Appeal No. UKEAT/0322/12/GE

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 June 2013

Before

HIS HONOUR JUDGE SEROTA QC

DR B V FITZGERALD MBE LLD FRSA

MRS L S TINSLEY

X APPELLANT

Y RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS NABILA MALLICK (of Counsel) & MR L R OGILVY (Representative) Ogilvy & Ogilvie Associates 253 McLeod Road London SE2 0YJ
For the Respondent	MR CLIVE SHELDON (One of Her Majesty's Counsel) & MR EDWARD CAPEWELL (of Counsel) Instructed by: DMH Stallard Solicitors Gainsbrough House Pegler Way Crawley RH11 7FZ

SUMMARY

RACE DISCRIMINATION – Direct

SEX DISCRIMINATION – Burden of proof

The Employment Tribunal found that the Claimant had been unfairly dismissed on the basis of 10 or so breaches of the implied term of trust and confidence. Although in the circumstances the Employment Tribunal on the same findings 'could' have concluded that the Claimant had established a prima facie case of discrimination on the grounds of race, it dismissed that claim. The ET did not stand back to look at the cumulative effect of all of its findings and did not adequately explain how it came to accept that the detriments/less favourable treatments were not discriminatory.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. I proposed to refer to the parties as follows 'XX' is the Claimant, 'YY' I refer to as the Respondent. I do so by reason of anonymity orders that have been made. I have received no submissions asking me vary those orders so that anonymity will continue.

2. This is an appeal by the Claimant from a decision of the Employment Tribunal at the East London Employment Centre dated 23 January 2012 sent to the parties on 23 March 2012. The hearing was presided over by Employment Judge Ferris who sat with lay members. The hearing lasted some seven days and there were two days spent in chambers. The Employment Tribunal upheld the Claimant's claim that the she had been constructively dismissed but dismissed claims for race discrimination, harassment and victimisation.

3. The case was referred to a preliminary hearing by Mr Recorder Luba QC and at the preliminary hearing HHJ Hand QC referred the matter to a full hearing, save in relation to one ground in an amended Notice of Appeal.

The factual background

4. I take this largely from the decision of the Employment Tribunal. The Claimant is a lady of black African descent; I believe she comes from Zimbabwe. Her job entailed working with persons who were in the criminal justice system and identifying the extent, if any, to which they have participated in substance misuse. Her work would take her into custody areas of various police stations and courts. She was, I am told, the only black person involved in a project at which she was based at a police station in (I will call it, 'ZZ') so as to maintain its anonymity.

5. The Respondent is a health and social care charity which, among its other operations, works with persons who are affected by substance misuse. The Claimant's employment had transferred in April 2008 to the Respondent from her earlier employer whose business was smaller than that of the Respondent and was taken over by the Respondent.

6. To take matters fairly briefly and in chronological order on 3 April 2008 the Claimant sought arrangements whereby her hours could be flexible. She sought flexible working but this was refused. This was the second issued relied on by the Claimant as a detriment as identified by the Employment Tribunal. From 12 May 2008 until November 2008 there was an issue between the Claimant and the Respondent about who should bear the cost of a hepatitis vaccine which the Claimant reasonably required by reason of the conditions in which she was working and the persons with whom she was working. This was issue 3 as identified by the Employment Tribunal.

7. On 18 November 2008 the Claimant had cause to complain about very slow progress in harmonising the terms of her employment with the Respondent with those of her previous employment and there was a significant delay in attending to this matter. This again was a subject of complaint. In December 2008 a vacancy arose for the post of Acting Team Leader; this would have interested the Claimant but she was not called for interview whereas at least one other person who was white in similar circumstances was given the opportunity of being interviewed. This is issue number 1.

8. On 1 April 2009 the Claimant and her family were involved in a Social Services investigation in relation to a possible assault by the Claimant's husband on a child of theirs. The Claimant had telephoned the police claiming that she had been assaulted by her husband. The police reported the matter to Social Services who took no action. The matter was reported

to the Respondent although the Respondent never disclosed the matter to the Claimant. Unfortunately, and in the opinion of the Employment Tribunal, quite wrongly on 6 April 2009 the Social Services report about the Claimant was disseminated to various people including those persons who were her line managers and supervising her. In May 2009 the Claimant was required to complete a criminal records vetting form; she sent this to the police but refused to supply it to her employers.

9. The precise date is not known to me but it would appear that in May 2009 the Claimant had wanted to be provided with a personal alarm; this is detriment number 4. The Employment Tribunal was satisfied that her working conditions were unsatisfactory, she was working close to the custody toilets which were frequented by drug addicts, there was no CCTV and there was no surveillance; this is issue 5.

