Appeal No. UKEAT/0497/12/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 29 April 2013
Judgment handed down on 17 February 2014

Before

HIS HONOUR JUDGE SEROTA QC

BARONESS DRAKE OF SHENE

MR M WORTHINGTON

THE SOLICITORS REGULATION AUTHORITY — APPELLANT

MRS A J MITCHELL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR TIM SHEPPARD (of Counsel) Instructed by: Mills & Reeve Solicitors 78-84 Colmore Row Birmingham B3 2AB
For the Respondent	MR ROHAN PIRANI (of Counsel) Instructed by: Thompsons Solicitors The McLaren Building 46 Priory Queensway Birmingham B4 7LF

SUMMARY

SEX DISCRIMINATION – Direct

The Claimant and a male comparator were permitted to work from home on certain days each week to facilitate child care arrangements. The Claimant's right to do so was revoked, although she was offered the facility of more flexible working hours. The explanation for the Claimant's apparently less favourable treatment was rejected by the Employment Tribunal which went on to find that the reverse burden of proof in Section 63A of the **Sex Discrimination Act 1975** had come into play and that the Respondent had failed so show a non-discriminatory reason for its treatment of the Claimant.

Evidence of unreasonable and less favourable treatment coupled with a difference in protected characteristic is not sufficient evidence in itself without 'something more' to reverse the burden of proof; [the **Zafar** trap]. Something more' is required to entitle the Employment Tribunal to infer, in the absence of a satisfactory explanation, a discriminatory reason for the less favourable treatment and thus reverse the burden of proof.

In appropriate circumstances the "something more" can be an explanation proffered by the Respondent for the less favourable treatment that is rejected by the Employment Tribunal.

The finding that the Respondent had given a false explanation for the less favourable treatment did therefore constitute 'something more' and the Employment Tribunal was accordingly entitled, if not bound, to conclude that the Claimant had suffered discrimination.

Dicta of Sedley LJ in **Anya v University of Oxford** [2001] IRLR 377, Elias J in **Law Society v Bahl** [2003] IRLR 640**,** and Langstaff J in **Birmingham City Council v Millwood** [2012] UKEAT 0564 followed.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is an appeal by the Respondent from a decision of the Employment Tribunal at Birmingham (Employment Judge Tucker, who sat with lay members). The Judgment was sent to the parties on 9 January 2012.

2. The Employment Tribunal found that the Claimant had suffered direct discrimination on the grounds of her sex contrary to section 1(2)(a) and 6(2)(b) of the **Sex Discrimination Act 1975**. The time limit for presenting the claim was extended on just and equitable grounds.

3. The case was referred to a full hearing by HHJ Peter Clark on 12 October 2012 pursuant to rule 3(10) of the Employment Appeal Tribunal Rules of Procedure.

Factual background

4. We take this largely from the decision of the Employment Tribunal.

5. The Respondent is the independent regulatory arm of the Law Society. The Claimant was (and was at the time of the hearing), a costs recovery officer employed since 4 January 2000 at the Respondent's office in Royal Leamington Spa.

6. Before the introduction of the Flexible Working Regulations the Respondent sent a letter to the Claimant agreeing proposals she had made that she should be permitted to work in the office from Monday to Wednesday and on Thursdays and Fridays to work at home in order to facilitate her childcare arrangements in 2001 after her return from maternity leave. The Respondent reserved the right to review these arrangements; see paragraphs 9:3 and 9:4 of the decision of the Employment Tribunal. The Respondent has sought to challenge this finding.

7. The letter was copied to the Claimant's line manager, Mr Penson. The Employment Tribunal interpreted the agreement as meaning it should last until the Claimant's children were old enough not to require care and supervision or until the Claimant secured an alternative arrangement, subject to regular review. The arrangement seems to have worked well. At this time there were two recovery officers only, the Claimant and a Mr Bansai.

8. In April 2001 the Claimant returned from maternity leave, and the arrangement I have just described was put into effect. In August 2003 the Claimant commenced a second period of maternity leave. She returned to work in June 2004. In May 2007 it was agreed that the days she spent working at home should be changed.

9. In March 2008 Ms Chambis became the manager of the Costs Recovery Team. There was an agreed change to the Claimant's working hours on Wednesdays. It is important to note that Ms Chambis had no concerns about the Claimant's performance or with her holiday arrangements.

10. By this time there were five costs recovery officers employed by the Respondent including the Claimant and a Mr Amreak Singh. Mr Singh had a son with health difficulties and, by reason of his childcare arrangements and the long journey he undertook from his home to Leamington, it was agreed that he could work flexible hours similar to those worked by the Claimant.

11. On 10 September 2011 the Claimant informed Ms Chambis that she was now participating in a new school run and was having difficulties with her hours. When she was asked by Ms Chambis why she had not raised this point earlier, the Claimant said she was not

sure until the children started school what pre-school cover was available and what school clubs there might be. She asked if she could alter her working pattern to accommodate the new school run. Ms Chambis asked why she still needed to work at home as both children were at school. The Claimant explained that this enabled her to work efficiently and also to provide care for the children when necessary.

