Appeal No. UKEAT/0160/11/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
on 7th December 2012
Judgment handed down on 29th January 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MR C EDWARDS

MS N SUTCLIFFE

MR K KHAN — APPELLANT

ROYAL MAIL GROUP LTD — 1ST RESPONDENT
MS A ALLEN — 2ND RESPONDENT
MR D WAKEFIELD — 3RD RESPONDENT
MS S BEECH — 4TH RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	IN PERSON
For the Respondents	MS SAFIA THAROO (of Counsel) Instructed by: Eversheds LLP Kett House Station Road Cambridge CB1 2JY

SUMMARY

RACE DISCRIMINATION AND HARASSMENT

The appellant identified 11 specific acts of discrimination against him on grounds of race or religion in dealing with which he argued the Tribunal had erred in law, by failing to find the true facts, failing to shift the burden of proof to the employer, or failing adequately to explain its reasoning. Although the Tribunal's approach to at least one was muddled, in respect of its application of the burden of proof provisions (of which, conspicuously, it did not remind itself) properly understood the Tribunal sufficiently expressed its reasons for reaching the decisions it did, most of which turned entirely on findings of fact it was entitled to make, and none of which betrayed any error of law.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. After hearing evidence for ten days, and deliberating for a further six, an Employment Tribunal at central London extended time to enable claims of discrimination to be considered, on the basis that it was just and equitable to do so, and considered complaints of discrimination on the grounds of each of national origin and religion, and harassment, again on each ground separately, and dismissed them as well as claims for unpaid wages and unpaid holiday pay. It gave detailed reasons for those decisions over eight months later, on 15th September 2011. The unsuccessful Claimant appeals.

2. The Claimant was born in Pakistan. He complained to the Tribunal of 24 acts of discrimination, to which the **Race Relations Act 1976** and the **Employment Equality Acts (Religion or Belief) Regulations 2003** applied.

3. In a wide ranging Notice of Appeal, the Claimant sought to appeal the findings in respect of each of the 24 incidents of which he complained, and to complain that the Tribunal had been biased and the hearing unfair. However, having had the benefit of legal advice and representation at a Preliminary hearing in respect of the Appeal, he appealed only 11 of the 24 acts, and withdrew all other allegations. Notwithstanding this, before us Mr Khan (who appears in person as he did before the Tribunal) sought to resuscitate the other 13 grounds, and to raise separate issues relating to the documentation supplied by the First Respondent as grounds of appeal. For reasons given extempore at the hearing, and separately recorded, we did not permit what would have been a late re-re-amendment.

4. Some time was taken up in considering the amendment issue. Such was the nature of the issues yet to be heard that we had no confidence that without careful timetabling the parties would each have sufficient time to present their cases adequately within the day allotted to the case. Accordingly, the submissions were timetabled, with the lion's share of time being allowed to the Claimant, since he was in person. During the day we were able further to relax the time limits for him, but should record that he is plainly an intelligent and able man who sensibly focussed on a three page skeleton argument of 25th August 2011, and in the event had little difficulty in complying with the court's requirements.

Preliminary Observations

5. The Appeal Tribunal hears appeals on points of law only. To identify a finding of fact that should have been decided differently, on the basis that the Tribunal should have preferred the evidence for the appealing party, or should have identified that the evidence for that party was much more compelling than that for the successful Respondent, is not to identify a point of law. It is only where (a) there is no evidential basis for a finding of fact, or if a significant and material misconception of fact is established, or (b) if the overall conclusion, on the facts as found, is such as to fly in the face of reason or be wholly impermissible so that it may be said to be perverse, that such a finding or conclusion may successfully be attacked.

6. The detailed allegations before us are in relation to factual circumstances which are said to give rise to legal consequences. Those legal consequences depend upon the proper application of relevant law.

