Appeal No. UKEAT/0203/16/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 July 2017
Judgment handed down on 10 August 2017

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

MR I EFOBI — APPELLANT

ROYAL MAIL GROUP LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR TOM COGHLIN (of Counsel) and MR NAVID POURGHAZI (of Counsel) Bar Pro Bono Scheme
For the Respondent	MR STEVE PEACOCK (Solicitor) Weightmans LLP 100 Old Hall Street Liverpool L3 9QJ

SUMMARY

RACE DISCRIMINATION - Direct

RACE DISCRIMINATION - Burden of proof

The Employment Appeal Tribunal ("the EAT") allowed an appeal from the Employment Tribunal ("the ET"). The Claimant claimed that the Respondent discriminated against him because of his race in rejecting job applications which he made.

The EAT held that the ET had misdirected themselves about the effect of section 136 of the **Equality Act 2010** by treating it as imposing an initial burden of proof on the Claimant; but that even if the ET had not misdirected themselves in that way, errors in their approach to the evidence made their decision unsafe.

The claim was remitted to a different ET.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

1. The Appellant appeals against a unanimous Judgment of the Employment Tribunal ("the ET"). The ET consisted of Employment Judge Vincent Ryan, Mr Everett and Mr Bott. The Appellant is a black African who was born in Nigeria. He worked for the Respondent as a postman. He made 33 or so unsuccessful applications for IT-related jobs with the Respondent. Mr Coghlin, who represented the Appellant with Mr Pourghazi, told me during the appeal that that the ET decided during the course of the hearing that the Appellant would only be permitted to rely on the 22 job applications which are referred to in his ET1.

2. In a Decision sent to the parties on 24 March 2016 the ET held (among other things) that on 25 April 2015 the Respondent had "engaged in unwanted conduct related to the claimant's race that had the purpose and effect of violating the claimant's dignity" and had the effect of "creating an intimidating, hostile, degrading humiliating and offensive environment for the claimant" by refusing his request to finish his shift in time to go to a wedding, and that the Respondent had victimised him for bringing his discrimination claim in the ET by filming him surreptitiously on 22 October 2015, with a view to getting evidence for disciplinary proceedings which would expose him to the risk of dismissal, and by suspending his driving rights between 23 October and 15 December 2015.

3. The Appellant also claimed that the Respondent had discriminated against him directly on the grounds of his race in rejecting those job applications. The ET dismissed that claim and his remaining claims of harassment, of direct discrimination (which did not concern the rejection of his job applications), and of indirect discrimination. The Appellant appeals against

A the dismissal of his claims of direct discrimination relating to the rejection of his job applications. He does not appeal against the decision about the remaining claims of direct discrimination, indirect discrimination, or harassment. The Respondent does not appeal against the findings of harassment and victimisation.

B

4. I will refer to the parties as they were below. Paragraph references are to the ET's Decision, unless I say otherwise.

C

5. The Claimant was represented by Mr Coghlin and Mr Pourghazi of counsel, acting under the auspices of the Bar Pro Bono Unit, and the Respondent by Mr Peacock, a solicitor. I

D thank all the advocates for their helpful written and oral submissions. I thank Mr Pourghazi in particular for the useful spreadsheet which he produced summarising the evidence before the ET.

E

6. The issue is straightforward to state, but less easy to resolve. In short, it is whether the ET erred in law in failing to consider whether to draw an inference against the Respondent that the Respondent had discriminated against the Claimant on the grounds of his race in

F circumstances where there was at least some evidence from which such an inference could have been drawn, but in circumstances where the ET had accepted the Respondent's secondary evidence that the reason why the Respondent did not appoint the Claimant to any other posts for

G which he applied was not his race, but the poor quality of his generic application.

7. There are four broad grounds of appeal:

H

i. The ET erred in law in paragraph 2.21 of their Judgment in finding that no evidence was adduced about the race of the successful, shortlisted or longlisted

candidates, and therefore in saying that it could not make any findings of fact by inference or otherwise about potential real or hypothetical comparators.

ii. The ET erred in law in paragraph 2.22 of their Judgment in finding that the Claimant had not proved facts from which the ET could conclude that the Respondent's recruiters or hiring managers knew of the Claimant's colour, nationality or ethnicity or that those factors or any of them were relevant to or influenced their decisions.

iii. The ET erred in law in dealing with the Claimant's 33 (or 22) applications in the aggregate. They should have considered each separately.

iv. The ET erred in law in paragraphs 2.4-2.34 and 4.2 of their Judgment in failing to take into account (or properly take into account or understand) various parts of the evidence in deciding what inferences to draw about direct discrimination.

The ET's Decision

8. The ET listed the agreed issues in paragraphs 1.1-1.5. At paragraph 1.2 the ET listed the several issues it had to decide about direct discrimination. The ET noted that there was an agreed draft Schedule of issues and of the law in the joint bundle of documents.

9. The Respondent, the ET found, is a large employer with various functions and departments, including IT. The Claimant is a citizen of the Republic of Ireland. He has degrees and diplomas, graduate and post-graduate, in Information Systems, a BSc Honours degree in Information Systems, and qualifications in forensic computing. His principal relevant qualifications were awarded by Trinity College Dublin and by Dublin City University.

10. When the Claimant came to the United Kingdom, he started work for Angard (on 5 October 2011). Angard provides services to the Respondent. The Claimant started work on fixed term contracts. On 27 August 2013, he was employed by the Respondent. Angard paid the Claimant a higher hourly rate than the Respondent paid. The ET held that there was no evidence that this was because of the Claimant's race. The Claimant wanted to move away from being a postman into computer-based or managerial work which was better suited to his qualifications and ambitions.

11. The Respondent advertises vacancies in various ways, including on sites on the internet. It receives thousands of applications, both from internal and external candidates. They must be submitted on-line on the Respondent's on-line form. The form asks for personal details. At the relevant time, external candidates were required to fill in the town and country of their birth. As well as filling in the form, a candidate had to upload a CV into the recruitment system (paragraph 2.5).

12. The Respondent has different recruitment systems for managerial and operational jobs. The ET described the system for recruiting people for managerial jobs in paragraph 2.6. A hiring manager gives a job brief to a recruiter which is used to inform the advertisement for the post. There are very large numbers of applications for nearly all posts. After the advertisement, the recruiter sifts all the applications to produce a long list. The recruiter then has a discussion with the hiring manager, who gives instructions to the recruiter to make a shortlist, based on the manager's requirements for the job. The aim is to produce a shortlist of four or five candidates. Time pressure means that managers only want to see a small number of candidates. They do not have time to read CVs of unsuitable candidates. The hiring managers are not concerned with the personal details of candidates.

13. Those on the shortlist are interviewed. A candidate who is shortlisted for an interview takes a test called "Talent Q". This has two parts: a psychometric test called "Dimensions", and skills and ability tests called "Elements" (described in more detail in paragraph 2.6.3). The manager who is hiring for a post decides which parts of Elements are to be used in the recruitment for that post.

14. The hiring manager is sent the candidates' CVs, the completed Dimensions and Elements tests and shortlist information. If, after the interview, the hiring manager is satisfied that there is a suitable candidate, and if the post is still open and within budget, an appointment is made. Sometimes a post is cancelled or postponed without an appointment, if circumstances have changed since it was advertised. Because there are so many applicants, feedback is not given as a matter of course, but it will be if a candidate asks for it.

15. The ET described the process for appointing operational staff in paragraph 2.7. All applicants take an on-line Talent Q test called "Aspects". It is a test which a candidate passes or fails. Only the top scorers are interviewed.