12. The Employment Tribunal did not accept that notes of the conversation produced by Ms Chambis were contemporaneous (see paragraph 11).

13. Ms Chambis said that she wished to offer other members of the team the same level of flexibility as afforded to the Claimant. She took advice from the Respondent's human resources department and was advised she could review and revoke the arrangement with the Claimant. Ms Chambis asked the Claimant to advise her of the proposed hours of working on a day-to-day basis for agreement. The Claimant complied with this request. The Employment Tribunal was critical of Ms Chambis for raising this matter without warning.

14. On 25 September 2008 the Claimant met Ms Chambis, who told her she could not work at home but that Ms Chambis would consider permitting her flexibility in relation to her start and finish hours so as to enable her to take the children to and from school and she would also permit the Claimant to work at home on an ad hoc basis once a week, to be agreed in advance. The Claimant was unhappy and said she wished to take legal advice. Ms Chambis delayed implementation of the change in arrangements until 1 November 2008 and invited the Claimant to make a request for flexible working. The Claimant declined to do so on the ground she already had an arrangement in place.

15. Paragraph 9.16 of the Employment Tribunal decision set out Ms Chambis' explanation. Firstly, the Claimant no longer needed to work at home, as her children had started school but Ms Chambis was still willing to be flexible in relation to start and finish times of the Claimant's working day. Secondly, other members of the team wanted to be granted flexibility similar to that enjoyed by the Claimant for reasons not connected with childcare. Thirdly, for "operational reasons". Fourthly, Ms Chambis said that she had received confidential comments from other team members about the work the Claimant was doing or her working arrangements. Fifthly, she had concerns about the Claimant's pattern of leave during school holidays. (The Employment Tribunal considered that the Claimant had acted appropriately.) Sixthly, she told the Employment Tribunal that she had only decided to review the Claimant's working arrangements because she believed the Claimant was not a team player and was always out to look after herself. The Employment Tribunal noted that this assertion did not appear in her witness statement and she gave this evidence at the end of her evidence. The Employment Tribunal considered that the manner of Ms Chambis giving that evidence and its timing were "significant".

16. Insofar as operational requirements were concerned, the Employment Tribunal was satisfied that the only such requirement was that there should be two costs recovery officers present each day.

17. On 1 October 2008 a letter was sent to the Claimant confirming the new arrangement. Thereafter the Claimant worked in accordance with the new conditions but did so reluctantly and raised a grievance on about 23 October 2008.

18. On 3 November 2008 the Claimant sent an email to the effect that the changes to her working pattern were contrary to her contract of employment and should not be seen as having

been accepted by her. On 17 November 2008 the Claimant's grievance was dismissed. She appealed unsuccessfully.

19. It is to be noted that Ms Chambis told Mr Amreak Singh that she would not review his flexible working times as a permanent arrangement, although she maintained to the Employment Tribunal that she was entitled to review them. Mr Singh was permitted to work from home on an ad hoc basis one day each week.

The Judgment of the Employment Tribunal

20. The Employment Tribunal set out the facts as we have briefly outlined them above. It referred to the relevant sections of the Sex Discrimination Act; we will refer to these in detail later in the Judgment. The Employment Tribunal was referred to section 1(2), section 5(3), section 6(2), and section 63A(2). It then referred to a number of cases concerned with the reverse burden of proof to be found in section 63A(2) of the Act including **Igen v Wong** [2005] ICR 931, **Barton v Investec** [2003] ICR 1205, **Madarassy v Nomura International** [2007] ICR 867. It referred at length to the "road map" set out in that case. In relation to the law relating to comparators, the Employment Tribunal referred to **Aylott v Stockton on Tees BC** [2010] ICR 1278, **Shamoon v Chief Constable of the RUC** [2003] ICR 337. The Employment Tribunal also referred to a decision of HHJ McMullen QC in **Cordell v Home Office**. No reference is given for this authority and I have not been able to trace it.

21. We are not aware of any criticism of the Employment Tribunal's self-direction.

Conclusions of the Employment Tribunal

22. The Employment Tribunal concluded (paragraph 15) that Mr Amreak Singh was an appropriate comparator because of his childcare commitments. The Employment Tribunal

noted that the comparator is required to be "comparable" but not identical to the complaint. Amreak Singh's relevant circumstances were not materially different from those of the Claimant.

