40. Secondly, with respect to the shifting of the burden of proof, in respect of both incidents Mr Clarke submitted that to have concluded, as did the Employment Tribunal, that the burden of proof had shifted was a decision that no reasonable tribunal properly directing itself could have arrived at on the evidence. Thirdly, in this context, He also relied on inadequacy of reasoning.

41. Mr Clarke's second main submission took issue with the conclusion in relation to the barrow incident that the explanation given had not discharged the burden of proof. The Employment Tribunal had failed to consider Mr Kidd's evidence that by taking the Claimant off the caged vehicle he was creating a saving. In fact there was no difference in treatment because the Claimant was the only person assisting a driver. He was in a unique position because he was the only "loader" or "side-hand" who had been moved. Mr Clarke's attack on this finding was that it was one no reasonable Employment Tribunal properly directing itself could have reached on the evidence. In other words the conclusion that the Employer had not proved a non-discriminatory explanation in connection with the demotion was perverse.

42. Mr Clarke's third submission related to the issue on limitation. It was that the Employment Tribunal simply erred by regarding the two acts as being connected and extending

over a period. They were two years apart and for that reason alone cannot be said to be "a continuing act" in the sense of being the same act extending over a period of time. Moreover, Mr Kidd was only peripherally involved in the barrow demotion and the evidence had been that his instructions came from superior managers. Thus his involvement was not the same in the first incident as it was in the second; this demonstrated that there was not one act extending over a period but two separate and disconnected acts.

43. Mr Ditchburn on behalf of the Claimant emphasised the correctness of the self direction given by the Employment Tribunal and that the Employment Tribunal had found a series of primary facts; firstly, that the Claimant had been demoted, which constituted a detriment; secondly, there was no explanation as to why that had happened; thirdly; the explanations advanced had been rejected; fourthly, the Claimant had been prevented from undertaking a driving test assessment, which made no sense and all attempts to explain that had been rejected; fifthly; the Claimant is black; and sixthly, no other person had received the same treatment.

44. He submitted that a proper consideration demonstrated the fallacy inherent in the Employer's submission. The Employment Tribunal had not simply relied on unreasonable conduct but had been entitled to conclude that, where there is apparently no good reason for differential treatment and a number of false explanations for differential treatment have been given, then that can give rise to an inference of discrimination. As to whether the burden of proof should have shifted in respect of the Claimant being moved onto the street barrow work, Mr Ditchburn submitted that this was all really a question of fact and that there was no error of law.

45. He argued that the allegation of perversity was really putting the alleged misdirection point again in a different guise and, in any event, was just an attempt to re-argue factual

findings that had been open on the evidence. Furthermore there was no inadequacy of reasoning. The reasoning is perfectly well set out; indeed, it is sufficiently clearly set out so as to enable the employer to make the criticism that the Employment Tribunal has misdirected itself and/or has made a decision that no reasonable tribunal properly directing itself could have made on the evidence. This shows that the employer knows perfectly well why it has lost and that is the litmus test for adequacy of reasoning.

46. As to limitation the Employment Tribunal did not make any error when it relied on the fact that the same person was responsible for both incidents and involved in both incidents. He relied upon the judgment of this Tribunal in **Moxam v Visible Changes Ltd** UKEAT/0267/11/MM MAA and in particular on paragraph 37 of that judgment. So far as the barrow incident was concerned the Employment Tribunal found that Mr Kidd had taken the decision himself. Therefore, it followed that, insofar as there had been evidence that the decision to demote had been taken at a higher level, it must be the case that the Employment Tribunal had rejected that evidence or, at least, had concluded that that Mr Kidd had played an active part in it. In short the Employment Tribunal had concluded that Mr Kidd's hand was in both and that each presented instances of discrimination by him over an extended period. On that basis it was open to the Employment Tribunal to find that this was a continuing situation.

Discussion and conclusion

47. The topic of how to address the difficulties of proving discrimination can be traced from the seminal judgment of Neill LJ in **King v Great British-China Centre** [1992] ICR 516 (drawing adverse inferences without any reversal of the burden of proof) through **Glasgow City Council v Zafar** [1998] ICR 120 (unreasonable conduct is not, without more, evidence of discrimination), **Anya v University of Oxford** [2001] ICR 847 (the need for a thorough factual investigation of the facts and the reaching of reasoned conclusions as to the facts found), UKEAT/0487/12/BA

section 54A of the **Race Relations Act** (the statutory reversal of the burden of proof) and through the cases on the reverse burden such as **Igen v Wong** and **Madarassy v Nomura International** and on to **Hewage v Grampian Health Board**. All exhibit the same tension; how to recognise the difficulty of proving discrimination, on the one hand, whilst not at the same time stigmatising as racially discriminatory conduct which is simply irrational or unreasonable, on the other.