10. On 20 July 2009 the Claimant was suspended and this suspension was disclosed to other staff; this is issue 8. She resigned with effect from 20 July. The Claimant maintained that her resignation was in fact caused by reason of breaches of contract on the part of the Respondent and in effect was a constructive dismissal; this is issue 9.

11. On 18 August 2009 the Claimant was invited to a disciplinary hearing; this is issue 12. The Claimant also alleges various incidents of post-termination victimisation and detriment including further dissemination of the Social Services documents which was described indeed by a senior member of the Respondent's management as being serious and unprecedented. There was no apology by the Respondent to the Claimant for the wrongful dissemination of these confidential documents.

12. The Claimant maintained that there were a number of protected acts. She had made a complaint to her line manager, Beverley Ball, in relation to the refusal to permit her to have flexible working. On 12 May 2009 during a supervision with another manager, Mr Perry, the Claimant complained that she was being treated differently to others in the project. On 18 November 2005 she issued a joint grievance with a Mr Penrose, one of her colleagues. Her resignation letter of 20 July, which was before she was aware of the disciplinary proceedings was also relied upon as a protected act.

13. I turn now to the decision of the Employment Tribunal. The Employment Tribunal defined the issues, it directed itself as to the law. No issue was taken as to the way in which it directed itself as to the law on victimisation and harassment. In relation to the very important issue of the burden of proof in discrimination cases the Employment Tribunal directed itself thus at paragraph 11:

> **"In relation to the claim for direct discrimination we remind ourselves of the "Barton" guidelines. The Claimant must prove facts from which the Tribunal could conclude that less than favourable treatment on the grounds of her race may have occurred before the burden shifts to the Respondent."**

This is the two-stage test referred to in **Igen v Wong** [2005] ICR 931 and **Madarassy v Nomura** [2007] IRLR 246.

14. So far as constructive dismissal is concerned the Employment Tribunal gave itself a conventional direction, referring to **Western Excavating v Sharp** [1978] ICR 221. It also at paragraph 13 directed itself that it needed to look at the employer's conduct as a whole and referring to **Omilaju v Waltham Forest LB** [2005] IRLR 35.

15. The Employment Tribunal at paragraph 40 referred to the main witness for the Respondent, a Ms Beverley Ball. She became the Claimant's manager. She was described by

the Employment Tribunal as being a pleasant and intelligent witness. However, the Tribunal was unimpressed with her abilities as a manager. It concluded that the Respondent's poor management of the Claimant was the main reason for the Claimant's resignation and the end of the good work which the Claimant was doing and was capable of doing as a worker on the project.

16. The Employment Tribunal said that it reached its conclusions about the alleged acts of less favourable treatment and the related but not identical issues in relation to constructive dismissal; see paragraph 41. The Employment Tribunal then went through the various issues to which I have referred. In relation to the first issue at paragraph 45, this is the question of the job interview in which the Claimant was not permitted to make a late application but a white comparator, Miss Joanna Poole, was. The Employment Tribunal concluded:

> **"We cannot find that the Claimant was treated less favourably than her co-workers. The requirement was that applications be made by 1 December. Four people made applications by 4 December and all of them interviewed. It cannot be said that the Claimant was treated less favourably because her application having been received after 1 December it was accordingly discounted."**

17. At paragraph 55 the Employment Tribunal dealt with the second of the complaints that related to the refusal to permit the Claimant to work flexible hours. The Employment Tribunal had this to say about it:

> **"Accordingly we do not accept what Beverly Ball has said about this request for childcare variation in her evidence. If this had seriously impacted on the Claimant at the time, the Claimant would surely have raised it at the time, but the Claimant's email of 16 January 2009 makes it clear that she had resolved it herself and it was not a continuing issue in the sense that there was no continuing childcare issue. It is an example of management inefficiency. The inefficiency being Beverley Ball's failure to resolve a reasonable request made by the Claimant. In the absence of any tension created between the Claimant and the Respondent by a follow-up made by the Claimant at the time our conclusion is that there is here no evidence of less favourable treatment, even though there is evidence of inefficiency which prejudiced the Claimant."**

18. At paragraph 66 the Employment Tribunal dealt with the position so far as concerned the payment for the Hepatitis vaccine. The Tribunal made it clear it was not persuaded that there

was a case of racism as opposed to poor management. The Employment Tribunal noted that it was clumsy to overlook to the need to arrange for the vaccine and the Respondent owed the Claimant a duty to provide a safe system of work and it was probably a breach of that duty to fail to ensure appropriate vaccination. There was a breach of duty but again the Employment Tribunal said it was not racist.

