Appeal No. UKEAT/0117/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 September 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR R KUMAR APPELLANT

DHL SERVICES LIMITED RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ELLIOT GOLD (of Counsel) Bar Pro Bono Scheme
For the Respondent	MR RUSSELL BAILEY (of Counsel) Instructed by: DHL GBS Legal Services Solstice House 251 Midsummer Boulevard Milton Keynes MK9 1EQ

SUMMARY

RACE DISCRIMINATION - Direct

RACE DISCRIMINATION - Burden of proof

Direct race discrimination - burden of proof - section 136 ***Equality Act 2010*** *- whether the Employment Tribunal had wrongly imported the first stage test into its scrutiny of the Respondent's explanation at the second stage - whether it had, in any event, subjected the Respondent's explanation to the correct level of scrutiny - whether it had adequately explained its reasoning*

The Claimant had applied for a position with the Respondent but had failed at the second interview stage. He did not consider the explanation for his non-appointment could be true as he contended it did not reflect what had been discussed at the interview. Pursing a claim of direct race discrimination before the ET, he argued that the ET should infer that he had not been appointed because of his race. The ET disagreed. With the agreement of the parties, it approached this question as if the first stage of the shifting burden of proof (section 136(2) **Equality Act 2010**) had been met and it therefore turned to the Respondent's explanation. Doing so, the ET first made findings of fact as to what had been discussed at the second interview and found, contrary to the Claimant's case, this had provided the basis for the decision not to appoint, as had been explained to him. Testing the Respondent's evidence and explanation, the ET considered various points raised by the Claimant (including the racial diversity within the workplace; the lack of up-to-date equal opportunities training; the Respondent's failure to answer pre-action questions) but did not consider it should draw any inference from these matters. It dismissed the Claimant's claim. The Claimant appealed.

Held: *dismissing the appeal*

The ET had not lost sight of the test it was to apply and had not imported the first stage of section 136(2) into its determination whether the Respondent had met the burden upon it for the

purposes of section 136(3). It had been required to make findings as to what had been discussed at the second interview as this was material to the explanation given to the Claimant and relied on by the Respondent before the ET. The ET further tested the Respondent's explanation against the various matters relied on by the Claimant but did not consider it should draw any inferences from these factors and, in any event, was satisfied that the evidence of the relevant decision taker discharged the burden of proving that the decision not to appoint the Claimant was in no sense tainted by race. Carrying out this exercise, the ET had subjected the Respondent's case to the appropriate level of scrutiny and had provided adequate explanation for its conclusions.

HER HONOUR JUDGE EADY QC

Introduction

1. The appeal in this matter raises issues relating to the approach to be adopted to the shifting burden of proof under section 136 of the **Equality Act 2010** ("EqA") in a complaint of direct race discrimination.

2. In my Judgment I refer to the parties as the Claimant and the Respondent, as below. This is the Full Hearing of the Claimant's appeal from a Reserved Judgment of the Birmingham Employment Tribunal (Employment Judge Perry sitting with members, Mrs Sheldon and Mr Moss, on 7 and 8 July 2016; "the ET"), sent to the parties on 4 August 2016. Both parties were represented by counsel before the ET; albeit that Mr Gold did not then appear.

3. By its Judgment, the ET held there had been no contravention of the **EqA**; the Claimant appeals. On the initial paper sift, Simler P took the view that the appeal disclosed no reasonable grounds but, after a hearing under Rule 3(10) of the **EAT Rules 1993** (as amended) before Slade J, the appeal was permitted to proceed, it being considered reasonably arguable that the ET erred in law: (1) in answering the wrong question under section 136 **EqA**, and/or failing to draw appropriate inferences; (2) when finding that the Respondent had discharged its burden under section 136(3); and/or (3) in failing to provide adequate reasons.

The Relevant Background and the ET's Decision and Reasoning

4. In a claim presented to the ET on 19 February 2016, the Claimant - who relevantly describes himself as British-Indian - complained that he had suffered direct discrimination

because of race, in that he was not selected for a role for which he had applied with the Respondent, as a first-line manager ("FLM").