48. The solution proposed by the authorities is to require an explanation of conduct only where there is a basis for thinking that the conduct is potentially discriminatory. Even though it involves an extensive citation it is better to set out the actual words of Mummery LJ rather than attempt a paraphrase of the judgment in **Madarassy** discussing this point:

> **"54. I am unable to agree with Mr Allen's contention that the burden of proof shifts to Nomura simply on Ms Madarassy establishing the facts of a difference in status and a difference in the treatment of her. This analysis is not supported by *Igen Ltd v Wong* [2005] ICR 931 nor by any of the later cases in this court and in the Employment Appeal Tribunal.**
>
> **…**
>
> **56. The court in *Igen Ltd v Wong* [2005] ICR 931 expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicated a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.**
>
> **57. "Could… conclude" in section 63A (2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and of the reason for the differential treatment. It will also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal will need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment, evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5 (3) of the 1975 Act; and available evidence of the reasons for differential treatment.**
>
> **58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of adequate explanation only becomes relevant if a prime facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If it does not, the tribunal must uphold the discrimination claim.**
>
> …

69. ... The only factor which section 63A (2) stipulates shall not form part of the material from which inferences may be drawn at the first stage is the "the absence of an adequate explanation" from the respondent.

70. Although no doubt logical, there is an air of unreality about all of this. From a practical point of view it should be noted that, although section 63A (2) involves a two-stage analysis of the evidence, the tribunal does not in practice hear the evidence and the argument in two stages. The employment tribunal will have heard all the evidence in the case before it embarks on the two-stage analysis in order to decide, first, whether the burden of proof has moved to the respondent and, if so, secondly, whether the respondent has discharged the burden of proof.

71. Section 63 A (2) does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or the comparators chosen by the complainant or the situations with which the comparisons are made are not truly like the complaint or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant it was not on the ground of her sex or pregnancy.

72. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the complainant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prime facie case of discrimination on the proscribed ground. As Elias J observed in *Laing v Manchester City Council* [2006] ICR 1519, para 64, it would be absurd if the burden of proof moved to the respondent to provide adequate explanation for treatment which, on the tribunal's assessment of the evidence, had not taken place at all.

…

76. In my view, Mr Allen's submission goes further than *Igen Ltd v Wong* warrants. He argued for a presumed lack of an adequate explanation providing "a material premise" for the reversal of the burden of proof. The "absence of an adequate explanation" may, he said, be the only basis on which the tribunal could infer that a significant ground for the treatment of the complainant was a proscribed one.

77. In my judgment, it is unhelpful to introduce words like "presumed" into the first stage of establishing a prime facie case. Section 63A (2) makes no mention of any presumption. In the relevant passage in *Igen Ltd v Wong* … the court explained why the court does not, in the first stage, consider the absence of an adequate explanation. The tribunal is told by the section to assume the absence of an adequate explanation. The absence of an adequate explanation only becomes relevant to the burden of proof at the second stage when the respondent has to prove that he did not commit an unlawful act of discrimination. In *Igen Ltd v Wong* the court did not go so far as to say that there was "a statutory presumption that there was no adequate explanation" for the respondent's treatment of the complainant and that there was therefore discrimination on a proscribed ground and that this presumption alone caused the burden of proof to move to the respondent.

…

79. I do not accept Mr Allan's submission on the construction of the expression "in the absence of an adequate explanation" or his criticisms of Elias J in *Laing* [2006] ICR 1519. It seems to me that the approach of Elias J is sound principle and workable in practice. This court should approve it. No alteration to the guidelines in *Igen Ltd v Wong* is necessary."