16. On-line application forms can be viewed by recruiters and hiring managers but they do not normally look at them. The personal information is collected at the start of the process so that it is available to be used later if it is needed. It is only needed for the successful candidates. It is used to check a candidate's ability to work in the United Kingdom and to enable security checks to be done (paragraph 2.8).

17. In paragraph 2.9 the ET explained that there is a difference between the approach towards internal and external candidates. The former do not need to provide information about

town and country of birth on the application form because the Respondent already has that information. The Claimant misunderstood the process and mistakenly applied as if he was an external candidate when he was an internal candidate.

18. The Claimant provided and uploaded his CV with each application he made. He had two versions of his standard CV, one a slightly modified version of the other. He provided "a series of neutral statements of actions and duties" but no "context or any illustration or narrative". There was no information "specifically tailored to any one of the particular jobs for which he applied". It was described, in that sense, as "a generic CV". Apart from updating his CV, he kept using the same CV, without any context or illustration, despite the fact that he had been rejected for similar jobs for which he had used the same CV. He "persisted with a CV whose content and format repeatedly and with good reasons (lack of relevance and detail) failed to find favour in a competitive exercise" (paragraph 2.10).

19. The Claimant's case was that what he put down was technical information which a technical specialist could interpret. The ET accepted that the CVs did not show the Claimant's "engagement with the roles for which he applied and his interpersonal ability … and therefore neither a recruiter nor hiring manager would know on reading the CV how the claimant himself assessed that he would perform in the roles for which he was applying".

20. Mr Fawcett, who gave evidence, gave advice to the Claimant about how to work up his CV by giving more details on it. He and two other operational managers, Mr Wilde and Mr George, knew about the Claimant's ambitions. They spoke to him encouragingly about how he could realise them. Separately, a specialist recruiter, Mr Dixon, arranged an interview for the Claimant for job 33 by bypassing the listing processes, to give him a better chance, and gave

him feedback (paragraph 2.12). The ET made further findings about this in paragraph 2.14. At other times, when he asked for it, the Claimant was given feedback about his unsuccessful applications. The Claimant was longlisted twice, in August 2014 and in March 2015.

21. Sometimes the Respondent used a recruitment company, Alexander Mann ("AM"), because of the size and complexity of its recruitment operations. The ET found no discriminatory conduct by AM, and had no specific evidence that AM had access to the Claimant's application forms or to the information about the Claimant's place of birth. The Claimant made no allegations against AM and there was no evidence, or reason to infer, that the Respondent told AM to discriminate against the Claimant on the grounds of his race (paragraph 2.13).

22. The Claimant was interviewed for a job as Assurance Technical Specialist on 28 January 2013. The interview was arranged by Mr Dixon, to help the Claimant. The Claimant said that Mr Dixon told him that it was a speculative interview. At, or after, the interview, the Claimant was told that he was not "a perfect fit" for the job and that he was not "good in the administrative side". He was not, the ET found, the best candidate, and he was not appointed. This post was one of several reviewed by independent recruiters during the Claimant's grievance hearings. All the independent recruiters upheld the original decisions not to take the Claimant's application further, including in the case of this post (paragraph 2.14).

23. The Claimant was shortlisted for, and was sent a written invitation to, an interview on 4 December 2013 for the post of Information Security Risk Analyst by a recruitment co-ordinator. Before the interview, Mr Dixon contacted the Claimant to tell him that the interview would be over the phone rather than face-to-face. The Claimant emailed Mr Dixon after the

phone interview asking him to confirm that the phone interview had replaced the face-to-face interview. Mr Dixon did so. The hiring manager considered that the Claimant was technically strong but did not know the process well enough. His application did not succeed. In the event, that campaign was cancelled, and the Respondent did not appoint anyone to that post. The Respondent told the Claimant and he did not complain at the time that he had been discriminated against (paragraph 2.15).

24. The ET accepted Ms Hancock's evidence that on occasions face-to-face interviews were changed to phone interviews for reasons such as diary clashes. The ET said that the Claimant had not proved facts from which it could find, directly or by inference, that either the change of interview format or the cancellation of the job was in any way related to the Claimant's race (paragraph 2.15). The ET made further findings about cancellations in paragraph 2.18. There was "no evidence that any advertised post was "pulled" because the claimant had applied and was as he alleges the "last man standing"". The ET found that no advertised job was cancelled or recruitment postponed because of the Claimant's protected characteristics.

25. The Claimant complained of discrimination in relation to 30 or more applications. Six or more different recruiters were involved at different stages and two or more hiring managers. The ET were prepared to accept as "entirely possible" the Claimant's evidence that over 55% of successful candidates for posts with the Respondent succeeded because they were related to or friendly with someone in its hierarchy. That was his evidence and the ET heard nothing to counter it. The Claimant was adamant that to be successful, one had to rely on nepotism or cronyism, or at the very least, long service and experience with the Respondent. The ET however accepted from the Respondent that the successful candidates considered by the ET "with whom the claimant compared himself all evidenced significantly longer relevant

managerial or other experience, and produced more detailed and more relevant CVs than the claimant in which they displayed actual or potential requisite engagement and interpersonal skills for the posts applied for, which was lacking in the claimant's generic CVs" (paragraph 2.16).

26. Not all of the jobs the Claimant applied for required his highly technical qualifications, but they all required other skills which the Claimant did not show in his CV. That was why the Respondent classified his CV as "poor" and generic. Without denigrating the Claimant's qualifications, the ET agreed that in that sense only, his CV was "poor" (paragraph 2.17).

27. The Claimant's case was that he could not change his CV because it would look fraudulent. That was why he kept using a failed model. The ET found that the Claimant took and failed Talent Q (paragraph 2.16). They recorded the Claimant's claim that he never sat Talent Q and that the Respondent had produced documents proving otherwise (paragraph 2.19). The Claimant claimed that somebody in or for the Respondent had manipulated his CV and other documents. There was a conspiracy against him which involved deceit and fraudulent changes to documents including the bundle for the hearing. "These allegations were uncorroborated, implausible, lacked cogency and credibility and [were] disbelieved by the [ET]". At best, the Claimant was mistaken in these respects. In his evidence, the Claimant showed that he lacked awareness and the ability to analyse objectively. The ET accepted his credible evidence about some of his claims, but his evidence about the job applications was unconvincing (paragraph 2.19).

28. The ET did not hear evidence from any of the recruiters or hiring managers who had dealt with the Claimant's applications over the years "because they have left the business over

the years …". In paragraph 2.20 they listed the Respondent's witnesses who did give evidence, and described the topics they covered in their evidence. They gave cogent and credible evidence despite a mistake by Mr Hames (about the questions asked of external candidates). That mistake did not cause the ET to doubt "the main thrust of his evidence or that of Ms Hancock. Specifically the [ET] concludes that there is no reason to believe, and on the balance of probabilities it does not, that the information given by the claimant as to his town and country of birth was searched for, viewed and taken into account at any stage of the processing of the claimant's applications for jobs with the respondent" (paragraph 2.20).

29. At paragraph 2.21 the ET said that "No evidence was adduced as to the Race of the candidates" who were successful, or who were longlisted, or shortlisted or interviewed by the Respondent. The ET was "unable to confirm as [a] fact the Race of these successful or at least more successful candidates, and cannot make [any] findings on the basis that they are comparators for the purposes of the claimant's discrimination claims. No evidence was adduced that applicants for jobs who were either black African and/or Nigerian were more or less likely to be progressed through the recruitment process or to be appointed. The [ET] was therefore unable to make findings of fact by inference or otherwise about any potentially real or any hypothetical comparator(s)". The ET returned to the topic of comparators in paragraph 4.2. The ET said that they "did not find facts from which it could adjudge that the claimant was treated less favourably tha[n] a real or hypothetical comparator". They also considered comparators in paragraph 4.4 (see paragraph 44, below).