5. The Respondent is a large multinational company, employing some 2,000 people at its site in Solihull where the job was based. At the relevant time, it was recruiting for an extra shift and there were 14 FLM roles to be filled. Seven were filled internally, and the Claimant was one of the external candidates being considered for the remaining positions. The Claimant passed through the initial telephone screening interview in the Respondent's recruitment process, and also successfully attended a first interview - an assessment day - such that, along with four others, he was then invited to a second interview. The second interviews were conducted by a number of different individuals within the Respondent. The Claimant's interview was conducted on 20 October 2015, by Ms Soulsby (formally a Manager with the Respondent, who left, before the ET hearing, after about nine months of employment).

6. Ms Soulsby took the decision that the Claimant was not appropriate for one of the FLM roles, something that was communicated to him at some point prior to Friday 23 October. On 27 October, he sought reasons for his non-appointment, and those were provided by email on Thursday 29 October, in which it was explained as follows:

> **"Raj has worked at a much senior level and has managed some significant amounts of budget levels, whilst trying to quiz Raj as to this being a downward step he felt it was not as he could gain a foothold into DHL future career progression.**
>
> **Raj was quiet and it was clear that he was comfortable in a coaching mode as to an assertive one which is needed in this fast-paced environment. He may well feel uncomfortable in a conflict situation.**
>
> **There is no doubt Raj has much experience and is well qualified and I feel he needs to perhaps channel his efforts into a role more suitable for his persona." (Paragraph 29 of the ET's Judgment)**

7. Of the seven external candidates appointed to FLM positions by the Respondent, four self-categorised as white, one as white-Irish, one as British-Pakistani, and one as British-Indian.

A The Claimant had initially relied on one of the successful white appointees, Mr Rowe - described in the diversity monitoring information as white-Irish - as a comparator in his claim. Mr Rowe had scored the same as the Claimant at the assessment day, save that the Claimant had scored 22/50 in one respect (the group exercise) where Mr Rowe had scored 18/50. Mr Rowe's second interview had, however, been conducted by a different manager, who had apparently considered him suitable for appointment. Allowing that this meant that Mr Rowe could not be relied on as a direct comparator, the Claimant put his case as one of a comparison with a hypothetical white applicant for the FLM role. More specifically, he argued that Ms Soulsby had reached conclusions that were not open to her, based on the discussion at the second interview; he claimed that her rationale suggested a racist undertone, and her failure to seek further information from him, and the deficiencies in her equalities training, were matters from which the ET should draw an inference that her conclusions were arrived at as a result of conscious or subconscious racial bias.

8. Given that Ms Soulsby's rationale was at the heart of the claim, it was agreed by the parties that the ET should go straight to the second stage of the two-stage approach to the burden of proof and section 136 of the **EqA** - the *reason why* question - and thus consider whether the Respondent had discharged the burden upon it by proving that the treatment was not on the proscribed ground.

9. In considering whether the Respondent had discharged the burden it thus faced, the ET addressed the different reasons identified for the Claimant's non-appointment. In so doing, it needed to resolve certain evidential conflicts as to what had been discussed at the second interview. Whilst not accepting that any inference should automatically be drawn from a failure by an interviewer to address or follow up a point of concern with the candidate, or from

a candidate's failure to fully respond to such a point, the ET allowed that this might be part of the relevant factual matrix, such that - taken together with other matters - this might allow it to draw an adverse inference. As for the documentary evidence, the ET accepted that the notes disclosed by the Respondent were only a partial record of the discussion at the second interview. Ms Soulsby had also made notes in a notebook, which she had handed in when she left the Respondent's employment, and the HR team had failed to make the necessary link to look for this. It was, however, common ground that the Claimant had said that a role with Respondent would be a foothold for him to future progression, albeit that did not appear in the notes that had been disclosed. The ET thus accepted that those notes only provided a partial record, and it considered most likely that the "foothold" discussion had arisen after Ms Soulsby had challenged the Claimant as to whether the FLM role was a downward step - the first matter identified in her rationale for his non-appointment.