49. In the latest and highest authority on the subject, **Hewage v Grampian Health Board** [2012] ICR 1054 at paragraphs 30 and 31 of the judgment of the Supreme Court Lord Hope refers to "paras 56 and following" and specifically quotes parts of paragraph 70 and paragraph 77 of the judgment of Mummery LJ in **Madarassy** and then says this at paragraphs 31 and 32:

> **"31. … The assumption at that stage, in other words, is simply that there is no adequate explanation. There is no assumption as to whether or not a prime facie case has been established. The complainant must proved facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. So the prime facie case must be proved, and it is for the claimant to discharge that burden.**
>
> **32. The points made by the Court of the Appeal about the effect of the statute in these two cases could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J (President) pointed out in *Martin v Devonshire Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."**

50. The finding of direct discrimination at paragraph 69 of the judgment (see above at paragraph 29 of this judgment) related to the demotion in 2009 and the preventing of the Claimant's driving being assessed between November 2010 and May 2011. Mr Clarke submitted that the same misdirection applied to the both, although in each situation the error was different. The misdirection was to regard a difference in status and a difference in treatment as sufficient to shift the burden of proof. In the context of demotion he submitted that the Employment Tribunal had wrongly taken its perception of the inadequacy of the explanation into account. In the context of the driving assessment the Employment Tribunal had wrongly concluded that the fact no "*caprice and malice*" explanation had been put forward by the Employer could be taken into account in deciding whether the burden of proof had shifted.

51. This appeal illustrates that, despite the judgments of the Court of Appeal in **Igen v Wong** and **Madarassy** and the judgment of the Supreme Court in **Hewage**, which suggests that no further guidance is to be expected, shifting of the burden of proof to the Employer remains a difficult and controversial topic. Mr Clarke submits that both **Madarassy** and **Hewage** support the logic of his analysis that the Employer here should not have been required to give a non-discriminatory explanation for its conduct in putting the Claimant onto street barrow work and not allowing his driving to be assessed in the usual way. As to the former, the Employment

Tribunal should not have considered any of the reasons for that demotion at that stage; as to the latter something more was required than evidence of an unreasonable approach to assessment by the manager.

52. Mr Clarke gave as an illustration of what evidence beyond the difference of status and difference of treatment might tip the balance and reverse the burden of proof. If the manager here had been found to have called the Claimant "a black c…", which the Employment Tribunal found had not happened, then the burden of proof would have shifted.

53. If one thinks at all of the burden of proof in such circumstances then our reaction would be that, of course, the burden of proof would shift in the circumstances of such a remark having been made. But the reality is that it would not be necessary to consider the burden of proof; the remark is at one and the same time, both axiomatically discriminatory and inexplicable in non-discriminatory terms. As the then President, Underhill J, said at paragraph 39 of the judgment **Martin v Devonshires Solicitors** it is important not to make too much of the burden of proof provisions, a sentiment with which Lord Hope clearly agreed in **Hewage**. Sometimes consideration as to whether the burden of proof has shifted is entirely artificial.

54. If an Employment Tribunal concludes that something did not in fact happen then it is artificial to consider whether the burden of proof has been reversed (see paragraph 64 of the judgment of a division of this Tribunal presided over by Elias J in **Laing v Manchester City Council** [2006] ICR 1519). Likewise, where the Employment Tribunal concludes that a blatantly discriminatory remark has been made the exercise of solemnly considering whether the burden of proof has been reversed is otiose.

55. But that choice of example by Mr Clarke does not diminish his argument; there may be better examples. It does, however, illustrate why, the logical attraction of the argument notwithstanding, we think the criticisms made by Mr Clarke should be approached with caution and even circumspection. The example given may not be useful in terms of considering how the burden of proof should be shifted but as a specimen of the genus of additional material, which when added to difference of status and difference of treatment, tips the balance and reverses the burden of proof, it has the worrying characteristic that it is blatantly discriminatory. It would be a retrograde step if there had to be something obviously and blatantly discriminatory before the burden of proof was reversed.

56. Mr Ditchburn submitted that not very much may need to be added to a difference in status and a difference in treatment in order to shift the burden of proof. We think that is the right approach. The "industrial jury" analogy might appear to be a little threadbare in modern times but we think Employment Tribunals should be wary of treating the burden of proof provisions (and the judicial decisions explaining them) as such a rigid template that the forensic approach of an Employment Tribunal to evidence becomes different to that of other fact finding first instance tribunals. Mr Clarke submits that the Employment Tribunal, having directed itself that it was to take no account of any explanations then fell into error by taking them into account.