30. The ET then said that the Claimant had not proved facts from which they could conclude that the Respondent's recruiters or hiring managers knew of his protected characteristics, or that those factors or any of them were relevant to or influenced decisions not

to shortlist, longlist, interview or appoint the Claimant for any of the jobs he applied for. "There is ample evidence to conclude that there were other sound reasons untainted by unlawful discrimination for the rejection of his applications at various stages … Despite the large number of [rejections] and the claimant's academic qualifications, such was the credible evidence" that the ET did not have to draw any inferences "such as that race played a part or that the recruitment decisions were tainted by unlawful discrimination" (paragraph 2.22).

31. At paragraph 2.23 the ET described the Claimant's grievance about his failed job applications. The grievance went to stage 3 of the Respondent's procedure. The appropriate recruiters and managers were interviewed, and employees of AM. The Claimant's applications were reviewed and compared with the successful applications. A "conscientious conclusion was reached that there was no evidence that the claimant was treated unfavourably". The ET found that this was "on balance … a correct and conscientious finding" despite the Respondent's convoluted administrative actions during the campaigns. "The procedures were not always straightforward but they were not tainted by discrimination" (paragraph 2.23).

32. The ET accepted the Respondent's evidence about why the Claimant did not qualify for a share offer (paragraph 2.25). He appealed and his appeal was successful. The rules of the scheme were then changed to correct the anomaly which the Claimant's successful appeal had exposed. This was not related to the Claimant's race.

33. The ET considered, and rejected, other claims made by the Claimant (paragraphs 2.25-2.28). There is no appeal against these conclusions and I say no more about them.

34. In paragraph 2.29, the ET considered the Claimant's claim that he had not been allowed to go to a wedding on 25 April 2015 and that this had amounted to harassment. The ET set out the facts. In brief, the Claimant had understood that his manager, Mr Wilde, had given him permission to start his working day early and to leave early that day. The Claimant would be working at the Flint depot that day. The ET did not accept that Mr Wilde had forgotten the relevant conversation, but found that Mr Wilde did not definitely agree to the Claimant starting and leaving early. As it turned out, the manager at Flint, Mr Nichol, was not expecting the Claimant to start early that day, when the Claimant "presented himself" at Flint early that morning. Mr Nichol told the Claimant he must work from 8am to 1pm. The Claimant did not return from his round until 12.15, there was an argument, and the Claimant left early, but missed the wedding. The ET noted that the Claimant had not asked for annual leave that day and had therefore been "prepared to take something of a chance". The ET found that Mr Nichol had refused to accommodate the Claimant's request. The ET disbelieved the potentially innocent explanations for their conduct given in evidence by Mr Wilde and of Mr Nichol. The ET held that the Claimant had proved facts from which the ET could infer that the reason for the refusal of his request was tainted by discrimination. They were therefore "able to draw an inference as to why they were covering up and … what were the true reasons for" refusing the Claimant's request. The ET inferred that the reason he was not allowed to finish early was because he was a black African and/or Nigerian.

35. In paragraph 2.30 the ET considered an allegation that the Claimant had been covertly filmed on 22 October 2015. The Claimant presented an ET1 on 29 June 2015 alleging race discrimination. That was a protected act, as the parties agreed, and as the ET found. Mr Veets was a postman who was normally based at Rhyl. On 22 October 2015, he was helping at Ellesmere Port. He was assigned to the same round as the Claimant. The Claimant was the

driver. During the last six or seven minutes of a long shift, he covertly filmed the Claimant on his phone. The Claimant was driving without his seatbelt. The ET held that it was clear from Mr Veets' own evidence that he was looking for evidence against the Claimant (paragraph 2.30.3).

36. Because Mr Veets had very recently been to training on the topic, he knew that driving without a seatbelt was both an offence and a breach of the Respondent's policy, and could lead to disciplinary action. Mr Beech was Mr Veets' brother in law. Mr Beech was Mr Wilde's immediate line manager. Mr Wilde was the Claimant's immediate line manager. Mrs Beech, Mr Veets' sister, also worked for the Respondent. She and Mr Veets spoke regularly; Mr Veets and Mr Beech probably spoke twice a week. Mr Beech heard about the driving incident the evening it happened, and before Mr Wilde did. The ET did not believe Mr Veets' evidence about whether he was paid for two hours' work after the end of the round.

37. Mr Veets reported the incident to Mr Wilde the next day. He claimed to have been upset by the Claimant's driving and conduct, but, the ET said, they were not convinced by his evidence about this. The filming and the report were vindictive and malicious (paragraph 2.30.6). They caused detriment to the Claimant. The Claimant immediately admitted driving without a seatbelt. He even offered to call the police and report himself. Mr Wilde removed the Claimant's driving rights pending an investigation. That also amounted to a detriment.

38. Gary, a white comparator, had his driving rights suspended in similar circumstances for 21 days. The Claimant's rights were suspended for 52 days. This was an unnecessarily long suspension, which was also a detriment (paragraph 2.30.8). The Claimant was allowed to amend his ET1 to include a claim of victimisation in relation to this on 9 December 2015. The

ET said that it was no coincidence that Mr Wilde decided to lift the suspension on 15 December 2015. There was no investigation of the driving incident. The ET found that Mr Veets knew about the ET claim, as did Mr Wilde. The ET did not accept Mr Veets' evidence that he was neither trying to create a vacancy at Ellesmere Port (a depot he wanted to move to) nor curry favour with his managers by providing evidence against the Claimant (paragraph 2.30.11).

39. In paragraph 2.30.12 the ET summarised their findings which were favourable to the Claimant and unfavourable to the Respondent's two witnesses. They held that they could, and did, infer that these acts were because of the Claimant's ET claim. Mr Veets had two motives, but he would not have filmed another employee in the same circumstances.

40. In paragraph 3 of the Judgment the ET summarised the law by reference to the relevant statutory provisions. At paragraph 3.11 they referred to the parties' "substantial written submissions", including submissions about the authorities. There was no disagreement about the authorities in those submissions. "The battleground between the parties was factual". The Employment Judge checked with the parties during the hearing that they agreed with each other about the effect of the authorities. The ET noted that the Claimant is academically inclined, had studied the law relevant to his case and was confident about its terms and effects (paragraph 3.12). This gave the ET confidence that the Claimant and the Respondent's solicitor genuinely understood and agreed the citations they had made. They each confirmed that they did not require the ET to rehearse the principles in the Judgment. The ET was content that the parties had referred accurately to the authorities and quoted them accurately (paragraph 3.12). The ET did not refer to, or analyse any of the authorities.

41. The ET said that it was for the Claimant to prove facts from which the ET could conclude that there had been discrimination. "Subject to that it would fall for the respondent to prove that there was no unlawful discrimination". If the Claimant discharged the burden of proof, then, "absent an innocent explanation which was accepted by the [ET] his claims would succeed" (paragraph 3.14). It was not for the ET to decide who were the best candidates or the candidates whom the ET would have appointed. The ET said that it was not for them to, and they had not, "run through thirty or more recruitment campaigns … merely to gainsay the respondent's recruiters, hiring managers and … [AM]". Rather, it was for the ET to "make relevant findings of fact in respect of specific allegations of discrimination and apply the law to those findings". It was not for the ET to consider whether the Respondent, through its managers and employers had acted "kindly or even reasonably" towards the Claimant, but to decide whether the burden of proof had been satisfied.