7. Thus, here there are primary findings of fact (which, argue the Respondents, determine the matter), but a failure to apply the law (says the Claimant). In particular, the Claimant makes

the point in respect of many of the allegations that the facts as found required the Tribunal to conclude that the burden of proof shifted. The Tribunal did not, as most Tribunals do and as it might have done, set out the terms of section 54 A of the **Race Relations Act 1976**, and the cognate provisions of the **Employment Equality (Religion or Belief) Regulations 2003** which provide for the shifting of the burden. Indeed, although at paragraph 119 of its judgment it listed what sections of statute it had applied – it did not set them out word for word - it did not mention section 54 A at all. It is a pity it did not do so, as we shall explain. Had it done so, it would have recorded in part, the following:

> **"54 A (2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunals could, apart from this section, conclude in the absence of an adequate explanation that the Respondent – (a) has 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… that act."**

8. In **Madarassy v Nomura International plc** [2007] EWCA Civ 33 Mummery LJ made it clear that he did not agree that the burden of proof shifted simply upon a Claimant establishing the fact of a difference in status and a difference in treatment. As he put it at paragraph 56:

> **"The Court in *Igen v Wong* [2005] ICR 931 expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the Respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference of status and a difference in treatment only indicate a possibility of discrimination. They are not without more sufficient material from which a Tribunal "could conclude", on the balance of probabilities the Respondent had committed an unlawful act of discrimination."**

Something more than that is required. Accordingly, in order to demonstrate that the Tribunal made an error of law, Mr Khan would have to show us that in any case in which the Tribunal declined to reverse the burden of proof there was something more, factually, upon which he

could rely, and upon which the Tribunal not only could but should have reversed the burden of proof.

9. The second general basis upon which Mr Khan attacked the Tribunal's conclusions was that it had insufficiently explained how it came to the decision it did: that the decision was not "Meek-compliant". As to this, it is axiomatic that a decision must set out with sufficient clarity why a party has won and the other lost. It is an error of law not to do so, not only because it is no less than justice requires for the parties, but also to ensure that a proper review of the decision may be had by an appellate court, and also because a sufficient process of reasoning assists the Tribunal itself to ensure it is doing justice between the parties.

10. The judgment here was given by reference to each of the 24 complaints made to the Tribunal. The oldest was number 24, so that the chronology operated in reverse. Anyone reading this decision, whether as party, Appeal Court, or interested reader, should understand it by reference to the schedule which the Tribunal attached to the end of its judgment which conveniently identifies the eleven relevant complaints in respect of which the appeal proceeded: they were numbers 24, 23, 22, 20, 19, 15, 10, 9, 8, 4 and 2.

The Facts

11. The Claimant was employed as a Revenue and Credit Control Manager by the First Respondent. In 2005 a colleague, Mr Donn, had been looking at what the Claimant regarded as pornography on-line. It was an image of overweight naked women painted in the colours of cows. The Claimant complained to Adele Allen, their line manager, who became the Second Respondent. He then complained about her response, that she said that he was making a 'moral judgement' and that his and Mr Donn's perceptions of what might be pornographic could be

due to 'cultural differences'. The Claimant took these comments to relate to his race or religion.

12. This incident did not itself feature in the list of 24. However, the Claimant thereafter raised it on a number of occasions as demonstrating prejudice against him because of his race, religion, or both. The Tribunal considered Ms Allen's response, which was in evidence before it. By "cultural differences" she had meant the differences between the Claimant, whom she regarded as a 'smart and professional individual', and Mr Donn who was 'somewhat of a man about town'. The Claimant was ambitious; Mr Donn was lazy. She was not, she said, referring either to the Claimant's religion or to Pakistani culture. The Tribunal said this (at paragraph 17):

> **"The Tribunal found that the second Respondent's comment, in the absence of her explanation, could be taken as a reference to the Claimant's religion or to the culture of Pakistan, and moreover and as an unfortunate stereo-type of a Muslim of Pakistani origin. We found it was not unreasonable for the Claimant to perceive her comment in the way he did, although she did not mean it that way.**
>
> **18. In any event, when the Claimant told the second Respondent in November 2005 that her remark had been offensive, she apologised, because it had not been her intention to offend him… they shook hands."**

Viewed through the spectacles of section 54A and **Madarassy**, the Tribunal appear here to have accepted that the burden of proof should shift. If so, it should have looked then for the alleged discriminator to prove what was the reason for the comment, and that it was in no way related to race or religion.