19. At paragraph 67 the Employment Tribunal dealt with issues 4 and 5, failure to provide the Claimant with a personal alarm and failure to provide her with suitable off-site working conditions. The Employment Tribunal was satisfied that these allegations had been made out. I need not go into the reasons, however, it also concluded that there was no unfavourable treatment as a result. The Employment Tribunal noted that the effect of working in such circumstances was unfortunate and the Claimant had told her supervisor that at times she felt crushed by the negativity that could be present in the office and expressed continued concerns over that negativity.

20. However, the Employment Tribunal found that the same conditions applied to other workers in the team and there was no differential treatment of the Claimant; see paragraph 85. The Employment Tribunal from paragraphs 88 to 116 dealt with the disclosure by the Respondent of the details of the Social Services investigation. It was highly critical of how the Respondent came to disclose these matters and of its failure to provide support for the Claimant. It characterised the Respondent's treatment of the Claimant as both unreasonable and unnecessary, however at paragraph 116 the Employment Tribunal said:

> **"The Tribunal does not identify any evidence of less favourable treatment of the Claimant in this pre-termination disclosure. Beverley Ball's management of the Claimant was clumsy in the respects identified in these reasons but the Tribunal does not find that it was motivated by racism. We accept Beverley Ball's evidence to the extent that she denied any racial motivation in her mismanagement of the Claimant."**

21. At paragraph 131 the Employment Tribunal found that the Claimant had been correct to assert that the Respondent's breaches of duty had led to her resignation. This was described as the compounding effect of:

> **"- A failure to harmonise the post TUPE arrangements so as to give the Claimant the Cost of Living Allowance.**
>
> **- to procure the Claimant's vaccination.**
>
> **- the failure to procure an adequate personal alarm.**
>
> **- the general lack of support in and about January, February, March and April 2009 when the Claimant was substantially alone in the Claimant Suite at the front end of the DIP Project.**
>
> **- the disclosure of information in and about the Social Services investigation by Bev Ball without any appropriate steps to protect the Claimant.**
>
> **- the failure to provide the Claimant with any support in the aftermath of the conclusion of that investigation.**
>
> **- the clumsy treatment of the Claimant arising from the submission of the Vetting Form direct to the Police in circumstances where the Claimant's trust and confidence in the Respondent had clearly been exhausted.**
>
> **- and the meeting on the 15 July 2009 when final criticism of the Claimant of her "failures" drew the Claimant to resignation."**

22. In effect the Employment Tribunal found that the Claimant's assertions as to the treatment to which she had been subjected had been made out but, as is already apparent, the Employment Tribunal had not linked these to any less favourable treatment on the grounds of race. At paragraph 132 the Employment Tribunal said:

> **"In the judgement of the Tribunal the Respondent's repudiatory breaches (see the paragraph above) justified the resignation. The Tribunal's conclusion (on discrimination and the termination of employment) is that this constructive dismissal was not an example of less favourable treatment on the grounds of race. It was manifestly less favourable but it was the result of mismanagement by the Respondent, rather than racially motivated discrimination."**

23. At paragraph 135 the Employment Tribunal had this to say:

> **"It is the judgment of this Tribunal functioning as an industry jury that Ms Ball was guilty of poor management, rather than racism. However, one of the three members of the Tribunal did have reservations about Ms Ball's explanations for her treatment of the Claimant. The fact is that the Claimant was the only black person working at the ZZ Project, as well as being the only black African. The Claimant was an Outreach Worker working on her own in difficult and unpleasant conditions. Basic steps to protect and support her (the vaccination, the alarm, recruitment of co-workers, the business with Social Services investigation) were clumsily mishandled by the Respondent and it was necessary to examine Ms Ball's explanations for the management decisions made by her. One of the three members of this**

Tribunal felt that Ms Ball's explanations were only just convincing to persuade the Tribunal that there was no racial motivation for what might be seen as less favourable treatment."

24. The Employment Tribunal had clearly some initial difference of opinion but at paragraph 136 the Employment Tribunal unanimously, having noted Ms Ball's conduct on another occasion calling one of the Claimant's colleagues to account for racist language, this was found to be a key indication of the care taken by Ms Ball to deal appropriately with discrimination concluded I now quote:

"In the end the Tribunal's unanimous judgement is that in her dealings with the Claimant Ms Ball made poor management decisions but was not racists. This was the Tribunal's decision as an industrial jury, dealing with the a complicated case in which the Claimant was, with respect to her, unequipped to present and argue a nine-day trial against experienced employment counsel who was accompanied by a solicitor or legal officer on every day of the trial."