42. In paragraph 4.1, the ET considered the Claimant's claim for indirect discrimination. The Respondent applied a provision, criterion or practice ("PCP") of requiring internal and external candidates for jobs to put the town and country of their birth on an application form. The ET said that the Claimant had not proved facts from which they could conclude that this PCP put people who shared the Claimant's race at a particular disadvantage. The ET also found that the Claimant had not been put at a particular disadvantage by the PCP. He had not proved facts from which the ET could connect the Claimant's race or national origin with his failure to be long-listed, short-listed, or appointed. The evidence from the Respondent showed that the Claimant had not been disadvantaged because of his race. There was some confusion about the Respondent's legitimate aim. The aims seemed to be security, and to check eligibility to work. Those were legitimate aims and the steps did not seem disproportionate. It was easier to gather this information at the outset. The fact that the information in issue was no longer

required "suggests that there was another way of doing things which would avoid the risk of conscious or subconscious discrimination". But the Respondent did not have to justify the requirement at the time because the Claimant had not proved facts from which the ET could conclude that there was discrimination (paragraph 4.1.3).

43. At paragraph 4.2 the ET considered direct discrimination. It referred to the various issues it had listed at paragraphs 1.2.1-5 and said "our response to each … is the same in that the claimant has not proved facts from which we could conclude that there was discrimination, and in any event the respondent had disproved any suspicion of discrimination. The [ET] did not find facts from which it could adjudge that the claimant was treated less favourably tha[n] a real or hypothetical comparator. The [ET] asked itself, repeatedly, whether the claimant's respective failures to be appointed to posts for which he applied were because of his race; was race the reason? As a finding of fact the [ET] concluded that it was not. The claimant did not satisfy the conscientious requirements of the respondent's recruiters and hiring managers as he failed to demonstrate that he was a suitable, or the best, applicant, notwithstanding his academic qualifications".

44. At paragraph 4.4 the ET considered comparators. These principally were the successful candidates for the posts. The ET said that they did not have enough evidence to show that they were appropriate comparators; in any event, there was evidence "to establish that the respondent had good reasons, untainted by discrimination, to prefer their CVs to that of the claimant: they were better candidates". The ET mentioned Gary in the context of the removal of driving rights; but no comparator was needed because this was a victimisation claim. "Generally where a comparator was required the claimant appeared to be relying on hypothetical comparators; the [ET] did not think that the claimant had given this … much

thought". In paragraph 4.5 the ET said that it only found that there was less favourable treatment because of the Claimant's race in relation to the wedding on 25 April 2015.

45. In paragraph 6 the ET said, "In reaching [the] judgment the [ET] considered each claim in particular, and then considered the situations facing the claimant as a whole to consider whether it could make any inference in respect of the otherwise failed claims. For all the reasons set out above it concluded that it could not draw any further adverse inferences. Where the respondent had plausible, acceptable, innocent explanations its evidence was accepted and that has resulted in findings that some of the claimant's claims fail".

46. In paragraph 7, the ET referred to submissions which the Claimant sent to the ET, but not to the Respondent, after the decision had been announced. The ET would not read these preparing the Written Reasons for the Judgment, which had, by then, been asked for. The ET appended those short email submissions to the Judgment.

The Burns / Barke Procedure

47. On 10 May 2016, HHJ Richardson stayed the appeal pending a response from the ET to questions he asked. The ET replied on 23 May 2016. The ET was asked whether it had made any case management order on the first day of the hearing. The ET explained, in short, that the Claimant had initially confirmed that his claim related to the Respondent's failure to appoint him to 30 odd posts, but that later he had, in effect, floated an amendment to his claims so as to impugn intermediate stages of the recruitment process, such as long-listing, short-listing and interview. In due course the Claimant applied to adjourn the second day of the hearing so that he could clarify his claims and approach ACAS for a settlement. The ET decided not to adjourn for those purposes. The hearing resumed at 11.24 am.

Submissions

48. Mr Coghlin made three broad submissions. The ET had:

a. made findings which were not supported by the evidence;

b. failed to consider what broader inquiry it should have made and was lured into an objective rather than a subjective approach to the Respondent's decisions;

c. and used too broad a brush and failed to analyse properly what inferences it could or should have drawn from the evidence.

49. He submitted that in a discrimination case the ET has to identify the decision maker(s) (**IPC Media Ltd v Millar** [2013] IRLR 707 at paragraph 25 per Underhill P (as he then was)) and then consider the state of mind of each decision maker so as to decide whether race or national origin was an influence to any significant extent (**Reynolds v CLFIS (UK) Ltd** [2015] EWCA Civ 439; [2015] ICR 1010 at paragraph 11 per Underhill LJ: that was an age discrimination case, but the same reasoning applied to a race discrimination case). That means that the protected characteristic need not be the sole cause of the act of which the Claimant complains, so long as it is a more than trivial cause. The Claimant also relies on paragraph 36 of **Reynolds**, in which Underhill LJ said that liability attaches to an employer where an employee for whom he is responsible does a discriminatory act, and that employee is motivated by the protected characteristic at issue.

50. It follows, submits Mr Coghlin, and I accept, that it is not open to an ET to treat all the employees of an employer as a collective entity when considering whether, or (just as importantly) not, an employer has discriminated against an employee. But the ET in this case fell into that error: for example, at paragraph 2.17, when they referred to the Claimant's failure to show relevant skills in his CV (apart from his technical qualifications) and said "For that

reason the respondent categorised his CV as being poor in that it was generic …". The ET, he submitted, had, in the next sentence, slipped into the error of forming its own view of the quality of the Claimant's CV, and applying an objective approach instead of the subjective approach of asking what was in the minds of the individual decision makers. He pointed out that not all the job descriptions were in the ET bundle, and that the Claimant must have apparently met the requirements for the two jobs for which, according to Mr Hames' witness statement, he was longlisted. Those two jobs are different from the jobs the ET describes in paragraphs 2.14 and 2.15 of the Judgment.

51. He argued in support of ground 1 that the ET was wrong to say in paragraph 2.21 that there was no evidence of the race of the successful candidates: there was some, as Mr Pourghazi's table shows. That part of the table is based on a document which was before the ET (page 91 in the bundle for the appeal). The Respondent collected this information in the recruitment process. No successful candidate shown on page 91 was a black African. Mr Coghlin submitted that the Respondent failed to adduce evidence, which it must have had, and which the EHRC Code of Practice advises it to collect and keep, of the race or national origin of most of the successful candidates. The Respondent also failed to call any decision maker. The ET was entitled, if not bound, in those circumstances, to infer that no successful candidate was a black African, or born in Nigeria. It was an obvious inference from the way the Respondent defended the claim that no successful applicant was a black African or of Nigerian origin, because if they had been, the Respondent would have said so in its ET3. That common sense inference meant that there was no difficulty in identifying a comparator.

52. He sought support for that submission by referring to the decision of the European Court of Justice in **Meister v Speech Design Carrier Systems GmbH** Case C-415/10 [2012] ICR

A 1006. In that case the Court held (in sum) that where an unsuccessful applicant for a job had asked for and had been refused disclosure of the file of the successful applicant, a Court must take into account all the circumstances in deciding whether or not the applicant had shown that she had established facts from which discrimination could be presumed and could take that refusal into account in reaching that decision. I do not know, however, whether the Claimant ever asked the Respondent for disclosure of the relevant information about the race and/or national origins of the successful candidates in this case.