13. The Claimant complained by way of grievance to his employer about these remarks. He made other allegations that he had been bullied and harassed. They were investigated by a Ms Beverley, who reported on 3rd March 2006. She found that Ms Allen had bullied and harassed the Claimant, but did not find that this was on the ground of his race or his religion.

14. Complaint number 24 reads:

> **"You bullied and harassed me as accepted in the investigation report of March 2008 (sic)…" [**we think that 2006 was intended**] "…offending me on racial and religious grounds as highlighted in the report, you were maintained as a senior direct report to David Wakefield and consulted over the placements process and then I got victimised to remove me from the jobs listed as in your 'area'. I will rely on this report to demonstrate why all the subsequent victimisation happened, but reserve the right to cite further details if required."**

15. This complaint was made both against Royal Mail, and Ms Allen. It appears to assume that the investigation report of March 2008 found that the employer had offended the Claimant on racial and religious grounds. Crucially it did not determine that there had been any racial or religious discrimination against him: the Tribunal could not have put it in clearer terms than it did in paragraph 29.4 and 29.5. At paragraph 129, the Tribunal said, in respect of the complaint considered at paragraphs 17 and 18 that:

> **"In any event those remarks did not concern the Claimant's race or religion, but his attitude compared to Mr Donn's regarding pornography. We concluded that the Claimant had not established this allegation.**

16. A second allegation comprised within number 24 was that Ms Allen had on another occasion asked him 'you don't have a problem with women do you?' Her understanding was that he would answer either 'of course not' or 'it's the first time (I've been managed by a woman) so it is difficult', a response which they could then discuss and resolve. The Claimant's understanding, however, was that Ms Allen was accusing him of having a problem with women or women managers. At the Tribunal, the Claimant said that Ms Allen had referred not just to women but to 'white women' thereby introducing a racial element. The Tribunal found (paragraph 25):

> **"However, the Claimant had not previously said anything of the sort, and the Tribunal did not accept his evidence. If the Claimant had heard the Second Respondent refer to 'white women', it did not doubt that he would have recorded it straight away, and subsequently at every opportunity."**

In its conclusion section, at paragraph 130, the Tribunal concluded that the comment was insensitive. It found that it was reasonable for the Claimant to have regarded it as offending him on racial and religious grounds. It then said:

> **"However, the burden was on the Claimant to prove that the second Respondent meant the question to refer to his national origin or religion and we concluded, in accordance with our findings in paragraph 29.5 above, that he had not established this allegation."**

17. 29.5 was a reference to what the Tribunal found in respect of the investigation and report by Ms Beverley. It said that it accepted the Second Respondent's evidence that her question regarding women carried no racial or religious connotation.

Discussion

18. Mr Khan submitted that the Tribunal had applied no adequate analysis and made factual errors in coming to the conclusion it did from paragraphs 129 – 132. He argued that to conclude that the remarks about cultural difference and moral judgments were not made in relation to race or religion but reflected comparative attitudes to pornography was a 'non-sequitur'. We concluded that although such remarks could on their face be heavily laden with racial or religious connotation, the explanation given by Ms Allen was nonetheless open to the Tribunal to accept if it felt it should. If it did accept that explanation as genuine, and not as being contrived after the event, this would leave no space for it to have been motivated on grounds of race or religion. Thus, if the burden had passed (under section 54A) it had been discharged by the Royal Mail and Ms Allen proving what was the reason for the comment

being made, and that it had nothing whatsoever to do with the Claimant's race or religion. The expression "we concluded that the Claimant had not established this allegation" could, as Mr Khan pointed out, suggest that a wrong test had been applied – one which did not recognise the shifting of the burden of proof, despite that which the Tribunal had purported to do at paragraphs 17 and 18. That remark in the last sentence of paragraph 129 would have been an error if the Tribunal had been deciding matters on the burden of proof. It was not. It was clear in its finding that it accepted Ms Allen's non-discriminatory explanation. In that context, the last sentence, though clumsily expressed, was saying no more than that the allegation did not succeed.