23. The Employment Tribunal did not consider Mr Bansai to be a comparator. At paragraphs 18 and 19 the Employment Tribunal found that the Claimant had proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an act of discrimination revoking the arrangements put in place in 2000 that the Claimant could work from home two days per week. There was evidence that she had been treated differently and less favourably than the relevant male comparator, Mr Singh. The Employment Tribunal added:

> **"We found Ms Chambis' evidence about her approach to what she asserted were the Respondent's operational needs unsatisfactory as set out below." (paragraph 19)**

24. The Employment Tribunal then went on to consider further the effect of the reverse burden of proof:

> **"19. We then asked whether the respondent had discharged the burden on the balance of probabilities by proving that the treatment was in no sense whatsoever on the proscribed ground. Having regard to *Igen*, this required us to assess not merely whether the respondent has proved an explanation for such facts, but further whether it was adequate to discharge the burden of proof on the balance of probabilities that the proscribed ground was not a ground for the treatment in question.**
>
> **20. We considered that the respondent failed to discharge that burden. It did not establish that the reason that the arrangement was reviewed and revoked/removed was because it needed to be removed in order to ensure that there were two people in the office or in order to ensure that other individuals could be offered flexibility. Ms Chambis stated in evidence that other individuals wanted to work on a flexible basis. There was not however clear evidence that it was necessary to remove the claimant's arrangements in order to achieve that. Further, as noted above, we found Ms Chambsis' evidence unsatisfactory. For example she did not in our judgment adequately provide an explanation as to why she did not follow a logical or sequential approach to addressing the need that two staff members be present in the office or that several staff members needed/wished to have some flexibility regarding their working pattern. For example she did not take any steps to speak to all members of the team (either individually or at a team meeting) about the flexibility they needed to see, for example if a rota could not be set up. We were surprised that an obviously intelligent and able individual chose to focus simply on one member of the team rather than looking at the team as a whole. Ms Chambis did not provide any credible explanation as to why she did that. Further, the fact that the terms of the letter written in 2000 referred to nursery arrangements and when the claimant's children were 'old enough' did not explain why Ms Chambis decided to review those arrangements. At most, the respondent's (in our judgment erroneous) interpretation of**

> **those terms might be one possible why the arrangement should be reviewed, i.e., because it considered that it was entitled to do so. However, Ms Chambis also stated in evidence that she believed that she had an entitlement to revoke Mr Singh's arrangements if required by the needs of the business. Ms Chambis did not explain sufficiently why she took action in relation to the claimant and not Mr Singh: overall we were not satisfied with her evidence about that."**

25. The Employment Tribunal gave a detailed explanation as to why it rejected Ms Chambis evidence; see paragraph 20 and in particular paragraph 21:

> **"21. Further, and importantly, we were not satisfied that Ms Charnbis gave the tribunal a full and frank account of the reasons for her action. The evidence which she gave on 17th November 2011 did not sit well with her witness statement or the basis upon which the case had been presented up until that point. Up until then the respondent had asserted that the flexible working arrangement was withdrawn for business reasons and because the claimant's entitlement under the agreement reached in 2000 had expired. What Ms Chambis revealed in our view in oral evidence was that there were other, more personal, and less justifiable motives which explained why she acted as she did. We considered that we could not place reliance in her assertion that the reason for the treatment was in no sense whatsoever gender."**

In the circumstances it concluded that the Claimant had been treated less favourably than a male comparator, the Respondent had failed to discharge the burden of proving that the treatment was not in any way influenced by reasons of sex.

Notice of Appeal and submissions in support

26. Mr Sheppard, on behalf of the Respondent, submitted that the Employment Tribunal was in error in its interpretation of the home-working agreement. He submitted that the Employment Tribunal did not apply the "reasonable bystander" test propounded by the House of Lords in **Chartbrook v Persimmon Homes** [2009] 1 AC 1101. The Employment Tribunal, it is said, gave a meaning to the agreement that was not there in its face and relied upon the fact, as it should not have done, that the Respondent had not questioned the agreement between the years of 2001 and 2008. Accordingly, the finding that the agreement still applied and had not come to an end was flawed.

27. It was also submitted that the Employment Tribunal had erred in law in determining that Mr Amreak Singh was a proper comparator. There was no finding as to the distance that he lived from Royal Leamington Spa (in fact he had an 80-mile round trip whereas the Claimant's round trip was some 8 miles). There were no findings as to the severity of the health issues of Mr Singh's son. If the Claimant's arrangement had come to an end, there was no valid comparison. Further, the Claimant had a materially different contractual arrangement from Mr Singh. Mr Singh applied under the flexible working policy, leading to a permanent change in his contract, whereas the Claimant did not apply under the policy and her contract of employment had not varied permanently. The Claimant had two children. Mr Amreak Singh had three. We observe at this point in time that the comparator does not have to be a clone of the Claimant, merely "not materially different".

28. It is then said the Employment Tribunal made an error of law in respect of its approach to the question of whether the Claimant suffered less favourable treatment than her comparators. The Employment Tribunal should have asked first if there was less favourable treatment, and only then decided if that treatment was unlawful. It is said that based on the authorities relied on the Employment Tribunal approached that issue on the basis of a hypothetical rather than an actual comparator; we do not accept this to be the case. The Employment Tribunal clearly did consider that there was an actual comparator, Mr Singh. Mr Sheppard went on to submit that consequently the Employment Tribunal placed insufficient emphasis on the question whether the Claimant had received less favourable treatment than Mr Singh.

29. It is said that the Employment Tribunal's approach to the meeting of 10 September was flawed. The record of that meeting showed no gender-based reason for Ms Chambis' actions,

and the Employment Tribunal should have given clear reasons why it found the record of the meeting propounded by the Respondent to be inaccurate.