57. But the fact of inconsistent accounts as to why something has happened have for many years, if not centuries, been regarded as a basis from which inferences can be drawn by tribunals of first instance. The statutory provisions as to the reversal of the burden of proof and the jurisprudence, which has grown up around them, exclude actual consideration of the substance of the explanation but if the fact that there have been a number of inconsistent explanations or reasons put forward is to be excluded from consideration as to whether the

burden of providing a non-discriminatory explanation should pass to the Employer (and the Claimant's case, therefore, fail at that stage) then the Employment Tribunal has been put into a strange position in contrast to other courts and tribunals that have to make factual findings. We can see no basis for excluding from consideration the fact that there have been a number of differing and inconsistent reasons advanced for particular behaviour. Therefore, in this appeal we do not accept that the Employment Tribunal erred by taking into account that there had been differing and inconsistent explanations advanced by the Employer when deciding that the burden of proof had been reversed. It is the fact of the inconsistency that is being included not the explanations themselves.

58. Mr Clarke's criticism of the Employment Tribunal in relation to the refusal to assess his driving so as to allow him to be considered for driving jobs is not that the Employer's explanation was taken into account but that the Employment Tribunal had concluded that the burden of proof shifted because the manager had behaved unreasonably and shown antipathy towards the Claimant. Malice alone is not enough submitted Mr Clarke, even where it is quite virulently expressed and appears irrational.

59. In our judgment this submission takes too narrow a view of the evidential horizon of this case. The Employment Tribunal was struck not just by the malice or the strength of sentiment, which it found as a fact the manager had expressed in terms of the permanence of the configuration of his anatomy (see paragraph 36 to 39 of the judgment referred to above at paragraphs 12 and 13 of this judgment) but by the fact that the manager professed to be completely unaware of the Claimant's driving ambitions, something which the Employment Tribunal rejected as being untrue (see paragraph 36 of the judgment discussed above at paragraph 12 of this judgment). We cannot think of any other tribunal or court of first instance where the professed lack of knowledge of a witness as to a state of affairs having been rejected

as untrue that would not be regarded as something, when added to other factors, capable of being the basis for an adverse finding in the absence of some explanation by the witness for his or her conduct. Lies alone cannot condemn and they may be capable of being explained but an explanation is called for. It would be a remarkable restriction placed on Employment Tribunals to say that they are in a different category to all other tribunals. We think that neither the statute nor the authorities require such a conclusion.

60. But Mr Clarke's submits that even if the manager did not tell the truth about his knowledge of the Claimant's ambition the lie here reflects nothing more than "caprice or malice" and takes the issue of potential discrimination no further. In our judgment this ignores what the Employment Tribunal emphasises at paragraph 67 of the judgment (see above at paragraph 27 of this judgment) that it had never been suggested by the Employer that "caprice or malice" was the basis of the conduct.

61. Whilst the shifting burden of proof is essentially a legal construct decisions about it are likely to be matters of fact. As such, issues as to whether the burden of proof has or has not shifted are likely to be fact sensitive and we do not think this Tribunal should interfere except in the clearest to case of misdirection or perversity. In the instant appeal we do not think that the Employment Tribunal misdirected itself as to either the demotion or the driving assessment.

62. Before we turn to the question of perversity, however, there is one final aspect of Mr Clarke's submissions on misdirection as to shifting the burden of proof that we should address. This arises out of the last sentence of paragraph 67 of the judgment:

> **"One of the factors that the Tribunal took into account in reaching this conclusion was that the Claimant had been subjected to two separate acts of differential treatment for which there was no good reason and, indeed, in respect of which they had rejected the Respondent's evidence."**

Mr Clarke's point is that the number of allegations cannot be added together to make a sum greater than the total of their parts. If an allegation, taken in isolation, should not result in a shifting of the burden of proof then the addition of it to another proposition adds no weight to that other proposition. His contention is that neither the demotion nor the refusal of a driving assessment were potentially discriminatory and zero plus zero is zero.

63. The mathematical basis of the submission is irrefutable and if we had agreed that neither proposition raised the issue of potential discrimination we would agree that to regard the burden of proof as shifting according to the number of allegations would be a misdirection. In the event we did not agree with his submissions as to either event. But as the appeal unfolded it became clear that one permutation might be to find that there had been an error or there was perversity in relation to one but not the other. Mr Clarke's submission was that to rely on something that had no discriminatory potential as not only reinforcing the conclusion to shift the burden of proof in relation to another allegation but also by reference to that other allegation to shift the burden of proof in relation to the former must be erroneous. Mathematically this can be expressed as zero plus one is one and not two.