53. The starting point for ground 2 was paragraph 2.22 of the Judgment. Mr Coghlin submitted that there was no evidence to support the linked findings that decision makers did not know about the Claimant's race or national origin, and were not influenced by that factor. First, the evidence before the ET showed that the Claimant's name was visible to recruiters, and would make it clear that if not a black African or of Nigerian origin, he was, at least, of foreign origin. Second, the evidence showed that recruiters could, if they chose, look at an external applicant's town and country of birth (the Claimant had misunderstood the process and consistently applied as an external applicant, even though he worked for the Respondent and was therefore an internal applicant). That evidence is summarised in paragraph 12 of the Claimant's skeleton argument. Mr Coghlin added, for completeness, that Mr Adams had corrected the notes at page 102 of the appeal bundle in manuscript to add that "nationality" and "country of birth is" (ie "visible to a recruiter"). This was supported by the grievance outcome letter at paragraph 9 of page 106.

54. Mr Coghlin also criticised the first sentence of paragraph 2.20 of the Judgment. This suggests that the ET did not hear evidence from the people who rejected the Claimant's applications because they had left the Respondent's business. The evidence before the ET did

not support a finding, either, that all the people who had rejected the Claimant's applications were employed by the Respondent (some were employed by AM) or that all the Respondent's employees had left the business (see paragraph 6 of Ms Hancock's witness statement "… his applications were considered by a number of different recruiters, which, as I have stated, the majority of which have since left [the Respondent]". "The majority" is not the same as "all". Mr Coghlin told me (for what it is worth) that the LinkedIn profile of Mr Adams, who is named as the decision maker in the case of four applications (see Mr Pourghazi's table), suggests that he still works for the Respondent. Neil Dixon, from AM, is named as the decision maker in five cases (ibid). Whether or not Mr Adams now works for the Respondent is neither here nor there. The point is that there does not seem to have been any evidence before the ET that either of these people (or indeed any of the named decision makers) could not be contacted by the Respondent, and the evidence did not show that they had all left the Respondent.

55. Mr Coghlin submitted that the findings in paragraph 2.22 were unsatisfactory in the light of this evidence and in the light of the fact that none of the recruiters was called to give evidence. The ET had taken a cursory approach; they had not reflected the evidence accurately in their findings, and had accepted second- or third-hand evidence about the decision makers' approach. In this state of the evidence, in a case which was not otherwise hopeless, the Respondent's decision not to call the decision makers was one from which an inference could be drawn.

56. Mr Coghlin relied here on the judgment of Lord Sumption SCJ in **Prest v Petrodel Resources Ltd** [2013] UKSC 34; [2013] 2 AC 415. In **Prest** a wife claimed ancillary relief against her husband. She argued that seven properties which were nominally owned by companies controlled by her husband were in fact beneficially owned by him. Lord Sumption,

with whose judgment the other members of the Court agreed, described the evidence as "incomplete and in critical respects obscure" (judgment, paragraph 43). "A good deal", he continued, "therefore depends on what presumptions may properly be made against the husband given that the defective character of the material is almost entirely due to his persistent obstruction and mendacity".

57. Lord Sumption then adopted a statement by Lord Lowry in **R v Inland Revenue Commissioners ex p TC Coombs & Co** [1991] 2 AC 283 at 300F-G, with a modification for ancillary relief cases (see paragraph 45 of the judgment). The reasons he gave for making that modification apply with some force, by analogy, to discrimination claims, given the effect of section 136 of the **Equality Act 2010** ("the 2010 Act"), to which I refer below. I have not heard argument about this, but ETs may, on the basis of such reasoning, be entitled to "draw on their experience and to take notice of the inherent probabilities when deciding what an uncommunicative [Respondent] is likely to be concealing".

58. The Applicants in **Coombs** applied for judicial review of the notice issued by an inspector on behalf of the Commissioners of Inland Revenue requiring the production of documents. The Inland Revenue's case was that the information which led it to consider that the documents in question might be relevant to the taxpayer's liability could not be disclosed to the Court on the grounds of confidentiality, but that that information had been disclosed to the inspector before he gave his consent to the issue of the notice.

59. Lord Lowry considered what evidence might displace the presumption of regularity which applied to the issue of the notice. He referred to the fact that the inspector, who had heard the application for it, had consented to the notice. He then said:

> **"Another fact is the sparseness of the evidence adduced by the Revenue. In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified."**

60. The Revenue's reticence was explained, if not entirely justified, and that reduced its effect in favour of the Applicants. Lord Lowry analysed the evidence as a whole and concluded that it did not show that the inspector's opinion, when he gave the notice, was unreasonable.

61. Lord Sumption also referred to a passage from Lord Diplock's speech in **Herrington v British Railways Board** [1972] AC 877 at pages 930-931, saying that Courts had "tended to recoil from the fiercer parts of this statement", and to **Wisniewski v Central Manchester Health Authority** CA [1998] PIQR P324 (with apparent approval). In that case, Brooke LJ, with whom the other members of the Court agreed, drew four propositions from his review of the authorities (which included the **Coombs** case and **Herrington**):

> **"(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.**
>
> **(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.**
>
> **(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.**
>
> **(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."**

62. **Wisniewski** was a clinical negligence case. The trial Judge had drawn an adverse inference from the fact that the treating doctor, who was in Australia, had refused to come to England to give evidence at the trial. The Court of Appeal upheld his approach. The Court said

A that the plaintiff had a "prima facie, if weak, case" and that the Judge had been entitled to treat witness' absence as strengthening the case against that witness.

B 63. Mr Coghlin submitted that the ET was bound to consider the effect of the absence of the decision makers from the hearing, and whether it should draw an inference against the Respondent because of their absence, and that when that factor was combined with the Respondent's failure to adduce evidence about the race or national origins of the successful C candidates, and with other evidence in the case (or its absence), the ET was bound to draw an inference that the Respondent had discriminated against the Claimant on the grounds of his race or national origin in rejecting his applications.

D 64. He relied on a number of further gaps in the evidence. There was no evidence from Mr Hames and Ms Hancock about three of the applications (10, 18 and 20). Such evidence as there was second-hand and amounted to attempts by the Respondent's witnesses to reconstruct the E reasoning of the actual recruiters. He gave many examples from the witness statements of Ms Hancock's and Mr Hames. He referred to a document on which Mr Peacock relied in his skeleton argument (and in his submissions on the appeal), an email from Charlotte Dodd dated F 8 June 2015 (about three weeks before the Claimant presented his ET1). She could not say why the Claimant was rejected (because she did not reject him), but based on her experience and what she would be looking for, she gave her opinion about the "detailed evidence" about G various aspects of nine posts which she said was missing from the Claimant's CV.

65. He also relied on four further points:

H i. The ET's comments about nepotism, which he described as "remarkable";

ii. The ET's strong findings about the intended effect of the Respondent's harassment (paragraph 4.3.10), and about the victimisation claim; in this regard, also, the ET's rejection of the evidence of the Respondent's witnesses as untruthful;

iii. The ET's failure to recognise and to take into account the Respondent's failure to comply with the EHRC Code of Practice (and see paragraphs (8) and (13) of the guidelines annexed to the decision of the Court of Appeal in **Igen Ltd v Wong** [2005] EWCA Civ 142; [2005] ICR 931), and the confused evidence which the Respondent had given about the collection of personal data in application forms;

iv. The ET's failure to recall Mr Hames when he sent an email, after he had given evidence, correcting a point that he had got wrong in his evidence, and the ET's acceptance that Mr Hames had made a genuine mistake.