10. As for the second point of concern, the ET accepted that the workplace into which the FLMs were to be appointed was confrontational and pressurised, not something challenged by the Claimant. More specifically, it accepted that Ms Soulsby had taken the view that a potential FLM had to be able to address confrontational situation, a view apparently corroborated by the other manager's decision to appoint Mr Rowe, who had given relevant responses in this regard. The ET considered the notes that were available supported Ms Soulsby's evidence that she had made this point to the Claimant, but he had failed to give an appropriate example to demonstrate he had relevant experience in this regard, instead referring to a situation which did not meet the point he was required to address.

11. More generally, the ET recorded that Ms Soulsby came across as an abrupt, possibly over-confident, and forthright individual, and it accepted that the Claimant may have perceived

her manner as negative towards him, but that did not mean her reasoning was in any sense influenced by race. The ET also noted the various points raised by the Respondent relating to the Claimant's credibility. Whilst those matters did not impact upon the principal issue - whether the Respondent had discharged the burden of proof - it allowed they might have been relevant to the extent there was a conflict on the evidence. The ET had reached its conclusion that Ms Soulsby's evidence was to be accepted independently of any issues relating to the Claimant's credibility, but noted that those issues would have reinforced its view had it been necessary to take them into account.

12. The ET further had regard to the more general evidence relating to diversity within the Respondent's workforce (whilst its shop-floor workforce was ethnically diverse, that was not true of management levels) and also to the particular picture painted in respect of the FLM appointments, but did not consider the statistical picture was indicative of an employer with a bias against appointing non-white staff. Whilst noting that the Claimant had served an equality questionnaire on the Respondent, the ET observed that it post-dated the repeal of section 138 of the **EqA** and recorded that the point was not pursued by the Claimant's counsel. In any event, an ET was not obliged to draw an inference from an employer's failure to answer a statutory questionnaire; any such failure was only relevant insofar as it shed light upon the actual discrimination complained of; see **D'Silva v NATFHE** [2008] IRLR 412 EAT.

13. The ET further noted various deficiencies in the Respondent's diversity and equal opportunities policy and training, and the absence of any evidence of monitoring or scrutinising appointments. It did not consider however that these matters disclosed facts from which it could draw inferences of discrimination. It set out its final conclusion as follows:

> **"73. … Based on the evidence we heard we find that Ms Soulsby's reason for determining the claimant was not appointable was not due to a desire on her part to preserve an existing pattern of employment or due to the claimant's race but due to the rationale she provided at**

> **the time (which we accept was her rationale) namely she was concerned about the FLM post being in her view "a downward step" and thus questioned if he intended it to be a long term post, that Mr Kumar was not suited for an FLM role in "this fast-paced environment" and that Mr Kumar was not suited to "conflict situations" which in our judgment she felt the role entailed. In our judgment her decision was in no sense motivated by race and accordingly the claim fails."**

The Relevant Legal Principles

14. This appeal is primarily concerned with the approach to the burden of proof laid down by section 136 of the **Equality Act**, as follows:

> **"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

15. In a recent decision of the EAT, Laing J presiding, it has been observed that section 136(2) imposes no burden on the Claimant; rather, the ET must consider all the evidence, adopting an essentially neutral approach at this first stage of the exercise, see **Efobi v Royal Mail Group Ltd** UKEAT/0203/16, at paragraphs 77 to 79. In determining whether the burden has shifted, the question for the ET is not whether, on the basis of the facts it has found, it *would* determine that there has been discrimination, but whether it *could* do so. Given that the point does not directly arise on this appeal, I do not seek to explore in this Judgment whether, even if there was no legal burden on a Claimant for section 136 purposes, there might - **Efobi** notwithstanding - be an evidential burden. In the present case, as I have recorded above, the ET expressly stated that it was proceeding, with the agreement of the parties, on the basis that the burden should in any event be taken to have shifted to the Respondent. It was thus for the Respondent to show that it had not contravened the **EqA**; that is that its treatment of the Claimant was in no sense whatsoever referable to the relevant protected characteristic; see **Barton v Investec Henderson Crosthwaite Securities Ltd** [2003] ICR 1205 EAT at paragraph 22 and **Igen Ltd v Wong** [2005] ICR 931 CA at paragraphs 37 and 76.