30. The Employment Tribunal, it is then said, made an error of law in applying the shifting burden of proof. It made no findings as to what the "something more" beyond a difference in gender together with less favourable treatment was required for the burden of proof to shift and the difference in treatment and the difference in gender alone was not enough. It was submitted that Ms Chambis' lack of veracity was not capable of being "something more".

31. Alternatively, it was submitted that the Employment Tribunal ran together the two limbs of the shifting burden of proof. The Employment Tribunal did not make sufficient findings as to what the "something more" might have been. There should have been clear findings as to the facts that the Employment Tribunal found proved from which it could draw the necessary inferences, but the Employment Tribunal had imported into stage 1 the burden on the Respondent to disprove discrimination. The Employment Tribunal did not clearly explain why it rejected Ms Chambis' evidence.

32. The Respondent criticised the manner in which the Employment Tribunal had followed the guidance set out in **Madarassy**. It was submitted that we should follow the judgment of Mummery LJ in **Madarassy** with caution; it was neither a rule of law nor prescriptive. It was repeated that Ms Chambis' lack of veracity was not capable of being "something more". The absence of a satisfactory explanation only became relevant when a prima facie case had been made out. The absence of a satisfactory explanation was only a credibility point. It was submitted that, as the Employment Tribunal had made findings that it did not accept Ms Chambis' explanation, and there was accordingly no satisfactory explanation put forward for the different treatment of the Claimant as compared to Mr Singh. The absence of an

explanation, it was repeated, was not relevant to stage 1 of the test propounded in the **Igen v Wong** line of authorities. Our attention was drawn to what Mummery LJ had stated at paragraph 58 in **Madarassy.** It is apparent, however, that Mummery LJ was simply referring to a submission by counsel, Robin Allen QC. Mr Sheppard suggested that that paragraph had been approved by the Supreme Court in **Hewage v Grampian Health Board** [2012] ICR 1054; having considered **Hewage** we do not believe that to be the case.

The Claimant's submissions

Home-working

33. It was submitted there was no need in discrimination cases to apply principles of contractual interpretation. In any event, the Employment Tribunal's construction of the agreement was correct. The Employment Tribunal construed the agreement as against the factual matrix. The reference to the phrase when "your child is old enough" was contended by the Respondent to mean "when your children are in school". The Employment Tribunal, on the other hand, interpreted the phrase as meaning "old enough not to need the mother's care". If the terms of the agreement were ambiguous, the Employment Tribunal was entitled to rely on antecedent matters and the whole matrix of fact. The Claimant's evidence as to her understanding was to be found at paragraph 9.3 of the decision. There was no evidence from Mr Penson as to what he considered the meaning of the ambiguous term "old enough" to be. The Employment Tribunal had construed the agreement in the correct manner and drew attention to paragraph 114 of **Chartbrook**, a decision of the House of Lords in **Investors Compensation Scheme v West Bromwich Building Society** [1998] 1 WLR 896. There was no need for the Employment Tribunal to refer to the "reasonable man".

34. The issue in point was not whether Ms Chambis was able to revoke the agreement but why she did so. The Employment Tribunal was not satisfied with her explanation, so the

argument as to the construction of the agreement was no more than a red herring, although it fed into the question of "why"? The Employment Tribunal at paragraph 3 had set out the issues in the case, so whether there was a withdrawal of a contractual or non-contractual concession was irrelevant. There was little evidence anyway as to what the background knowledge of the Respondent was said to be.

Comparator

35. It was submitted by Mr Pirani for the Claimant that the issue was essentially factual and the finding that Mr Singh was an appropriate comparator could not be said to be perverse. It was submitted that the Respondent's submission that the Employment Tribunal had approached points in the wrong order, dealing with the "reason why" before dealing with the less favourable treatment, as it should have been dealt with the other way round, is not correct. The Employment Tribunal in fact dealt with points in their correct order. The Employment Tribunal at paragraph 12 asked whether Mr Singh was an appropriate comparator. (The Respondent conceded that paragraph 11 was a correct self-direction by the Employment Tribunal, derived from **Igen v Wong**.) The Employment Tribunal went on to conclude that he was an appropriate comparator and it accordingly had to follow that the Claimant had been treated less favourably. It was sufficient to show that there was a material similarity between the position of the Claimant and that of Mr Singh, as the Employment Tribunal correctly found. The Employment Tribunal dealt with issues such as distance, the health of the child, discontinuance of home working. Therefore it gave sufficient reasons for its findings in relation to the meeting of 10 September 2008 and it was clearly not satisfied with the evidence of Ms Chambis.