25. At paragraph 151 the Employment Tribunal summed up as follows:

"The Tribunal's conclusion is that poor management decisions were made in relation to the Claimant post termination of her employment. Those decisions were not motivated by racism. There was no direct discrimination. There was no harassment."

26. At paragraph 152 the Employment Tribunal dismissed the claims for victimisation and said as follows:

"As to the claim for victimisation, there is no doubt that the Claimant complained of discrimination. The Tribunal has found that there was no discrimination. There was no evidence before the Tribunal to connect these protected acts (or any of them) with the Respondent's treatment of the Claimant, and (as these reasons record) the Tribunal has not found discrimination."

27. I now turn to the Notice of Appeal. The first ground of appeal is that the Employment Tribunal failed to adopt a proper approach to the application of the law relating to discrimination. It is said in fact by the Respondent that it is largely an attempt to re-argue the facts. It is said that the Employment Tribunal fell into error in not establishing a comparator. There were comparators and in any event, as it seems to us, the authorities show that it is not

necessary to always have a comparator. It was submitted on behalf of the Claimant that as a result of failing to establish a comparator it was not possible for the Employment Tribunal to apply the reverse burden of proof in what was section 54A of the **Race Discrimination Act**. Ms Mallick submitted that the issue was not whether the treatment was racist but whether it was differential treatment on the grounds of her race. Again, it seems to us it is quite clear that although the language of the Employment Tribunal may have been infelicitous that is precisely what they were asking themselves.

28. By way of an example of the way in which Ms Mallick approached this matter we refer to what she had to say about the Employment Tribunal's findings at paragraph 42. This was in relation to the failure to invite the Claimant to interview for the post of Acting Team Leader. There were white comparators, such as Miss Poole and it was submitted by Ms Mallick that there was no adequate consideration of the two stage test and the facts that were found were sufficient to engage the second stage; it seems to us that this is an attempt to re-argue questions of fact.

29. Similarly in relation to Employment Tribunal paragraph 47 dealing with the refusal to permit the Claimant to work flexible hours she submitted that the facts standing on their own were sufficient to raise an issue that the Employment Tribunal could have concluded that the differential treatment was discriminatory and should have gone on to the second stage. Again, as with the first example we gave, this is an attempt to re-argue questions of fact and there was no reason for the Employment Tribunal to go on to a second stage in the absence of the Claimant having established the necessary factual prima facie case.

30. Ms Mallick went through, and would have been prepared to go through, each of the specific findings of fact because she maintained that looked at individually, and we stress the

'individually', the Employment Tribunal could be seen to have misapplied the law. It seems to us that Ms Mallick is inviting us to fall into the **Zafar** trap; that is to suggest that discrimination can be inferred simply on the basis of a difference in ethnicity between the claimant and a comparator and evidence of different treatment. [See **Zafar v Glasgow City Council** [1998] IRLR 36 and Elias J in **Law Society v Bahl** [2003] IRLR 640 at 93.] Ms Mallick would have been happy to have taken us through with similar arguments in relation to each finding of fact which she challenged.

31. The second ground of appeal was that the Employment Tribunal had failed to see any inconsistency between the Respondent's pleaded case and its evidence and that would have enabled it to conclude that there may have been discrimination. It was also said that the Respondent had never advanced an argument that the reason for the Claimant's treatment was bad management. Again, these are factual issues and it seems to us and do not raise an issue of law. It is said that the Employment Tribunal made no decision on the question of harassment or victimisation but as is apparent from the paragraphs which we have read out the Employment Tribunal did in fact specifically refer to both and found that there was no harassment and no victimisation; see paragraphs 151 and 152 to which we have already referred.

32. The fifth complaint is that there has been non-compliance with rule 30(6) of the Employment Tribunal Rules of Procedure and that as a result the reasoning of the Employment Tribunal is unclear; we will come onto that submission later in the judgment.

33. Ground six which related to perversity was dismissed by Judge Hand.

34. The final ground of appeal to which we will turn shortly is that the Employment Tribunal failed, having gone through individual complaints, to stand back as it should have done and

look at the totality of the evidence to see whether that informed the reason why the matters which it had investigated individually had been taken. We were referred by Ms Mallick to the case of **Fearon v Chief Constable of Derbyshire**, a decision in this Tribunal of HHJ McMullen QC UKEAT0445/02 in which there are citations from the leading authorities on cases involving proof of discrimination.

35. We are bound to say that although Ms Mallick was willing and indeed anxious to argue all the points individually, in fact although she was attacking individual findings she was also saying that the individual findings needed to be looked at in the light of all of the other findings. If they stood alone it would be difficult to interfere with those findings because they are findings of fact on evidence accepted by the Employment Tribunal. The purport of the submissions made by Ms Mallick was that the Employment Tribunal had not considered the cumulative effect of the various matters that it had accepted. It had not stepped back and looked at them cumulatively or in relation to the various breaches and it had not looked at them in the context of the other breaches.