19. It is trite that the judgment of an Employment Tribunal must not be expected to be the finest product of elaborate legal draftsmanship. Often it may not be felicitously expressed. What matters is whether the reasoning is clear so that a party may know why he has lost. Here, though, as Ms Tharoo conceded, the Tribunal's description of the legal test appears somewhat muddled, the findings taken overall are clear.

20. The same applies to paragraph 130. To find that it was reasonable for a Claimant to refer to a comment as offending him on racial and religious grounds might imply a shifting of the burden of proof. The Tribunal does not express it that way. Moreover, perception that one has been offended on a proscribed ground does not mean that objectively considered that is what has taken place. The comment regarding women on the face of it might be thought more likely to refer to the difference in gender between Ms Allen and Mr Khan than it would to any difference in race or religion. The test applied suggests that the Claimant had to prove that Ms Allen intended the question to refer to his national origin or religion. The Tribunal accepted that it did not (paragraph 29.5). That test is arguably too narrow, for discrimination does not

depend upon intention. It can occur with the best of motives (see **Amnesty International v Ahmed** [2009] ICR 1450), it may be subconscious, or it may be by the application of a criterion which inherently and indissociably discriminates upon the proscribed ground, without any thought to discriminate (e.g. **James v Eastleigh Borough Council** [1990] 2 AC 751). However, it is also accepted law that words which are neutral upon their face may be rendered discriminatory by the intent with which they are spoken.

21. The context here is critical. As Ms Tharoo points out, and we accept, there was nothing inherently racist or discriminatory on religious grounds to ask a question of the Claimant concerning his relationship with women. All would depend upon the context within which the words were delivered, and the intent of the person speaking them. There could be no escape here from the fact that Mr Khan's allegation was that the words were deliberately spoken with intent to discriminate in mind, against a background in which Ms Allen had obliquely referred to race and religion in, for instance, making her cultural difference remarks which were also complained of as part of allegation 24. Thus, a finding of fact as to the intent with which the words were spoken was critical. The Tribunal made it: it simply did not accept the Claimant's evidence that Ms Allen had referred to 'white women'. Since she had not done that, her words could not on their own sufficiently show a discriminatory intent so as to shift the burden of proof so as to require an explanation from the employer which excluded discrimination on the grounds of religion or race. The repetition in paragraph 130 that the Claimant had not established the allegation justifies the same response from us as above: read as a whole the Tribunal clearly did not accept that Ms Allen referred to 'white women'; did accept that she was asking only about his relationships with women; and thought she had nothing in mind about his race or religion when doing so.

22. Part of the reason that the Tribunal had for rejecting the Claimant's evidence that he had mentioned 'white women' was that he had never made that allegation before. He argued this was wrong. He pointed out to us that in a document in 2008 he had reported that "AA threatens KK that if he makes a complaint AA will claim that he is only doing so because she is a 'single white female manager' (specifically made just after the July terrorist bombings)…". 'AA' is Ms Allen; and 'KK' is Mr Khan. Certainly, here, the Claimant was running together the words 'white' and 'female'. Ms Tharoo has pointed out however, that the context is very different. This was not an allegation that Ms Allen had approached the Claimant asking if he had a problem with white women. Rather it records a response made to the Claimant in order to head him off from making complaints about her behaviour. It is not the same allegation as that considered by the Tribunal. Accordingly, that part of the reasoning at paragraph 25 which supports a conclusion that the Tribunal did not accept the Claimant's evidence stands: and upon reflection, we agree with Ms Tharoo on this.

23. There was no evidence that the Claimant was victimised to remove him from "jobs listed etc." as in the remainder of allegation 24. If that is a reference to the events described at paragraphs 26 - 28 in the decision, then it contradicts, rather than supports the idea that the Claimant was **victimised** by being removed from jobs in which he would report to Ms Allen: it was, as the Tribunal found precisely what he had asked for in 2006, following his grievance against Ms Allen: and it is precisely what Royal Mail arranged should happen, with the effect that from early 2006 he never again reported to Ms Allen.