66. Ground 3, in short, was that the ET had not, and should have, considered each complaint individually. The ET should have put itself in a position to "see both the wood and the trees" (cf paragraph 79 of **Fraser v University of Leicester** UKEAT/0155/13/DM, per HHJ Eady QC, quoting counsel for the Respondent in that case, Mr Pitt-Payne QC) and did not do so. With one or possibly two exceptions (paragraphs 2.14 and 2.15) the ET had not considered the Claimant's 22 applications. Moreover, they had said, in paragraph 3.15, that it was not for them to "run through thirty or more recruitment campaigns … merely to gainsay the respondent's recruiters …". Contrary to a submission made in Mr Peacock's skeleton argument, it was not unduly pedantic to require the ET to make a decision on each allegation of discrimination. The ET were not required to "gainsay" the recruiters, but to analyse the evidence about the state of mind of the recruiters with the statutory test in mind.

67. Mr Peacock submitted that the burden of proof provisions were perhaps less important in this case than might at first appear, as they had "nothing to offer" when the ET was in a position to make positive findings on the evidence about the "reason why" the Respondent had behaved as it had. He referred to **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11; [2003] ICR 337 paragraph 7 per Lord Nicholls for that formulation of the test which an ET should apply in discrimination cases. That test was formulated against the language of the secondary legislation which applied then in Northern Ireland, which differs from the language of section 19(1) of the **2010 Act** ("on the ground of" cf "because of"), but I do not consider that this is a material difference. The ET's general findings, were, he said, an answer to complaints made under broad headings, by analogy with **Fraser v University of Leicester**.

68. He argued that spending two and a half hours in this appeal hearing on the first part of the burden of proof missed the point when there was as clear an explanation as there was in this case of the reason why the Claimant's applications were rejected. The burden of proof need not be applied in a mechanistic way. If the ET is satisfied with the general "reason why", a claim will fail. It was irrelevant whether or not the burden of proof formally shifted: see **Fraser**.

69. Mr Peacock also submitted that the question at stage 1 is whether there is material from which an ET could, not must, draw an inference. He referred me to the **Barton** guidance (**Barton v Investec Henderson Crosthwaite** [2003] ICR 1205 at pages 1217-1218), which is set out in paragraph 14 of **Igen v Wong**. I accept that submission. He further submitted that that meant that there was a discretion whether the burden shifts. I reject that submission. It confuses the nature of the evidence (evidence from which an inference could be drawn) with what the ET must do if, as a matter of judgment (not discretion) it accepts that there is such

evidence. If it accepts that there is such evidence, it does not have any discretion; the burden of proof has shifted.

70. He referred me to the many passages in the Judgment from which it is clear that the ET accepted the Respondent's explanation of "the reason why". The Claimant had used "a failed model" despite feedback. Mr Peacock encouraged me to focus on "the reason why"; if I did so, the appeal ended there. "The reason why" could not be clearer. The ET had made no perverse findings, and there was no error of law in their approach. The grounds of appeal were all about inferences, but this case turned on "the reason why".

71. I asked Mr Peacock (who did not appear below) why there was so little evidence before the ET about the race and national origins of the successful candidates. He said that it was likely that the Respondent had taken the risk of "laying its cards" on its explanation of "the reason why", because there was lots of evidence about "the reason why". He submitted that there was no error in paragraph 2.21. The ET's focus was, rightly, on "the reason why". The evidence about race and national origin might not have been available, the Claimant did not ask for it, there was an onus on him to ask for it, and there was no obligation on the Respondent to disclose it. That last submission appears to be correct, so far as it goes. The **Employment Tribunal Rules of Procedure 2013** impose no duty on parties to disclose documents; no such duty arises unless and until an ET makes a disclosure order under Rule 31. I do not consider that any such duty is imposed by the general terms of the overriding objective (Rule 2). In any event, he submitted, even if it had been open to the ET to draw an inference that none of the successful candidates was a black African, or born in Nigeria, that would not have shifted the burden of proof. But even if it had shifted, that would not have helped the Claimant.

72. I sensed that Mr Peacock had difficulty answering some of my questions about ground 2. He had to accept that there was no evidence before the ET, either that all the decision makers had left or about which decision makers had left. He had no answer to the question how, logically, the evidence of Ms Hancock or of Mr Hames could support the ET's conclusion in paragraph 2.20 that the information about the Claimant's town and country of birth was neither viewed, nor taken into account by the Respondent's recruiters. Nor did he answer the question whether the Respondent's "reason why" was logically inconsistent with the Claimant's race or national origin having been a legally significant influence on the Respondent's decisions.

73. Mr Peacock submitted that the Claimant had to do more than to say that he was a black African born in Nigeria, that he had made many job applications, that he had put down his town and country of birth in his application form, and had not got the jobs. He would not be drawn on what more the Claimant had to show in order to shift the burden of proof. But even if the Claimant got over that hurdle, it all came back to "the reason why".

74. On ground 3, Mr Peacock submitted that the ET did not err in not considering each application individually. The applications concerned the IT function. The jobs required "broadly similar skill sets" and were similar jobs. The Claimant submitted pretty much the same CV for each one, and the reasons why the Claimant failed were very similar. This submission foundered somewhat on the rock of the email from Ms Dodd, to which I have already referred and which suggests that the jobs did not all require the same skills. He did not accept that the authorities require the ET to analyse each application, as each application was one claim for discrimination, although he accepted, when asked, that each application was the basis of a separate discrimination claim. He then submitted that the ET looked at each of

A applications. I reject that submission. It is clear from the Judgment that they did not do so. He submitted, next, that the evidence over seven days had involved an analysis of "pretty much every job". His revised submission was that he accepted that the ET had not considered every job, but that that was permissible, because the jobs were so similar.

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75. Mr Peacock moved on to ground 4. He described the ET's comment about "cronyism" as "odd"; but it did not negate the ET's finding about "the reason why". There was no

C suggestion that any of the successful candidates had got his job by that means. The Respondent took the Claimant's statement about cronyism as a "throwaway remark". No significance should be attributed to the ET's findings about the Claimant's colleague and managers in

D Ellesmere Port, as Ellesmere Port was totally separate from the Respondent's recruiters. He did not accept that the Respondent had breached the EHRC Code of Practice, and submitted, in any event, that the ET should not be criticised for not mentioning the Code of Practice, as neither

E party had referred to it during the hearing. The Respondent was alive to this issue, and had changed its practice by putting this information in a separate form.

76. Overall, he submitted that the ET do not have to be over-mechanistic or systematic in

F their application of stage 1 or of stage 2. If the ET are satisfied by the Respondent's general "reason why", they are entitled to find that there has been no discrimination. That that was the position in this case came across "loud and clear" from the Judgment. The ET were entitled to

G find that there was ample credible evidence that the Respondent's rejection of the Claimant's applications was not tainted by discrimination. That was a judgment which the ET were better placed to make than is the EAT.

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Discussion

77. Section 136 of the **Equality Act 2010** ("the 2010 Act") is headed "Burden of proof". It is sometimes called "the burden of proof provision". It is at the heart of the ET's reasoning. It applies to proceedings "relating to a contravention of this Act". Its language is significant. "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" (section 136(2)). Section 136(3) provides, "But subsection (2) does not apply if A shows that A did not contravene the provision". As Peter Gibson LJ made clear in paragraph 16 of **Igen v Wong**, what matters most in the applicable statutory provision about the burden of proof is its words; it is from those that ETs must take their main guidance. "Could" must mean "a reasonable tribunal could properly conclude": see per Mummery LJ at paragraph 57 of **Madarassy v Nomura International plc** [2007] EWCA Civ 33; [2007] ICR 867.