36. Ms Mallick was on much stronger ground when she pointed out that it is by no means clear, as the Respondent has submitted, that the Employment Tribunal did stand back and look at matters cumulatively. In view of the large number of what were serious breaches of duty there was a need for full and careful explanation as to why the cumulative effect of those breaches [I refer to them as breaches because they have been found to be breaches of the implied duty of trust and confidence] did not give a flavour of discrimination generally. In particular, Ms Mallick pointed out that Ms Ball had put forward explanations which the Employment Tribunal had not accepted. Ms Mallick submitted also the Employment Tribunal had concentrated on the conduct of Ms Ball who, whilst she may have been the principal player, was one of a number of other people involved in the matters of which the Claimant complained.

For example in paragraph 135 the Employment Tribunal refers to Ms Ball's explanations. She, of course, was not the Respondent.

37. At paragraph 134 there is again a reference to Ms Ball. It was submitted that the Employment Tribunal had not taken on board the other players involved, including Ms Jenkins who was her line manager and Mr Perry, Mr Wright; see paragraph 74, Mr Evans; see paragraph 82. She also pointed out that her complaints were not necessarily against individuals but against a number of persons and drew our attention to the paragraph 83 which we have read out in which she complained about being crushed by the negativity in the office. There were other persons involved; see paragraph 88 including a Mr Crowley.

38. At paragraph 141 Ms Mallick drew our attention to the fact that a pack of documents involving the confidential Social Services document were sent to a number of managers. They included Mr Crowley, Fela George, Alison Levy, Perry Wright, Damon Evans, Jan Jenkins, Sarah Davis and Michelle Drury. These were all people who were in the Claimant's office and variously were involved in a number of the matters of which she makes complaint. And Ms Mallick again submitted that there was no attempt by the Employment Tribunal to consider the cumulative effect of post termination complaints either as a group or in connection with earlier issues and she submitted that it was not appropriate for the Employment Tribunal to have come to a conclusion on the cumulative effect of the matters of which she had complained prior to termination without also taking into account the matters that had occurred after termination.

39. At paragraph 135, where it will be recalled, the Employment Tribunal had found that as an industrial jury Ms Ball was guilty of poor management rather than racism. Even there, there was no consideration given to the overarching complaint of poor management from the Respondent which might have been by reason of the Claimant's race.

40. The Respondent's case as that there was no need to construct a comparator actual or hypothetical if it asked the reason why as it did here. We were referred in this regard to **Shamoon v Chief Constable of RUC** [2003] ICR 337 and also to the decision of Underhill J in **Ahmed v Amnesty International** [2009] ICR 1450 that, "the basic question in a complaint of direct of discrimination was the reason why."

41. We were invited to adopt the guidance of Mummery LJ set out in **London Borough of Brent v Fuller** [2011] EWCA Civ 267, paragraph 31 to the effect:

> **"The reading of an ET decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

We shall do our best.

42. The Employment Tribunal then expressly directed itself to the guidelines in **Barton v Investec** which were substantially those which were approved of in the later cases of **Igen v Wong** and **Madarassy v Nomura**. It refers to the reverse burden of proof even if there is no specific reference to the two stage test. However it is submitted on the authority of the decision of Elias J in **Laing v Manchester Corporation** that it is not necessarily an error of law for an Employment Tribunal to fail to approach the matter on the two stage test; we will come later to the decision in **Laing**.

43. Mr Sheldon, who appeared on behalf of the Respondent, characterised the second ground of appeal as either being a repetition of ground 1 or asking the Employment Appeal Tribunal to reverse findings of fact made by the Employment Tribunal. He submitted that the fact that the treatment meted out to the Claimant was a result of poor management was irrelevant. It was

only necessary for there to be a non-discriminatory reason for the conduct whether specifically put forward by the Respondent or not for it to succeed in this defence. Reference will be made in due course to the decision of Elias J in **Bahl v The Law Society** [2003] IRLR 640 that a respondent may have a non-discriminatory reason for unreasonable treatment but may not wish to admit to doing something, for example, that reflects poorly on him.

44. In relation to ground 3 and 4, Mr Sheldon submitted that these were demonstrably ill-founded and the Employment Tribunal in every case made a specific finding that the treatment was non-discriminatory. So far as ground 5 was concerned the Employment Tribunal gave reasons that were perfectly adequate for the parties to know the reasons for its decision.