24. We have spent longer in dealing with allegation 24 than we shall with the other ten allegations, because this was the allegation in respect of which an appeal appeared to have most force, and it was only after being carefully taken through the Tribunal's decision by Ms Tharoo

that we finally concluded that there was no error of law. The other complaints we may take more shortly.

25. Allegation 23 was based upon the findings of Ms Beverley's enquiry. In her executive summary, she made it clear that the Claimant had been bullied and harassed by Ms Allen. The allegation was that in the light of that Royal Mail should have ensured that the bully was moved and not the victim. We understand, however, that the Tribunal accepted that the Claimant remained in the same post thereafter, but reported to a different Line Manager (see, in this regard paragraph 49 relating to September 2006, as well as the finding at 39). From June 2006, Mr Wakefield, who became the Third Respondent took over responsibility for managing the Claimant.

26. No issue here of the shifting of the burden of proof arose, nor could it: it does not apply to allegations of victimisation – **Oyarce v Cheshire County Council** [2008] EWCA Civ 434, C.A. The allegations of victimisation were not particularised by the Claimant. The Tribunal appears to have approached it as relating to a breach of a 'move the victimiser, not the victimised' principle. If so, the conclusion to which it came was entirely justified by the findings of fact to which it came. In context, we think the reasoning is sufficiently clear to satisfy the **"Meek"** test.

Allegation 22

27. The Claimant alleged against Mr Wakefield that he had telephoned the Claimant when returning by car from a meeting, had shouted at him and threatened to discipline him without cause. Here, the Tribunal found (applying the burden of proof) that the Claimant had not

proved that Mr Wakefield had shouted at him. In paragraphs 42 - 45, it rejected the allegation that Mr Wakefield told the Claimant he should not have attended the meeting because he lacked the appropriate authority level; and it rejected his contention that he had been questioned by Mr Wakefield about two complaints from colleagues. Moreover, at paragraph 45 it made a finding that Mr Wakefield told the Claimant that if he continued to direct personal insults at Ms Allen and to bad-mouth her, he would have to pursue matters in accordance with the conduct code. This is plainly not a threat to discipline *without cause*. Accordingly, there was no evidential finding which could sustain any conclusion as to discrimination.

Allegation 20

28. This allegation related to the Claimant having no contact from Mr Wakefield, although Mr Wakefield was his manager. He complained that he had to work in isolation without support. However, the Tribunal found (paragraph 51) that toward the end of 2006 Mr Wakefield agreed with the Claimant's own representative that he could work full-time from home, and that the evidence indicated he had never since worked from Royal Mail premises. The Tribunal, using the same wording as in respect of earlier allegations ('the Claimant did not establish this allegation') concluded at paragraph 136 that the evidence did not support it. Mr Khan argued in his skeleton that there was no reason why the allegation was rejected, and there was a failure to apply any test to the evidence. To us, however, the reason is clear and is as we have stated. The evidence upon which any successful claim would have to rest was simply lacking.

Allegation 19

29. This allegation was directed against all four Respondents. It related to a re-structuring process which started in early 2007. The Tribunal dealt with the relevant facts from paragraph 53 – 71. Summarising, the Claimant and others were assessed for posts within a new structure. Those most successful in the assessment process might get a promoted post. Those successful, but less so would be placed in the most suitable role available for them. Others would be assigned to a redeployment pool, referred to as being 'surplus'. When there, they would receive full pay, but were to be placed on a 13 week programme to look for alternative roles, for which they could apply - or they could continue to remain surplus, with an option to accept voluntary redundancy.