78. Section 136(2) does not put any burden on a Claimant. It requires the ET, instead, to consider all the evidence, from all sources, at the end of the hearing, so as to decide whether or not "there are facts etc" (cf paragraph 65 of **Madarassy**). Its effect is that if there are such facts, and no explanation from A, the ET must find the contravention proved. If, on the other hand, there are such facts, but A shows he did not contravene the provision, the ET cannot find the contravention proved. Long before section 136 was enacted, Industrial Tribunals were discouraged from acceding to submissions of no case to answer at the end of an Applicant's evidence in a discrimination claim. Section 136 prohibits a submission of no case to answer, because it requires the ET to consider all the evidence, not just the Claimant's, and because it is explicit in not placing any initial burden on a Claimant. The word "facts" in section 136(2) rather than "evidence" shows, in my judgment, that Parliament requires the ET to apply section 136 at the end of the hearing, when making its findings of fact. It may therefore be misleading

to refer to a shifting of the burden of proof, as this implies, contrary to the language of section 136(2), that Parliament has required a Claimant to prove something. It does not appear to me that it has done.

79. I acknowledge that this is not the way in which section 136 is interpreted in the Explanatory Notes. Explanatory Notes may be an admissible aid to the construction of a statute in order to establish contextual factors, but in so far as they reveal the Government's views about the scope of statutory language, they cannot be treated as reflecting the will of Parliament, which is to be deduced from the language of the statute in question (**Westminster City Council v NASS** [2002] UKHL 38; [2002] 1 WLR 2956, paragraphs 5 and 6, per Lord Steyn).

80. I acknowledge two further points.

81. First, this is not the way in which the burden of proof has been understood in the cases, starting with **Igen v Wong**. However, the statutory provision considered by the Court of Appeal in **Igen** was not section 136. It was section 63A of the **Sex Discrimination Act 1975** ("the SDA"), which was introduced by amendment. Similar amendments were made to other discrimination legislation at different times by section 54A of the **Race Relations Act 1976** and by section 17A(1C) of the **Disability Discrimination Act 1995**. Section 63A of the **SDA** and its sibling provisions provided, in sum, that where a Complainant proved facts from which the Tribunal could, apart from the provision in question, conclude that, in the absence of an adequate explanation from the Respondent, that the Respondent had committed, or was to be treated as having committed, an act of discrimination, the Tribunal was to uphold the complaint

unless the Respondent proved that he did not commit, or was not to be treated as having committed, the act.

82. Second, section 136, as I have interpreted it, goes further than article 8.1 of Directive 2000/43 requires. I note, nonetheless, that article 8.2 expressly permits Member States to introduce rules of evidence which are more favourable to plaintiffs.

83. Finally, there have not been many cases in which the effect of section 136, as opposed the effect of its predecessor provisions, has been directly considered. **Pnaiser v NHS England** [2016] IRLR 170 EAT is one; but this point was not adverted to. See also, for example, **Fennell v Foot Anstey** UKEAT/0290/15/DM, where, again, this point was not adverted to.

84. The ET did not did not refer to section 136 in their summary of the statutory provisions. I have no doubt, from at least six passages in the Judgment, taken together, that they did not understand the effect of section 136:

i. In paragraph 2.15 they said that the Claimant had not proved facts from which the ET could find directly or indirectly, or by inference that interviews were changed or appointments cancelled because of the Claimant's race.

ii. In paragraph 2.22 they said that the Claimant had not proved facts from which the ET could conclude that the Respondent's recruiters knew about his protected characteristics or that those influenced their decisions.

iii. In paragraph 3.14 they said that "It was for the claimant to prove facts from which the [ET] could conclude that there was discrimination. Subject to that it would fall for the respondent to prove that there was no unlawful discrimination. In

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the event that the claimant satisfied the burden of proof upon him, then absent an innocent explanation which was accepted by the [ET] his claim(s) would succeed".

iv. In paragraph 3.15 they referred to the question "whether or not the respective burdens of proof as described in paragraph 3.14 above … as, and on the respondent's part if, appropriate".

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v. In paragraph 4.1.3 they said, twice, in the context of the Claimant's indirect discrimination claim, "the claimant has not proved facts from which" they could draw a relevant conclusion.

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vi. In the next paragraph, paragraph 4.2, they said, "… our response to each … is the same in that the claimant has not proved facts from which we could conclude that there was discrimination, and in any event the respondent has disproved any suspicion of discrimination".

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See also paragraph 2.96.2, which suggests a similar, but in the event, immaterial, misdirection in the context of the Claimant's successful harassment claim, and paragraph 2.30.12, likewise, in relation to his successful claim for victimisation.

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85. The Respondent appears to have decided, as I think Mr Peacock accepted, to present and argue this case on the basis that the ET could "cut to the chase" and consider the Respondent's explanation for its rejection of the Claimant's many job applications. This approach was risky because it could be seen as a tacit acceptance that the Respondent had a case to answer. The Respondent seems to have decided, as part of this approach, not to present evidence which was within its own knowledge, but not within the Claimant's knowledge, which many Respondents faced with a claim for race discrimination would, prudently, present to an ET. So the Respondent did not volunteer evidence about the race or national origins of all the successful

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candidates (though, contrary to the ET's finding in paragraph 2.21, some evidence about this was before the ET). Nor did the Respondent call a single decision maker: even though (1), as appears from paragraph 2.16 of the Judgment, only eight or so people were involved, and (2) as Mr Coghlin submits, the evidence before the ET was not that all had left the Respondent's employment, or, indeed, that not all were employed by the Respondent, as some were employed by AM. This way of presenting the Respondent's case meant that there was no direct evidence of the thinking of any of the decision makers, and the ET had to rely, instead, on second-hand evidence about that thinking, evidence which tried to reconstruct that thinking from some of the materials which had been before the decision makers.

86. The Respondent's decision about the presentation of its case, however, was not tactically astute, given the effect of section 136, and given the availability to the ET of inferences. At the first stage of the analysis required by section 136, there is no burden on a Claimant to prove anything (although if his case is manifestly frivolous, a Respondent can apply to have it struck out). What the ET has to do is to look at the "facts" as a whole. If a Respondent chooses, without explanation, not to adduce evidence about matters which are within its own knowledge, it runs the risk that an ET will draw inferences, in deciding whether or not section 136(2) has been satisfied, which are adverse to it on the relevant areas of the case. Those inferences will then be part of the "facts" for the purposes of section 136(2).

87. The ET's misdirections about the burden of proof mean that I cannot be confident that the ET did not require the Claimant to prove things that he was neither required, nor able, to prove, such as the race and national origins of the successful candidates. The Claimant was a litigant in person, enthusiastic, perhaps, about researching the legal principles, but with no obvious grasp of litigation tactics. From what I have seen, he does not seem to have

appreciated that he could ask the ET to require the Respondent to disclose information relevant to his claims. The ET should have considered, and did not, whether it was appropriate for them to draw an inference about the race and national origins of the successful candidates. Had they done so, their perceived difficulties about comparators (which they referred to three times) would have evaporated.