45. Complaint was made by the Claimant that the Employment Tribunal had not referred to authorities such as **Rihal v London Borough of Ealing** [2004] IRLR 642 to which we will come shortly, but pointed out that there was no obligation on the Employment Tribunal to do so and in any event, had it done so it would have made no difference, he submitted, to the result.

46. On a fair reading of the Employment Tribunal's decision it did look at matters overall. Indeed it was bound to because it had considered the question of constructive dismissal based on all the matters of which the Claimant complained cumulatively; see paragraph 13 of the decision. So obviously if the Employment Tribunal had considered these matters in relation to unfair dismissal, it would have had them in mind cumulatively when it turned to consider the issues of race discrimination.

47. Mr Sheldon submitted that paragraph 41 of the decision showed that the Employment Tribunal did consider matters cumulatively. While paragraph 41 is consistent with that submission, it is very far from clear that the Employment Tribunal did in fact say that it was

looking at the matters complained of cumulatively. Reliance was also placed on paragraph 131 of the decision in which the Employment Tribunal had found a number of breaches of duty had led to the Claimant's resignation. And at paragraph 132 the Employment Tribunal had specifically reached a conclusion on discrimination and the termination of employment in that this constructive dismissal was not an example of less favourable treatment on the grounds of race. It was less favourable but it was the result of mismanagement by the Respondent, rather than racially motivated discrimination. This does not, in our opinion, quite bear the weight that the Respondents seek to place on it. It seems like an analysis limited to the question of the single act of dismissal.

48. Paragraph 134 again it is suggested looked at the matter of Ms Ball's conduct in the round. She was guilty of poor management, a lack of appropriate support for the Claimant and had incorrectly identified the main cause of stress as being of domestic rather than employment origin; continuing into paragraph 135 the Employment Tribunal found she was guilty of poor management rather than racism.

49. It was submitted here the Employment Tribunal was looking at the overall picture, in other words it was stepping back and looking at the cumulative effect of the matters that it found and other evidence designed to show that Ms Ball was not a racist; for example, the manner in which she had appropriately dealt with racist comments made by one of the Claimant's colleagues.

50. Mr Sheldon drew our attention to the finding that what was referred to was not a poor management decision, but poor management decisions in the plural again suggesting the Employment Tribunal had looked at the matter cumulatively. He submitted there could not be harassment without it being shown that the matters complained of had been done as a result of

the Claimant's ethnicity. That was the position under the **Race Relations Act** although it is now different under the **Equality Act**.

51. Our attention was drawn to the decisions in **Hewage** and in **Martins v Devonshire** to which we will come shortly.

52. We now turn to the law. We start by considering our approach to the decision of the Employment Tribunal generally. In the recent decision of the Supreme Court in **Hewage v Grampian Health Board** [2012] ICR 1054, paragraph 26 Lord Hope said:

> **"It is well established and has been said many times one would not take too technical a view of the way an Employment Tribunal expresses itself that a generous interpretation ought to be given to its reasoning and ought not to be subjected to an unduly critical analysis."**

53. We then turn to the helpful judgment of Elias J as he was in the case of **Aslef v Brady** [2006] IRLR 576 at paragraph 55:

> **"The EAT must respect the factual findings of the Employment Tribunal and should not strain to identify an error merely because it is unhappy with any factual conclusions; it should not 'use a fine toothcomb' to subject the reasons of the Employment Tribunal to unrealistically detailed scrutiny so as to find artificial defects; it is not necessary for the Tribunal to make the findings on all matters of dispute before them nor to recount all the evidence, so that it cannot be assumed that the EAT sees all the evidence; and infelicities or even legal inaccuracies in particular sentences in the decision will not render the decision itself defective if the Tribunal has essentially properly directed itself on the relevant law."**

54. We now refer to a number of authorities on the importance of the Employment Tribunal stepping back from its finding of fact to look at those findings of fact cumulatively and overall. In the case of **Quereshi v Victoria University at Manchester** [1996] (although reported at [2001] ICR 863) at paragraph 32 Mummery J as he was had this to say:

> **"Ever since the Court of Appeal's decision in King v. Great Britain China Centre [1992] ICR 526 the Industrial Tribunals and this Tribunal have found an invaluable and frequent source of assistance in the passage in the judgment of Lord Justice Neill on p.528E to 529C where he summarised the principles and guidance extracted from the earlier authorities.**

It is worth setting out that passage in full because nothing which we wish to say should be regarded as doubting or diminishing in any way the accuracy, clarity and value of that guidance. Lord Justice Neill stated the position as follows:

'...From these several authorities it is possible, I think, to extract the following principles and guidance,

(1) It is or the applicant who complains of racial discrimination to make out his or her case. Thus, if the applicant does not prove the case on the balance of probabilities he or she will fail.