30. Royal Mail brought in independent consultants to assist in carrying out the process by which employees were assessed and assigned for the new roles. The Tribunal found (at 55) that assessments of the candidates were carried out by the consultants 'together with senior members of the finance team'. The Claimant was concerned that Adele Allen might play a part in his assessment, and alleged after the event that she had done, to his disadvantage. He produced spreadsheets which showed the scoring of candidates, most of whose names were redacted bar initials. The scoring was separately totalled under three broad headings: leadership and business partnering capabilities, numeric and verbal reasoning, and scores obtained on personal development reviews ("PDR"s). The capabilities were assessed against a number of criteria and combined into one overall score, as to which those above 6 were eligible for promotion; those above 5 were to be considered for appointment. No one however, would be appointed unless (s)he scored a minimum of 50% on both numeric and verbal reasoning; and for a score of below 6, PDR scores became relevant. There did not appear to be any protocol for the way in which the average score on the assessed criteria (assessed on a numerical scale) related to the numeric and verbal scores (which were expressed in percentage terms) or quite

how the PDR s would be taken into account. It is, however, plain to us that the system adopted was not as simple as one in which a score on the assessed criteria would effectively amount to a guarantee of promotion or of assignment to another job. The Claimant pointed out that on the assessed criteria he totalled precisely 5. He complained that he was the only person who scored 5 (which he described as the 'pass mark') to whom an appointment had not been offered. But that factually is incorrect, judged by the Schedules he offered: another employee scored 5.4, but was not appointed – perhaps because he scored 10 percent only on the 'verbal elements'. A handful of candidates scored less well (4.8) but were appointed. He argued that Ms Allen had been allowed to influence the assessment and appointment process; and also that he was excluded from consideration from those posts which would in the revised structure have involved reporting to her as line manager. He argued this was a consequence of his earlier grievance about her and therefore that it constituted both direct discrimination against him on the ground of his race or religion or victimisation on that basis.

31. By allegation 19, the Claimant claimed that in the course of 'presentations to commercial finance' a statement had been made that the "direct reports" to David Wakefield and Ms Beech had had input as to who was selected for what job. Adele Allen would be one such "direct report". He complained that the Tribunal had not analysed this allegation and had totally failed to deal with the Appellant's assertion concerning presentations given by Mr Wakefield and Ms Allen.

32. At paragraph 56, however, the Tribunal found (i) there was no evidence to contradict Mr Wakefield's testimony that he deliberately ensured that Ms Allen played no part in the Claimant's interview and assessment; and (ii) found that Ms Allen had no such input. This was

repeated in paragraph 62 – the top appointments were made by Mr Wakefield and Ms Beech, and:

> "**appointments at the next level down were made with the additional input of Mr Wakefield's reports"** (i.e. potentially including Ms Allen) but (last sentence) **"there was no evidence that the Second Respondent was involved in decisions as to who would be placed in what new role".**

33. It explained (paragraph 60) that Royal Mail proposed to keep some employees, including the Claimant, on a 'development basis'. In accordance with the Royal Mail's genuine intention to bring highly qualified employees into new roles, the role most like the Claimant's old role required a professional qualification which the Claimant did not have, and this therefore precluded him from applying for it. Critically, it found that that requirement was not deliberately attached to the new role in order to exclude the Claimant from that appointment.

34. At paragraphs 70 and 71 the Tribunal made findings in respect of the allegations that Sue Beech had stated in December to the Claimant that she had consulted Mr Wakefield and in conjunction with him taken the actions she did, which she accepted were discriminatory and unfair. The Claimant's contention was clearly recorded by the Tribunal at its paragraph 70. Equally clearly, at paragraph 71, the Tribunal accepted Sue Beech's evidence that she had not said the words the Claimant attributed to her.

35. Mr Khan told us that Ms Allen's evidence had been that she had been in the same room as Ms Beech and Mr Wakefield when they had discussed the templates for the assessments, and assessments. It was thus inconceivable that she would not have contributed. The nub of this complaint was the allegation that Ms Allen had been allowed to influence the selection process during the re-structuring exercise. The findings of fact are clear to this. The Tribunal did not accept that she had. Accordingly, this allegation must fail on the facts. It was not perverse of the Tribunal to decide as it did. It had evidence to that effect upon which it was entitled to rely.

Allegation 15

36. This allegation, against Sue Beech, was that she did not treat the Claimant fairly or in accordance with the stated assessment procedure protocols because she said that the Claimant could not have a job in Adele Allen's section because of the previous charge he had brought against her (i.e. the grievance alleging she had harassed and bullied him).