16. As has been common ground in this case, it is not an error of law for an ET to move straight to the second stage of its task under section 136 (see, for example, **Pnaiser v NHS England** [2016] IRLR 170 EAT at paragraph 38) but it must then proceed on the assumption that the first stage has been satisfied; the Claimant must be placed at no disadvantage thereby, **Laing v Manchester City Council** [2006] ICR 1519 EAT at paragraphs 73 and 76.

17. Moreover, at either stage, an ET may draw such inferences as are appropriate from the evidence before it or from the absence of evidence. Prior to the repeal of section 138 **EqA**, it was specifically allowed that an ET might draw such inferences as it considered just and equitable from a failure of the Respondent to provide full answers to a statutory questionnaire. As, however, allowed in **Dattani v Chief Constable of West Mercia Police** [2005] IRLR 327 EAT, at paragraphs 43 to 46, such an inference might still be permitted, even where the failure to respond was in respect of a question asked outside the statutory procedure and, where the burden is on the Respondent, its failure to produce relevant documentation can be a relevant matter to which the ET should have regard when weighing the totality of its evidence; see **EB v BA** [2006] IRLR 471 CA at paragraphs 50 to 51, **Efobi** at paragraph 85, and **Meister v Speech Design Carrier Systems GmbH** C-415/10, [2012] ICR 1006 ECJ.

18. More generally, when considering the evidence at trial, it is right that an ET should exercise caution when asked to place reliance upon recollections, particularly if given some time after the event and in the context of litigation, rather than relevant contemporaneous documents, see **Gestmin SGPS SA v Credit Suisse (UK) Ltd** [2013] EWHC 3560 Comm, at paragraphs 15 to 22. In particular, when adjudicating upon direct discrimination claims, ETs should be aware of the specific difficulties that arise, and astute to the danger of self-serving explanations from employers or witnesses, a problem alluded to in the well-known passage

from the judgment of Neill LJ in **King v Great Britain-China Centre** [1992] ICR 516 CA, at pages 528f-529c. In testing a Respondent's evidence in such a case, it may well be relevant that an appropriate equal opportunities procedure has not been followed or subjective criteria adopted; see Sedley LJ at paragraph 21, **Anya v University of Oxford** [2001] ICR 847 CA.

Submissions

The Claimant's Case

19. The Claimant first submitted that the ET had erred by answering the first stage question under section 136(2) (whether a *prima facie* case of discrimination had been established) rather than the second stage question under section 136(3) (whether the Respondent had disproved the presumption of discrimination). The failure of focus was made explicit at paragraph 73, when it stated that "*the evidence before us does not disclose facts from which we can draw inferences of discrimination*"; this was a Reserved Judgment, and the ET's apparent transposition of the first stage test should not be seen as simply an infelicitous expression. More than that, the reasoning contained a number of references to the question whether the ET should draw inferences from the primary facts (see, by way of example, paragraphs 39, 41 and 42 relating to whether an inference should be drawn from a failure to follow up a point at interview, and paragraph 63 as to whether inferences should be drawn from other appointment decisions made by Ms Soulsby). More particularly, the ET had erred in excluding any possibility of drawing inferences from the Respondent's failure to properly respond to the Claimant's pre-action questionnaire. It recorded that the point was not pursued, but it was not formally withdrawn and it was incumbent upon the ET to consider whether the Respondent had provided adequate responses, and if not, the reason why, and to draw inferences if appropriate. As part of this exercise, the ET should also have considered the Respondent's failure to provide the disclosure the Claimant had sought, and any other inadequacies in its evidence.