(2) It is important to bear in mind that it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption that "he or she would not have fitted in".

(3) The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with S.65(2)(b) of the Act of 1976 from an evasive or equivocal reply to a questionnaire.

(4) Though there will be some cases where, for example, the non-selection of the applicant for a post or promotion is clearly not on racial grounds, a finding of discrimination and a finding of a difference in race will often point to the possibility of racial discrimination. In such circumstances the tribunal will look to the employer for an explanation. If no explanation is then put forward or if the Tribunal considers the explanation to be inadequate or unsatisfactory it will be legitimate for the Tribunal to infer that the discrimination was on racial grounds. This is not a matter of law but, as May LJ put it in North West Health Thames Health Authority v. Noone [1988] ICR 813, 822, "almost common sense".

(5) It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of all the evidence the Tribunal should make findings as to the primary facts and draw such inferences as they consider proper from those facts. They should then reach a conclusion on the balance of probabilities, bearing in mind both the difficulties which face a person who complains of unlawful discrimination and the fact that it is for the complainant to prove his or her case."'"

55. In the case of **Anya v University of Oxford** [2001] ICR 847 Sedley LJ had this to say:

"In the present case it was necessary for the Tribunal to find the primary facts about those allegations. It was not, however, necessary for the Tribunal to ask itself in relation to each incident or item whether it was itself explicable on racial grounds or on other grounds. This is a misapprehension about the nature and purpose of evidentiary facts. The function of the Tribunal is to find the primary facts from which they will be asked to draw inferences and then for the Tribunal to look at the totality of those facts, including the Respondents explanation in order to see whether it is legitimate to infer that the acts or decisions complained of in the originating application were on racial grounds. The fragmented approach adopted by the Tribunal in this case will inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have on the issue of racial grounds. The process of inference is itself a matter of applying common sense in a judgment of the facts and assessing the probabilities on the issues whether racial grounds were an effective cause of the acts complained of or where not."

56. Keene LJ made similar comments in the decision of **Rihal v London Borough of Ealing** [2004] IRLR 642 upon which Ms Mallick strongly relied.

57. There is ample authority for the proposition that it is a wholly unacceptable leap to conclude that whenever the victim of such conduct, that is unreasonable conduct, is black or a woman that it is legitimate to infer that the unreasonable treatment was because the person was black or a woman; see Elias J in **Law Society v Bahl** [2003] IRLR 640.

> **"Any unlawful discriminatory treatment [said Elias J] is unreasonable but not all unreasonable treatment is discriminatory and it is not shown to be so merely because the victim is either a woman or of a minority race or colour. In order to establish unlawful discrimination it is necessary to show that the particular employers' reason for acting was one of the prescribed grounds. Simply to say the conduct was unreasonable tells us nothing about the grounds for acting in that way. The fact that the victim is black or a woman does no more than raise the possibility the employer *could* have been influenced by influenced by unlawful discriminatory considerations. Absence of independent evidence supporting the conclusion this was indeed the reason no finding of discrimination could possibly be made."**

58. It is necessary in order to engage the second stage of the test, which I need not set out, referred to in **Barton v Investec**, **Igen v Wong** and **Madarassy** that "something more" has to be shown than difference in protected characteristic, gender or ethnic origin and unreasonable treatment. It is also clear from authorities such as **Shamoon** to which I have already referred that Employment Tribunals can be well advised to go straight to the question as to why it was that the treatment was meted out to the Claimant. In the decision of **Martin v Devonshires Solicitors** [2011] ICR 352 Underhill J said at paragraphs 38 and 39:

> **"38. The Tribunal does not in the passage which we have set out at para. 18 above, or anywhere else in the Reasons, refer explicitly to either section 63A of the 1975 Act or section 17A (1C) of the 1995 Act, which provide, in terms too well-known to require setting out here, for the so-called "reverse burden of proof", or to the decision of the Court of Appeal in Igen Ltd v. Wong [2005] ICR 931, which gives guidance on the effect of those provisions. Mr Stephenson submitted that that showed that the Tribunal had "failed to deal properly with the burden of proof" and had "failed to have due regard to the guidance in *Igen Ltd v. Wong*".**
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> **39. This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination – generally, that is, facts about the respondent's motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else's head – "the devil himself knoweth not the mind of man" (*per* Brian CJ, YB 17 Ed IV f.1, pl. 2). But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law. In the present case, once the Tribunal had found that the reasons given by Mr. Hudson and Mr. Buckland in their letters reflected their genuine motivation, the issue was indeed how that was to be characterised and the burden of proof did not come into the equation. (Cf. our observations in Hartlepool Borough Council v. Llewellyn [2009] ICR 1426, at para. 55 (p. 1448C).)"**