64. Mr Ditchburn submitted that where there is a common thread that links different allegations this kind of mathematical logic gets in the way of the fact finding role of the Employment Tribunal. The answer to this was the same answer as applied to the limitation point, to which we will come shortly; where there is a personality common to different allegations then that can lead to a shifting of the burden of proof generally both in respect of those allegations that have inherent potential for discrimination and those, which taken in isolation, do not. We agree; the whole point is that where allegations are linked by a common

personality they do not stand in isolation. But this is a conclusion not necessary for the disposal of this appeal because we have found that, taken in isolation, each was correctly viewed by the Employment Tribunal as having inherent discriminatory potential.

65. Mr Clarke's alternative submission was that to have concluded the burden of proof shifted in respect of either the demotion or the failure to assess was a decision that no reasonable tribunal properly directing itself on the evidence could have reached. We cannot see how characterising this as perversity is really approaching the matter from an additional perspective, which is significantly different from his misdirection analysis above. In any event, the findings made were, in our judgment, open to the Employment Tribunal on the evidence before it.

66. Nor do we think that the judgment of the Employment Tribunal on this aspect of the case was inadequately reasoned either in terms of the approach of the Court of Appeal in **Meek v Birmingham City Council** [1987] IRLR 250 or in terms of the Employment Tribunal Rules and **Greenwood v NWF Retail Ltd** [2011] ICR 896. We thought that Mr Ditchburn made a telling point in this context when he submitted that the judgment was coherent enough to enable the Employer to argue that there had been a misdirection and we believe the judgment very clearly states why the Employment Tribunal regarded the burden of proof as having shifted.

67. Mr Clarke made two further points. Firstly he argued that in connection with the demotion the Employment Tribunal had reached a perverse decision in concluding that the Employer had failed to give an adequate explanation. His main criticism of the judgment in this regard was that the Employer's accounts were not really conflicting. The manager had only been peripherally involved and decisions had not been taken by him but at a higher level, the Claimant was the only one who could be placed onto the street barrow and, although there was

no finding about this, the street barrow team must have been redeployed elsewhere, thus making a saving. Moreover policies can change within a matter of days. Attractive though some of this sounded, the Employment Tribunal had looked into this carefully and in detail. They had concluded that some of the explanations did not make sense and that there were inconsistent accounts. In the end we have concluded that Mr Clarke's skilful argument is really just a siren call for us to rework the evidence and reach our own conclusion. In our judgment the matter does not cross the high threshold of perversity. The Employment Tribunal were entitled to reach the conclusion that here had been no adequate explanation on the evidence before it and on the facts found.

68. Finally, Mr Clarke submitted that the Employment Tribunal had erred in concluding that the demotion incident and the failure to give the Claimant a driving assessment constituted an act extending over a period. In consequence the Employment Tribunal had adjudicated on both incidents when they should have only considered the latter. They were different in type, the manager had scarcely been involved in the former and the two matters were at some distance chronologically.

69. Mr Ditchburn relied on paragraph 37 of the judgment of a division of this Tribunal presided over by HHJ McMullen QC in **Moxam v Visible Changes Ltd** UKEAT/0267/11/MM MAA; he said:

> **"Having decided that Mr Wood made those remarks to or in the presence of the Claimant, which were events of race discrimination and racial harassment in June and July, it is hard to see why it would not consider the April event to be part of that regime. We accept Mr Ward's point that, at least, in respect of these three matters, they are all the same. They are all of language demonstrating the contempt Mr Wood had for people of different racial groups, said in the presence of the Claimant."**

Whilst we think that the above is not so much a statement of principle but rather an analysis of the particular factual matrix of that case, it does illustrate that if there is a common thread then it may be open to the Employment Tribunal to regard the act as having extended over a period. It seems to us that the real question here is whether the Employment Tribunal was entitled to regard Mr Kidd, the manager, as a common thread. Having found as a fact that the manager had been involved as a decision maker (see above at paragraph 46 of this judgment) it seem to us to have been open to the Employment Tribunal to regard him as a common thread connecting the two incidents by making decisions adverse to the Claimant in respect to of each. This was sufficient to justify the finding that this was, in effect, his act, extending over a period and the Employment Tribunal did not err in reaching that conclusion.

70. Accordingly the appeal will be dismissed.