20. Even if the ET had approached this as a second stage case, it had erred in its assessment as to the cogency of the evidence required for the Respondent to discharge the burden upon it under section 136(3). The ET relied on Ms Soulsby's oral evidence in concluding that the Respondent had discharged the burden of proof, notwithstanding significant factors to the contrary, i.e.: (i) the failure to disclose the full notes of interview; (ii) the absence of any evidence that Ms Soulsby had received equal opportunities training in interviewing, or of any scrutiny or monitoring (the **Anya** point); (iii) the Respondent's inadequate and out-of-date equalities material; (iv) Ms Soulsby's failure to put key concerns to the Claimant in interview; (v) the fact that the reasons relied on to reject the Claimant related to his personality and were entirely subjective. Moreover, the Respondent had failed to advance any evidence to corroborate a number of key elements of its case; i.e. that the workplace was confrontational and pressurised, or as to the degree of this, there being no reference to it in the job advert or description. Whilst not disputed that the workplace was confrontational, that was not a concession that an aggressive management style was required from an FLM; the burden still lay on the Respondent, and the ET had to demonstrate it was satisfied with the cogency of its evidence. Similar points could be made in respect of the materials relating to Ms Soulsby's other recruitment decisions. The ET had apparently also relied on Ms Soulsby's anger at the allegations in terms of assessing her credibility. The ET failed to have regard to what was missing and had thus failed to assess the evidence in the round.

21. Finally, the Claimant complains that the ET's reasoning was inadequate to show how it had reached its conclusions on the central issues of law and fact, see **Meek v City of Birmingham District Council** [1987] IRLR 250, paragraph 8; it had to do more than state simply whose evidence it preferred; see **Tchoula v Netto Foodstores Ltd** UKEAT/1378/96.

The Respondent's Case

22. For the Respondent it was observed that this was a case where the ET had permissibly moved straight to the second stage of the process under section 136 **EqA**, an approach consistent with that laid down in **Efobi**, which held that the correct approach was to consider all the evidence. Its focus was thus on the reason why Ms Soulsby had deemed the Claimant unsuitable. The reasons explained to the Claimant at the time were those Ms Soulsby confirmed in her evidence. It was the Claimant's primary case that the explanation given did not make sense; it was therefore logical for the ET to start its analysis by examining those reasons. That, in turn, required the ET to resolve evidential conflicts about what had happened at the second interview and, for the reasons provided by the ET (and taking into account both the oral and written evidence, that which was before the ET and that which was absent) Ms Soulsby's evidence was preferred. Having resolved the evidential conflict, the ET found the reasons given made sense; the main thrust of the Claimant's case below therefore failed.

23. Notwithstanding that primary and crucial finding, the ET went on to consider the other matters raised by the Claimant. In so doing, it was entitled to ask whether it drew inferences from any of those points. That was not falling back into the first stage of the exercise under section 136(2), but was testing the Respondent's explanation given the challenges raised by the Claimant. The ET was not precluded from considering whether it should draw inferences from the primary facts at the second stage; it was still required to see whether inferences should be drawn, such as would undermine the Respondent's explanation, see, for example, the illustration provided in this regard in the case of **Kowalewska-Zietek v Lancashire Teaching Hospitals NHS Foundation Trust** UKEAT/0269/15. Not all the points the Claimant had initially taken were pursued (see paragraph 8 of the ET's reasoning), in particular the questionnaire points (see paragraph 71) and how the Claimant was putting his case now was not

how it was put below. For example, before the ET he did not challenge the confrontational workplace point, not because he was saying that an aggressive management style was not required but because he was objecting that he had not been given the opportunity to demonstrate his competencies in this regard, it was not something made clear at interview. And that was the focus of his case: whether the reasons given for rejecting him as a candidate were credible, given what had taken place at the second interview.

24. More generally, a number of the points taken by the Claimant (in terms of what inferences should be drawn) might reflect badly on the Respondent, but went nowhere in terms of Ms Soulsby's position and reasoning: she had not been sent the pre-action questions; she had not been required to keep her notebook when she left the Respondent's employment about a month after interviewing the Claimant; she had not been responsible for the Respondent's inadequate equal opportunities policies. What was key was what was in her mind at the relevant time, whether her decision was in any way motivated by race.