59. Finally, I refer in this regard to the decision of **Manchester City Council v Laing** [2006] IRLR 748:

> **"73. No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in *Network Rail Infrastructure v Griffiths-Henry* (at para.17), it may be legitimate to infer that a black person may have been discriminated on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single right answer and tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.**
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> **74. Another example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator - whether there is a prima facie case - is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at paras 7-12, it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage.**
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> **75. The focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race".**
>
> **76. Whilst, as we have emphasised, it will often be desirable for a tribunal to go through the two stages suggested in *Igen*, it is not necessarily an error of law to fail to do so. There is no purpose in compelling Tribunals in every case to go through each stage. They are not answering an examination question, and nor should the purpose of the law be to set hurdles designed to trip them up. The reason for the two stage approach is that there may be circumstances where it would be to the detriment of the employee if there were a prima facie case and no burden was placed on the employer, because they may be imposing a burden on the employee which he cannot fairly be expected to have discharged and which should evidentially have shifted to the Employer. But where the Tribunal has effectively acted at least on the assumption that the burden may have shifted, and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever.**
>
> **77. Indeed, it is important to emphasise that it is not the employee who will be disadvantaged if the Tribunal focuses only on the second stage. Rather the risk is to an employer who may be found not to have discharged a burden which the Tribunal ought not to have placed on him in the first place. That is something which tribunals will have to bear in mind if they miss out the first stage. Moreover, if the employer's evidence strongly suggests that he was in fact discriminating on grounds of race, that evidence could surely be relied on by the Tribunal to reach a finding of discrimination even if the prima facie case had not been established. The Tribunal cannot ignore damning evidence from the employer as to the explanation for his conduct simply because the employee has not raised a sufficiently strong case at the first stage. That would be to let form rule over substance."**

60. We now turn to our conclusion. We, of course, approach this case on the need to have respect for the decision of the Employment Tribunal, we are also at pains to avoid falling into the **Zafar** trap. Discrimination cannot be inferred simply on the basis of differential treatment and difference in ethnicity, something more is required; that it is why concentration on

individual issues is unhelpful. If one looks at each complaint in isolation the findings of an Employment Tribunal may be unchallengeable. It is important to take a holistic view of all the relevant facts. In the present case we are not persuaded that the Employment Tribunal did take that approach, the Employment Tribunal should have said so explicitly and explained why the Claimant's ethnicity in circumstances where there had been a significant number of substantial breaches of contracts was not the reason for the less favourable treatment. Simply finding that there had been poor management was insufficient. Poor management itself might be a symptom of discriminatory conduct. Furthermore, the Employment Tribunal looked at the matter if it did look at the matter in the round before it had taken account of the issues that had arisen post termination; they were not brought into the equation. Nor did the Employment Tribunal have any regard to the fact that Ms Ball was not the only person who may have been responsible for discriminatory conduct.

61. Looking at all the findings together, had the Employment Tribunal done so, there was clearly ample material to bring the reverse burden of proof into play. The Employment Tribunal clearly could conclude from its findings as the various breaches of contract that there had been a discriminatory intent and therefore there was the need for a cogent explanation from the Respondent together with a careful explanation from the Employment Tribunal as to its reasoning. Simply saying it was all the result of poor management in our view is insufficient.

62. We have not considered the substance of the other grounds of appeal in any detail. It seems to us that the only challenge that could be made to the individual findings of fact was that they were falsified by the overall picture emerging when all matters were considered together. So far as grounds 1 and 2 are concerned we do not consider there is a need to establish a comparator and in any event they are largely attempts to re-argue the facts. Any inconsistency

between the Respondent's pleaded case and the evidence is a matter for the Employment Tribunal.

63. The Employment Tribunal did deal with harassment and dealt with victimisation having directed itself correctly as to the law; see paragraphs 9, 10, 151 and 152. So far as non-compliance with rule 30(6) is concerned there is no difficulty at all in understanding the reasoning of the Employment Tribunal and no-one could have any doubts as to why it reached the conclusions it did. The only issue is whether the Employment Tribunal approached the evidence on discrimination appropriately and we have concluded that it did not.

64. We have considered what we should do now; whether to remit the matter to the same Employment Tribunal or to a fresh Tribunal. We have come to the conclusion it would be too much to ask of this Employment Tribunal to be seen to bring a fresh mind to bear after a judgment which on a number of occasions blamed the poor management of Ms Ball for the matters of which the Claimant complained. We therefore remit the case for re-hearing before a fresh tribunal in the light of this Judgment.