Less favourable treatment

36. The Employment Tribunal made a finding that was clear and correct and justifiable on the facts. There was no reason why the Judgment of Mummery LJ should be treated with

caution. His Judgment was in any event not prescriptive and was not a rule of law; we were referred to the decision of Underhill J in **Hussain v Vision Security** UKEAT/0439/10/DA. The reason for less favourable treatment is frequently a matter of inference. In certain circumstances it may be proper to infer discriminatory intent simply by reason of the difference of treatment, coupled with the absence of any satisfactory explanation. It was for Employment Tribunals to consider whether the Claimant received less favourable treatment than an appropriate comparator before determining whether the less favourable treatment was on a proscribed ground ("The reason why" issue). This approach was expressly approved by the House of Lords in **Shamoon**. It was important that the burden of proof should be applied flexibly.

37. In applying the reverse burden of proof at paragraph 18 the Employment Tribunal relied on both the difference in treatment and the unsatisfactory explanation offered by the Respondent.

The law

38. We now turn to the law. Section 1 of the **Sex Discrimination Act 1975** provides as follows:

> **"Direct and indirect discrimination against women**
>
> **(1) In any circumstances relevant for the purposes of any provision of this Act, other than a provision to which subsection (2) applies, a person discriminates against a woman if—**
>
> **(a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or**
>
> **(b) he applies to her a requirement or condition which he applies or would apply equally to a man but—**
>
> **(i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and**
>
> **(ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and**
>
> **(iii) which is to her detriment because she cannot comply with it."**

39. Section 63A of the **Sex Discrimination Act 1975** provides for the reverse burden of proof in cases of sex discrimination:

> **"(1) This section applies to any complaint presented under section 63 to an employment tribunal.**
>
> **(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent—**
>
> > **(a) has committed an act of discrimination or harassment against the complainant which is unlawful by virtue of Part 2 or section 35A or 35B, or**
> >
> > **(b) is by virtue of section 41 or 42 to be treated as having committed such an act of discrimination or harassment against the complainant,**
>
> **the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed, that act."**

40. There is ample guidance in the authorities on what a claimant needs to do to raise a case from which an Employment Tribunal "could" conclude in the absence of an adequate explanation that the respondent has committed an act of discrimination. To some extent this is a well trodden path, although it is important to start with the words of the statute. In **Glasgow City Council v Zafar** [1998] ICR 120 the House of Lords held that unreasonable treatment, coupled with a difference in gender, was not sufficient in itself to raise a prima facie case of discrimination (the **Zafar** trap). The statute may be said to envisage a two-stage test. Firstly, it needs to be a case from which the Employment Tribunal "could" make the necessary finding. Secondly, if that threshold is reached explanation is required from the employer to show that the less favourable treatment is not discriminatory. It may be helpful, however, to follow the two stages, but that is not always necessary especially as in practice all the evidence in a case tends to be heard together. The Employment Tribunal may take into account all the evidence including that from the respondent in deciding if a prima facie case has been established.

41. We would refer to the decision of the House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 in which Lord Nicholls at paragraph 7 stated:

> **"With this introduction I turn to consider the application of these provisions in practice. In deciding a discrimination claim one of the matters employment tribunals have to consider is whether the statutory definition of discrimination has been satisfied. When the claim is based on direct discrimination or victimisation, in practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the 'less favourable treatment' issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the 'reason why' issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the claimant. Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining."**

42. It is helpful, perhaps, at this stage to consider the Judgment of Mummery LJ in **Madarassy v Nomura** [2007] IRLR 246 and what he said in considering an earlier Judgment of the Employment Tribunal in **Laing v Manchester CC** [2006] IRLR 748, to which we will come in due course. (This Judgment would appear to answer the Respondent's criticism of the Employment Tribunal having conflated the two-stage test if indeed that is what they did.)

43. Guidance in the form of a "road map" applying the two-stage process is to be found in **Madarassy** and earlier cases of **Barton v Investec** [2003] ICR 1205 and **Igen v Wong** [2005] ICR 931. These are well known but we set them out for the purposes of good order, as appended as an appendix to the judgment of the Court of Appeal in **Igen v Wong**:

> **"(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities 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 claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.**
>
> **(2) If the claimant does not prove such facts he or she will fail.**
>
> **(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.**

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

It is clear however that the Claimant must show 'something more' than a mere difference in protected characteristic coupled with less favourable treatment as compared to a comparator, before the Claimant has crossed the threshold of establishing facts from which the Employment Tribunal 'could' in the absence of an adequate explanation make a finding of discrimination.

44. As we have noted, the Respondent relied on a passage in the Judgment of Mummery LJ in **Madarassy**, paragraph 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 an adequate explanation only becomes relevant if a prima 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 he does not, the tribunal must uphold the discrimination claim."