88. I will give some examples of the evidence before the ET which might, on analysis, and when weighed with other material, have supported a decision that section 136(2) was satisfied:

i. He was very highly qualified.

ii. He was a black African of Nigerian origin.

iii. His name strongly suggests that he is of foreign origin, and to those who know about African names, that he is of African, or of Nigerian origin. His name was known to all recruiters.

iv. Information about his town and country of origin was accessible to any recruiter who chose to look.

v. He was longlisted for two jobs.

vi. The Respondent chose, with a very few exceptions, not to disclose the race or country of origin of any of the successful candidates. Such disclosure as there was showed that no black African or person of Nigerian origin had been appointed. In that situation, an ET ought at least to consider whether to draw an inference adverse to the Respondent about the race of the successful candidates.

vii. The ET accepted the Claimant's evidence about the role which cronyism played in recruitment; evidence which the Respondent did not, apparently, try to counter, or even to deny.

viii. The ET accepted the Claimant's evidence about his harassment and victimisation claims, and, more importantly, did not believe the evidence of three of the Respondent's witnesses about those claims.

ix. The protected act on which the victimisation claims were based was the bringing of the very claim for discrimination which the ET was hearing.

x. The ET made very strong findings about those claims, which I have already summarised. The ET held that Mr Veets victimised the Claimant in order to curry favour with managers (his brother in law was a manager) and that his action was vindictive and malicious.

xi. The ET held that it was no coincidence that the Claimant's driving rights were reinstated shortly after he was given leave to amend his ET1 to include the victimisation claims.

89. I accept that the evidence about the harassment and victimisation claims, and the evidence about the job applications concerned different parts of the Respondent's business. It would be for an ET to decide whether the very strong findings about what happened in Ellesmere Port might indicate a wider problem with discriminatory attitudes in the Respondent's organisation as a whole.

90. I also have doubts whether, in the light of those misdirections about the burden of proof, the ET imposed a sufficiently rigorous standard of proof on the Respondent. It is clear that, because of those misdirections, the ET decided that the Claimant had not "got to first base". Had they appreciated that the Claimant did not have to get to first base, but that they had to consider all the evidence in the round, they might have concluded that section 136(2) was satisfied, and then have subjected the Respondent's explanation to more rigorous scrutiny than

they did. Mr Coghlin's submissions about the correct approach are a powerful indication that the ET did not look closely enough at the Respondent's case. It seems to me that when this case is analysed, there is, potentially, a real question, not confronted by the ET, whether the evidence adduced by the Respondent was capable of "showing" that the Respondent (and that must mean, each decision maker who considered the Claimant's applications) did not discriminate against the Claimant. It is not for me, but will be for the ET (if it decides that section 136(2) has been met) to decide what, if anything, that evidence does show.

91. Examples which reinforce my unease about the approach of the ET to the Respondent's explanation are (1) the ET's reasoning in paragraph 2.22 that the Claimant had not "proved facts from which the [ET] could conclude that the respondent's recruiters or hiring managers knew of his colour, nationality or ethnicity, or that those factors (or any of them) were relevant to or influenced their decisions not to long-list, shortlist or interview or appoint the claimant", and (2) the similar passage in paragraph 2.20, which I quoted above. In paragraph 2.8, the ET had found that "the application form and the personal information on that form is accessible to a recruiter or a hiring manager who cares to search for it, but as described they would not normally do so and need not". So the ET accepted that a recruiter or hiring manager could see this information. Its "specific" finding in paragraph 2.20 that the information about the Claimant's town and country or place of birth was not searched for or taken into account at any stage of the Claimant's applications was based on the "thrust" of Mr Hames' and Ms Hancock's evidence. But neither witness was in a position to give evidence about what the recruiters or hirers looked up or took into account, for obvious reasons.

92. My doubts about the effects of the misdirections are compounded by the ET's inaccurate summary of important evidence. I accept Mr Coghlin's submissions that the evidence did not support two of the ET's findings:

a. The decision makers did not give evidence because they had (by implication all) left the Respondent's employment.

b. No evidence was adduced as to the race of the other candidates.

They are also compounded by the ET's failure to consider each of the Claimant's job applications separately.

93. It is not for me to decide whether section 136(2) was satisfied. But I have no doubt that when all the evidence is taken into account, including the inferences which it might have been open to the ET to draw based on that evidence (and lack of evidence) that there was material on which an ET could conclude (not must) that section 136(2) is satisfied. By "inferences" I mean inferences other than an inference of unlawful discrimination, such as inferences about the race of the successful candidates.

94. I should make clear that even if my interpretation of section 136 is wrong, and it is to be interpreted, despite the fact that its language is significantly different from the language of the predecessor sibling provisions, as imposing an initial burden of proof on a Claimant, that I would, nonetheless, have allowed the appeal.

95. I can state my reasons shortly. Mummery LJ made clear in **Madarassy** (at paragraphs 65-79) the reference to "evidence" in section 63A(2) of the **SDA** to "the evidence" is a reference to all the evidence in the case, including evidence from the Respondent. This

A approach must apply, also, it seems to me, to section 136(2). So, to the extent that the ET thought that they could only look at evidence adduced by the Claimant at the first stage, they misdirected themselves. Further, in order to be able to take into account the Respondent's explanation, the ET had to move to what has been described in the cases on the predecessor provisions as "the second stage". In **Madarassy** (at paragraph 81) Mummery LJ accepted that it might be appropriate in some cases for an ET to move straight to the second stage "acting on the assumption that the burden may have shifted to the respondent and then considering the explanation put forward by the respondent".

96. The doubts I have expressed about the ET's approach apply with equal force if section 136 is to be interpreted in line with its predecessor provisions. Even if the ET directed themselves correctly about the effect of section 136, and it does impose an initial burden of proof on a Claimant, their approach to the evidence means that I am not confident that they did understand that there might have been, in this case, facts from which a Court could have concluded that (in the absence of an explanation) the Respondent had discriminated against the Claimant, and that, because they failed to appreciate that, they did not scrutinise the Respondent's explanation rigorously enough.

97. I must reject Mr Coghlin's submission that, when the findings in the Claimant's favour are coupled with the Respondent's failure to call the decision makers and its indirect evidence about "the reason why", the only possible conclusion the ET could have reached was that the Respondent did discriminate against the Claimant in rejecting his applications. I do not accept that the authorities go that far. It is for an ET to weigh the partial explanation for not calling the decision makers, and to decide, in line with Brooke LJ's proposition (4) (see paragraph 61, above) what effect the partial explanation for the absence of the decision makers has, and

whether it nullifies or reduces the detrimental effect of that absence on the Respondent's case. In any event, I do not accept, for the reasons I have given, that I can decide whether section 136(2) was met. That, which is, logically, the prior question, is also a matter, not for me, but for the ET.

Disposal

98. I heard oral submissions from the advocates about disposal. My clear view is that I cannot substitute my view for that of the ET. I must therefore remit the direct discrimination claims concerning the Respondent's rejection of the Claimant's job applications to the ET. In the light of this ET's misdirections about the burden of proof and of my other criticisms of its approach, I consider that I must remit those claims to a differently constituted ET, despite the costs which that will impose on the parties.

99. I must also consider the scope of the remitted hearing. I do not consider that it would be right to give the Respondent the opportunity substantially to re-shape its case. The findings in paragraphs 2.1 to the first sentence of paragraph 2.10 should be preserved, together with the findings from the fourth and fifth sentences of paragraph 2.16, paragraphs 2.25-2.30.12, paragraph 4.3.2.10, paragraph 4.5 with the omission of the word only, paragraph 4.6, paragraphs 4.7 and 4.7.5.1-5.3, and paragraph 5 except the last sentence of that paragraph. The parties should be permitted to call the witnesses they called at the first hearing, and to rely on those witnesses' witness statements, and the documents which they adduced then. Either party may cross-examine the other's witnesses. If the parties consider that a case management discussion would be helpful before the remitted hearing, they may apply to the ET for one. Subject to that, it will then be for the new ET to decide whether the direct discrimination claims, or any of them, succeed.

100. I should add that, after this Judgment was circulated in draft, Mr Peacock made written submissions about the scope of the permission. I have considered those submissions carefully, and Mr Coghlin's written response to them. I am not persuaded I should change the views I expressed in the previous paragraph.