Discussion and Conclusions

25. At the heart of this case is the ET's approach to the shifting burden of proof. By agreement it was to proceed on the basis that it should assume the primary burden had shifted; so, assuming there were facts from which it could decide, in the absence of any other explanation, that the Respondent had discriminated against the Claimant because of race. The question is whether the ET actually did proceed on that basis, i.e. assuming it was for the Respondent to provide an explanation other than race. Even if it did, the Claimant asks the subsidiary question, whether it subjected the Respondent's explanation to the correct degree of scrutiny?

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26. In addressing the first point, it is correct to observe that, at paragraph 73 of its Judgment, the ET appears to lapse into the language of the first stage under section 136(2). As Mr Gold acknowledges, however, I must be careful not to elevate one line of the Judgment into something more than it actually is: the ET is entitled to expect its reasoning to be read as a whole. The question for me is whether, adopting a holistic approach to the Judgment, it is apparent that the ET adopted the correct approach - the approach it had expressly stated it was adopting in this case?

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27. I also need to exercise caution when considering the case as put on appeal, as against the case as presented before the ET. Various aspects of the Claimant's case plainly evolved during the course of the ET hearing (for example, on the question of the comparator and as to how the response to the pre-action questions was to be viewed, see generally the ET at paragraph 8) and it is right that I approach the ET's reasoning in the context of that which was in issue before it, which may not be entirely the same as that which has been emphasised before me.

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28. The ET started its process of reasoning, correctly directing itself as to the approach it was to adopt under section 136(3):

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> **"33. … Whilst a hypothetical comparator was identified as a white applicant for the FLM role the parties agreed … that given Ms Soulsby's rationale was at the heart of this claim we could and should go straight to the second stage of the two-stage approach to the burden of proof … (the "*reason why*" question) without considering the first stage of the test, and thus consider whether the respondent discharged the burden under the second stage by proving that the treatment was not on the proscribed ground. As we say, at the heart of that issue is Ms Soulsby's rationale. …"**

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29. Accepting that it had to scrutinise the Respondent's explanation and determine whether it had shown the decision was in no way informed by race, the ET turned to the explanation given. In so doing, it was bound to have regard to the Claimant's objection that this could not be the real reason for his non-appointment, as the justifications Ms Soulsby had given could not

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(the Claimant contended) have derived from the second interview and must have reflected subjective and prejudiced assumptions she had (consciously or subconsciously) made, which the ET should infer were tainted by race in the light of the evidence both before and absent from the hearing. As a first step, therefore, the ET considered it needed to resolve what had really been discussed at the second interview.

30. There was a conflict on the evidence in that regard, and the notes disclosed did not fully support Ms Soulsby's account, although she provided some explanation for that: she had also made notes in her daily notebook, which she had left with the Respondent when she had left its employment and the ET accepted that others within the Respondent may not have realised this notebook had any relevance such as to require it to be retained and disclosed. In any event, the ET also observed that the notes that had been disclosed did not include matters that the Claimant had himself accepted had been discussed. Working from that which had been agreed - specifically, that the Claimant had made some reference to the post being a foothold for him - the ET found it was more likely than not that Ms Soulsby was telling the truth and this was an observation the Claimant had made after she had pushed him on why he was applying for the post, which she saw as a potentially retrograde step for him. Similarly, as to whether Ms Soulsby had questioned the Claimant as to how he might deal with an aggressive and challenging workplace, the ET noted that which was agreed - that the Claimant had given an example of a past situation of managing relationships at work - and then looked at the other evidence. In this instance, the notes that were available included a heading before the Claimant's example of "*Job/Aggression*". On the balance of probabilities, the ET thus accepted Ms Soulsby's evidence that she had raised the point about the aggressive working environment, and the Claimant had failed to make the connection when giving his example (see paragraph 42 of its reasoning).