45. This, it was submitted, was authority for the proposition that the absence of an adequate explanation is only relevant at the second-stage of the process, but it is not relevant for establishing the prima facie case. This passage appears in a part of the Judgment in which Mummery LJ is setting out submissions made on behalf of the claimant by Mr Robin Allen and does not represent his view of the law. For the sake of completeness, we also draw attention to what Mummery LJ had to say at paragraph 64:

"*Igen v. Wong* (paragraph 22) held that this expression indicates that, in considering what inferences or conclusions could be drawn from the primary facts (stage 1), the employment tribunal is required to make an assumption,

> **'22. …which may be contrary to reality, the plain purpose being to shift the burden of proof at the second stage, so that unless the respondent provides an adequate explanation, the complainant will succeed. It would be inconsistent with that assumption to take account of an adequate explanation by the respondent at the first stage.'"**

46. We have derived significant assistance from the Judgment at first instance of Elias J in this Tribunal in **The Law Society v Bahl** [2003] IRLR 640. We derive the following from that Judgment:

(i) In appropriate circumstances the "something more" can be an explanation proffered by the Respondent for the less favourable treatment that is rejected by the Employment Tribunal

(ii) If the Respondent puts forward a false reason for the treatment, but the Employment Tribunal is able on the facts to find another, non-discriminatory reason, it cannot make a finding of discrimination.

47. At paragraph 96 Elias J, referring to the Judgment of Sedley LJ in **Anya v University of Oxford** [2001] IRLR 377 observed:

> **"It is relevant to note that no reference was made here to the ratio of the decision enunciated in Zafar (although the case was referred to for a different purpose; see paragraph 10). Mr de Mello says that these comments demonstrate that it is open to a tribunal to infer discrimination from unreasonable treatment, at least if the employer does not show that equally unreasonable treatment would have been meted out to a white person or man, as the case may be. We recognise that read broadly the passage could indeed justify such an interpretation, not least because the tribunal's comments in Anya which Sedley LJ referred to as 'arguably' incorrect seem to us, with respect, faithfully to reflect the principle established by the House of Lords in the Zafar case. However, we do not think that they could have been intended to be read in that manner. We do, however, respectfully accept that Sedley LJ was right to say that racial bias may be inferred *if there is no explanation for the unreasonable behaviour*. But it is not then the mere fact of unreasonable behaviour which entitles the tribunal to infer discrimination; it is not, to use the tribunal's language, unreasonable conduct 'without more' but rather the fact that there is no reason advanced for it. Nor in our view can Sedley LJ be taken to be saying that the employer can only establish a proper explanation if he shows that in fact he behaves equally badly to members of all minority groups. The fact that he does so will be one way of rebutting an inference of unlawful discrimination, even if there are pointers which would otherwise justify that inference. For example, an employer may have unreasonable disciplinary procedures which are regularly applied to all staff. Plainly there is no unlawful discrimination simply because the employee subjected to them happens to be black or female. The employer has not adequately explained, in the sense of justified, his conduct, because he has applied an unreasonable disciplinary procedure; however, he has shown that whatever the reason, it is not discriminatory. No doubt the mere assertion by an employer that he would treat others in the same manifestly unreasonable way, but with no evidence that he has in fact done so, would not carry any weight with a tribunal which is minded to draw the inference on proper and sufficient grounds that the cause of the treatment has been an act of unlawful discrimination."**

48. At paragraph 101 of Elias J's Judgment he said that the fact the Respondent gave a false reason for the less favourable treatment does not require the Employment Tribunal to make a finding of discrimination, depending of course on the relevant factual circumstances:

> **"The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility. If the tribunal does not accept the reason given by the alleged discriminator, it may be open to it to infer discrimination But it will depend upon why it has rejected the reason that he has given, and whether the primary facts it finds provide another and cogent explanation for the conduct. Persons who have not in fact discriminated on the proscribed grounds may nonetheless sometimes give a false reason for the behaviour. They may rightly consider, for example, that the true reason casts them in a less favourable light, perhaps because it discloses incompetence or insensitivity. If the findings of the tribunal suggest that there is such an explanation, then the fact that the alleged discriminator has been less than frank in the witness box when giving evidence will provide little, if any, evidence to support a finding of unlawful discrimination itself."**

49. As Elias J later made clear at paragraph 220:

> **"An inadequate or unjustified explanation does not of itself amount to a discriminatory one."**

50. He continued at paragraph 113:

> **"Third, there is an obligation on the tribunal to ensure that it has taken into consideration all potentially relevant non-discriminatory factors which might realistically explain the conduct of the alleged discriminator. As Lord Nicholls put it, if prima facie there is a factor which distinguishes the two situations, then that may well be the non-discriminatory reason for the treatment, unless the evidence indicates otherwise. If the tribunal do not recognise the potential significance of such a factor, then their decision will be flawed because they will have failed to take into account a potentially material characteristic or characteristics which could conclusively explain, on non-discriminatory grounds, the difference in treatment between the applicant and the hypothetical comparator. A tribunal cannot properly reject such potentially relevant explanations without considering them and having a proper evidential basis for rejecting them."**

51. At paragraphs 126 and 127 Elias J stressed the crucial need for the Employment Tribunal to consider all explanations that in the light of its findings might explain the decision of the Respondent. He continued at paragraph 126:

> **"We would summarise our analysis of the effect of these authorities as follows. In our opinion the decision in Shamoon indicates that tribunals need not be unduly concerned to identify which is the hypothetical comparator in order to address the issue of less favourable treatment, as though this were a necessary stage in the reasoning process. That may lead to unnecessary and needless disputes. The tribunal must of course ensure that there is a proper comparison of like with like: that is essential to the finding of less favourable treatment. Moreover, the relevant statutory provisions require a comparison such that the relevant circumstances of the comparator are the same or not materially different from those of the applicant. However, the significance of identifying the comparator is that it identifies potential differences between the applicant and comparator which could explain the difference in treatment. Strictly, whether those factors are considered in the context of constructing an appropriate hypothetical comparator or whether they are considered in the context of the stage of determining the reason for the conduct will not matter in practice, although the decision in Shamoon makes it plain that all relevant factors should be considered at both stages, and indeed that ultimately there is only one question. What is crucial is that the tribunal considers all the explanations which, in the light of its findings, may realistically explain the decision. These explanations may be the reasons for the treatment relied upon by the alleged discriminator which the tribunal accepts as genuine, or they may naturally suggest themselves in the light of the tribunal's primary findings of fact. Provided these potential explanations are considered, the tribunal will in fact have taken account of all the characteristics that could be material to the make up the hypothetical comparator, however the comparator is defined."**

52. We have found further helpful guidance from two Judgments of Langstaff J on the importance to be attached to the rejection of an explanation by the Respondent by the Employment Tribunal and the need to show some flexibility in following the guidance in **Madarassy**.

53. Langstaff J in **Maksymiuk v Bar Roma Partnership** UKEATS/0017/12/BI at paragraph 28 said:

> **"The guidance in Igen v Wong has been carefully refined. It is an important template for decision making. As Laing and Madarassy have pointed out however, a Tribunal is not required to force the facts into a constrained cordon where in the circumstances of the particular case they do not fit it. That would not be to apply the words of the statute appropriately. Intelligent application of the guidance, rather than slavish obedience where it would require contorted logic, is what is required."**

54. In **Birmingham City Council v Millwood** [2012] UKEAT 0564 Langstaff J considered the effect of the rejection of the respondent's explanations for the less favourable treatment meted out to the claimant:

> **"26. What is more problematic is the situation where there is an explanation that is not necessarily found expressly to be a lie but which is rejected as opposed to being one that is simply not regarded as sufficiently adequate. Realistically, it seems to us that, in any case in which an employer justifies treatment that has a differential effect as between a person of one race and a person or persons of another by putting forward a number of inconsistent explanations which are disbelieved (as opposed to not being fully accepted), there is sufficient to justify a shift of the burden of proof. Exactly that evidential position would have arisen in the days in which King v Great Britain-China Centre [1992] ICR 516 was the leading authority in relation to the approach a Tribunal should take to claims of discrimination. Although a Tribunal must by statute ignore whether there is any adequate explanation in stage one of its logical analysis of the facts, that does not mean, in our view, to say that it can and should ignore an explanation that is frankly inadequate and in particular one that is disbelieved.**
>
> **27…. To prefer one conclusion rather than another is not, as it seems to us, the same as rejecting a reason put as being simply wrong. In essence, the Tribunal in the present case appeared not to believe at least two of the explanations that were being advanced to it, and there were, we accept from what Mr Swanson has said, some three inconsistent explanations put forward for the difference in treatment that constituted the alleged discriminatory conduct."**

55. We remind ourselves of the approach that we should be taking to consideration of the Judgment of the Employment Tribunal. We firstly referred to the well known dictum of Elias J in **ASLEF v Brady** [2006] IRLR 576 at paragraph 55.

> **"Mr Sethi properly reminded us of certain well established general principles derived from the authorities. 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 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."**

56. Finally we remind ourselves of the Judgment of Lord Hope in **Hewage v Grampian Health Board** [2012] ICR 1054:

> **"26. It is well established, and has been said many times, that one ought not to 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 that it ought not to be subjected to an unduly critical analysis."**

57. With those considerations in mind we turn to our conclusions.

Conclusions

Alleged error on interpretation of the home-working agreement (HWA)

58. In our opinion there was no error at all on the part of the Employment Tribunal. The issue before the Tribunal in relation to that agreement was essentially an issue as to fact both in relation to the terms of the agreement, both oral and in writing, and also as to its interpretation. There was sufficient evidence before the Employment Tribunal to justify its finding and we are unable to interfere, because no point of law is raised in this regard, and in any event it seems irrelevant to us in considering the question of discrimination on the grounds of sex as set out in the issues before the Employment Tribunal. In our opinion it is irrelevant whether the withdrawal of a concession was of a contractual or non-contractual concession. The issue is not whether the Respondent could revoke the concession but why it did so. Ms Chambis gave her explanation to the Employment Tribunal, which was rejected.

59. We do not intend to deal with all the challenges to the findings of fact, of which there are a number; for example in relation to the meeting of 10 September 2011. It is not the function of the Employment Appeal Tribunal to re-hear the factual merits of a case and the Respondent's case comes nowhere near approaching the "overwhelming case" required for a perversity appeal; see Mummery LJ in **Yeboah v Crofton** [2002] IRLR 634 at paragraph 93.