37. The Tribunal found as a fact that she did not say these words. It was entitled to reach that conclusion. She gave evidence. Mr Khan could cross examine. The conclusion was not perverse.

Allegation 10

38. On the face of it this allegation appears almost to duplicate that at number 15. It reads: "You gave evidence to the investigating manager for the report dated 11th November 2008. You admitted treating me unfairly by manipulating the placement procedure and processes, depriving me of a substantive post to which I was entitled. You stated your reason(s) as being because of the Adele Allen B & H case which I had previously brought."

39. The investigation of 2008 to which this refers was undertaken by a Mr Webster. At the end of that process, in a report dated 11th November 2008, he reached conclusions which are set out at paragraph 115 of the Tribunal Judgment. It was his opinion that 'the only explanation' for the failure of Royal Mail to offer the Claimant a position in Revenue Protection at his substantive grade, a position that no longer existed, "was… the breakdown of the relationship between yourself and Adele Allen post the old B&H case. It is my belief that this was done on

pragmatic grounds… it would have been reasonable to have discussed the potential appointment… with you and Ms Allen prior to reaching a final conclusion."

40. Mr Khan told us that the allegation that he made was based upon a supposition which he drew from this expression of opinion by Mr Webster. He concluded that the reason why Mr Webster came to the view he did must have been that Sue Beech had admitted to him during his investigation that she had prevented the Claimant being offered such a post because of the past history between him and Ms Allen. There was however no evidence that she had said this. She gave evidence before the Tribunal: the allegation that she had said words to that effect was there to be put to her. The Tribunal, therefore, could accept it or reject it. At paragraph 71 it had accepted Ms Beech's evidence that she did not say as much to the Claimant himself. As to whether she had said anything similar to Mr Webster, the Tribunal said pithily at paragraph 146:

> **"The Fourth Respondent did not make any such admission and we accordingly concluded that the Claimant failed to establish this allegation."**

The allegation depended upon that fact being proved. It was not. The Tribunal was entitled to come to the conclusion it did. It expressed it sufficiently.

Allegation 9

41. This allegation is of discriminating by failing to reinstate the Claimant into an equivalent post to "ones you admit I was entitled to through the assessment procedure, which you admit I was victimised out of …". It was made against Royal Mail alone.

42. Here, the Claimant relied upon direct comparators. The Tribunal considered their position at paragraph 65.4. They were not true comparators, since they were not in the same material circumstances as the Claimant – both had scored significantly higher than the Claimant during the assessment process.

43. The Tribunal saw this complaint as referring to Mr Webster's report of 11th November 2008. That had concluded not that the Claimant should have been reinstated, but that he should (at the relevant time) have been given an opportunity to consider an alternative post. As Ms Tharoo pointed out, the allegation also asserted that Royal Mail had admitted that he had been victimised. However, it did not admit that he was entitled to a position in the revised structure. Nor did it admit that the Claimant had been victimised. Thus there was no factual basis to sustain this allegation and the Tribunal was right to reject it.

Allegation 8

44. This was that it took a protracted time to hear the Claimant's grievance. If so, the Tribunal sufficiently answered the complaint in paragraph 149. At paragraph 148 it dealt also with its conclusion that the allegation related to the Claimant's belief that there had been a finding of harassment and victimisation on the grounds of race or religion in Ms Beverley's report. It said:

> **"In accordance with our findings in paragraph 32 -34, we concluded that this allegation is founded on the Claimant's misapprehension of the effect of a finding of bullying. There were no findings of harassment or victimisation in the report by Ms Beverley, nor by this Tribunal."**

45. Read literally, the finding is inaccurate - as we have pointed out, Ms Beverley did find that bullying and harassment was proved. Ms Tharoo argues that the basis of the allegation was that Ms Allen had been found guilty not just of harassment and bullying, but of doing so on racial grounds. The reference to paragraphs 32-34 included 34 in which there is reference to a misapprehension by the Claimant that Ms Beverley had found that the treatment he received from Ms Allen was racially and/or religiously discriminatory. It is plain on a fair reading of the Tribunal decision that it did not accept that that was so.