31. In reaching these conclusions, I do not consider that the ET lost sight of the approach it was to adopt: to focus on the Respondent's explanation and to subject that to scrutiny, to determine whether it had established that the decision made was in no sense based on race. Whilst the ET's reasoning at times becomes discursive when addressing the evidentiary matters relied on by the Claimant, it continually returns to the key points and made findings that were firmly directed to the Respondent's explanation.

32. Having thus made its permissible findings as to what had been discussed at the second interview, the ET was entitled to find that the Respondent had made good a key aspect of its explanation, that Ms Soulsby's reasoning arose from the Claimant's responses in that discussion and she was not simply making assumptions about him which might have reflected conscious or subconscious views based on race.

33. The ET did not stop there, however. It went on to scrutinise further whether Ms Soulsby had given a genuine account of her reasoning, in terms of the Claimant's suitability given the nature of the workplace. On this point, I suspect that the Claimant's case on appeal may not be entirely the same as that developed before the ET; it is apparent that the Claimant did not challenge Ms Soulsby's evidence that the workplace was confrontational before the ET. In any event, the ET permissibly found it relevant that the other manager, who had interviewed Mr Rowe, had apparently seen his more robust managerial style as a strength in terms of the role the FLM was to fulfil. Mr Gold says that would seem to contradict the assessment made at the first interview stage and would not be borne out by the job description in this case. Those might have been good points to take below but I am not convinced that they were. In any event, however, I note that the first interview was based on a generic assessment (see paragraph 48 of the ET's reasoning) whilst the second interview was job-specific; at that stage, the ET

was entitled to see it as relevant that Ms Soulsby was not alone in her assessment of what was required for the FLM role.

34. The Claimant says that was still not sufficient to provide the cogent evidence required to satisfy the burden on the Respondent. That, however, is really an attack on the weight given by the ET to aspects of the evidence. It had the benefit of hearing Ms Soulsby giving evidence under cross-examination, and of reviewing the entirety of the documentary evidence in the light of the case as then pursued before it. I do not consider the ET lost sight of the need for the Respondent to adduce cogent evidence.

35. As both parties have acknowledged, at the heart of this case was Ms Soulsby's evidence. The Claimant says that made it all the more important that the ET test her account against that which was missing: the full notes of the interview, a clear selection criteria or scoring, equal opportunities training and procedures, answers to the pre-action questions. Again, I am not entirely convinced that all these points were taken with the same degree of force below, but I can accept that these were all matters that might have led an ET to conclude that a *prima facie* case was made out. That, however, takes the matter no further forward than the position from which the ET started: it was proceeding on the basis that the burden of proof was on the Respondent to show that - contrary to all the factors from which an ET *could* draw the relevant inference - the decision taken was untainted by race. The Respondent did that by calling Ms Soulsby, whose evidence, properly tested in a number of respects, was accepted by the ET. Having accepted that evidence, the ET concluded that the Respondent had established that the Claimant was not appointed because Ms Soulsby had real concerns that this was a retrograde step for him in terms of career, and she did not consider he had demonstrated he had the

A experience nor qualities that would enable him to fulfil the role of FLM in the confrontational and pressurised environment in which he would have to work.

B 36. Given this finding, the fact that the Respondent (not Ms Soulsby herself) had failed in certain other respects - equal opportunities procedures and training, answering pre-action questions, giving disclosure and so on - did not tip the balance. The Respondent had discharged the burden upon it.

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37. That is really also the answer to the Claimant's challenge on adequacy of reasoning. This was not a case where the ET simply said it preferred the evidence of one witness to

D another. It tested the evidence of the key witness and explained in some detail how it had done that and the conclusions to which it had then arrived. It further explained why the points made by the Claimant did not go anywhere, given the evidence that the ET had accepted. The ET

E may not have dealt with all the points that have been raised on appeal in the way that they are now put, but I am satisfied that the ET's reasoning was adequate on the case before it. For all those reasons, I dismiss the appeal.

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