The allegation that Amreak Singh was not a valid comparator

60. A comparator does not have to be a clone of the Claimant.

61. The Employment Tribunal, in our opinion, correctly directed itself and made the relevant findings of fact; see paragraphs 12, 13, 15 and 16 of the decision of the Employment Tribunal. The Employment Tribunal was entitled on the material before it to conclude that although Mr Singh's situation was not identical to that of the Claimant, it was not materially different and the relevant circumstances were the same. The argument as to whether Mr Singh was a valid comparator again appears to us to be an attempt to re-argue the factual merits of the case and does not raise a point of law.

Alleged error of law as to the approach to the question of less favourable treatment than that enjoyed by comparators

62. It was suggested that the Employment Tribunal should first have asked if there was less favourable treatment and only then decided if the less favourable treatment meted out to the Claimant was unlawful. It was also said that the Employment Tribunal had approached the issue of a hypothetical rather than actual comparator but placed insufficient emphasis on whether the Claimant had been treated less favourably than Mr Singh. We are unable to accept these submissions. The Employment Tribunal clearly compared treatment meted out to the Claimant with that of an actual comparator, Mr Singh, so in the event the less favourable treatment was not an issue. The issue was whether the less favourable treatment was discriminatory. That issue was decided, in any event, after the Employment Tribunal had considered the less favourable treatment.

Error of law in relation to shifting burden of proof

63. It was asserted by the Respondent that the Employment Tribunal fell into error in running both stages of the two-stage approach together and failed to make findings in relation to the "something more" that was required beyond mere difference in gender to bring the reverse burden of proof into play. It was submitted that Ms Chambis' lack of veracity was not capable of being "something more".

64. We do not consider that there is anything in these points either even if the Employment Tribunal should not have run two limbs of the shifting burden of proof together. It asked the reason why the Claimant had been treated as she was. It was not simply a question of the Respondent putting forward no explanation but having given a false explanation. That was clearly capable of being "something more"; see the citations earlier in this Judgment from **Bahl**, **Anya**, and **Birmingham**. The Employment Tribunal set out the reasons why it did not believe Ms Chambis' evidence at paragraphs 19 and 20 and stressed her lack of credibility at paragraph 21. This approach is entirely consistent with the approach taken in **Shamoon**, **Laing**, and the **Birmingham** case. We reject the suggestion that there was simply "no explanation" once Ms Chambis' evidence was rejected; the "something more" was the giving of a false explanation. It was no longer necessary in those circumstances to seek an alternative explanation from the Respondent, whose explanation had been rejected. The Employment Tribunal was, therefore, in those circumstances, entitled to treat the combination of the less favourable treatment, the difference in gender between the Claimant and Mr Singh, and the false explanation given as being evidence from which it could infer, in the absence of the satisfactory explanation, a discriminatory reason for the less favourable treatment. It also rejected the suggestion that the rejection of Ms Chambis' evidence went solely to her credibility. It went to the issue of whether the false explanation, when combined with the difference in gender rendered the less favourable treatment discriminatory.

65. In relation to the suggestion that Mummery LJ in **Madarassy** at paragraph 58 was setting out his view of the law; we have already remarked that he was in fact referring to a submission by Mr Robin Allen. As we have said, we have also not been able to find that this paragraph was approved in the **Hewage** case.

66. We regard the judgment of Mummery LJ in **Madarassy** as being a correct statement of the law and authoritative. It is certainly binding upon us and it would be wholly inappropriate for us to treat it with caution. We accept that the guidelines in the **Barton**, **Igen**, and **Madarassy** cases are not to be treated as being words of a statute; however, in the instant case it was wholly appropriate for the Employment Tribunal to adopt the approach recommended in **Madarassy** and the earlier cases.

67. In relation to the submission that if the employer's evidence of a non-discriminatory reason as admitted at stage 1 the whole stage process would collapse is concerned, the approach taken by the Employment Tribunal was not only approved by the House of Lords in **Shamoon**, but was also approved in **Anya** and in the Employment Appeal Tribunal in **Bahl** and Langstaff J in the **Birmingham** case.

68. We recognise that the effect of the reverse burden of proof in this case may have produced 'an assumption contrary to reality'. We note also that there appears to have been a difference of ethnicity between the Claimant and Mr Singh although it was not suggested that there had been any discrimination on the grounds of race. However it would seem that the facts relied upon to support the claim for discrimination on the grounds of sex would also have supported a claim for discrimination on the grounds of race.

69. Nevertheless we feel constrained by the authorities to decide that the Employment Tribunal was entitled to find that the combination of difference in gender and less favourable treatment than Mr Singh, coupled with the finding that the Respondent's explanation was false, brought into play the reverse burden of proof. In those circumstances, the Employment Tribunal then, in the absence of any other explanation for the less favourable treatment, was bound to conclude that the Respondent had discriminated against the Claimant.

70. In the circumstances all the grounds of appeal and the appeal must be dismissed

71. We express our gratitude to counsel for the assistance they have given to us in their written and oral submissions.