46. We accept Ms Tharoo's submission that the Tribunal was not using the words 'harassment or victimisation' in paragraph 148 in their common or garden meaning, such as may be given to the two in a disciplinary policy, but as terms of art as used in the Race **Relations Act 1976**. It must be remembered that harassment as defined, for instance, under the **Protection from Harassment Act** is differently expressed as a concept than that within the discrimination legislation; and colloquial understanding of the concept may include much which is not comprehended by statute, even before consideration is given to the cause which must operate under the discrimination statutes – i.e. gender, race, religion and the like. It makes no sense to read the Tribunal here as ignoring a clear finding by Ms Beverley as to bullying and harassment. It was, rather, rejecting his case on the facts.

Allegation 4

47. This alleged that Royal Mail continued to discriminate against the Claimant by treating him as 'surplus':

> **"…which is a <u>contemplated dismissal</u> – by not rectifying the detriment nor treating me the same as others who passed the assessment and placement procedure."**

Here the Claimant relied on general comparators and direct comparators – Duncan Clarke and Mandy Dibble. As we have pointed out the named comparators did not assist, since their circumstances were materially different. 'General comparators' might appear to add nothing, since it is hopelessly unspecific. Apparently, the Claimant put it that way because the Tribunal had earlier required him to identify two named comparators, and he wished to have a broader field for comparison.

48. At paragraph 153, the Tribunal dealt with the cause of the Claimant remaining surplus. It concluded that that was because he had failed to engage with the 'redeployment process'. There were findings of fact in the Judgment which justified that conclusion, which excluded the cause of the Claimant remaining surplus being an act of discrimination against him on the grounds alleged.

49. The Claimant raised the position of a Mr B, one of the "general comparators", to whom he would have wished to compare himself. Mr B scored 4.8 on the assessment of criteria, thus lower than the Claimant, and was only marginally higher on the numerical elements score. The Tribunal considered his case in comparison with that of the Claimant at paragraph 65.2 as if he were a specific comparator. It explained that not only had he a slightly higher numerical score, but:

> **"His PDR score was in the top 15-20% and he was identified as having a critical skill set required for the First Respondent's business, and had a very wide experience of it. He was appointed on a development basis. We find that this process did not discriminate against the Claimant."**

There were thus justifications for the appointment of Mr B which involved no discrimination against the Claimant. He was not in the same material circumstances since he scored so differently on the PDR element.

Allegation 2

50. Finally, the Claimant complained that it was an act of discrimination admitted by Royal Mail that:

> **"I wrote to you asking you to remedy the continuing situation/detriment which you admitted was because Sue Beech victimised me. You refused."**

The Tribunal dealt with this at paragraph 155. It did not accept that there had been any admission by Royal Mail that Ms Beech had victimised the Claimant. Nor did it accept that the letter (28th November 2008) in response to his, to which his complaint referred, was a refusal to remedy a situation. It said:

> **"Mr Webster did not refuse, but did tell the Claimant that he had concluded his work on the case, and that there was no provision for further consideration of his complaints."**

51. We have not been persuaded that there has been any error of law in the Tribunal's treatment of this allegation either. It rejected the facts upon which any finding of discrimination could have been based,

Overall Conclusion

48. We have on occasion been troubled by the way in which the Tribunal has sometimes expressed its reasoning. Ultimately however, it is clear that in respect of most of the complaints which he made the Claimant simply failed to establish the facts upon which he relied. These were essential pre-cursors to the Tribunal finding any discrimination. Any challenge to those findings is thus precluded as being a challenge against factual findings, and does not involve any error of law. Though it would have been preferable for the Tribunal to have set out, and more clearly applied, section 54A of the RRA 1976, and its equivalent in the 2003 regulations,

or indicated when it did not regard it as appropriate to do so, its reasoning taken as a whole is clear as to why it rejected the Claimant's case, and accepted that for the Respondent. We are compelled to conclude that each of the grounds of appeal raised by the Claimant must fail, and his appeal is therefore dismissed.