Appeal No. UKEAT/0147/16/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 & 20 July 2017

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

(SITTING ALONE)

MR K KANSAL — APPELLANT

TULLETT PREBON PLC & 8 OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS-APPEAL

APPEARANCES

For the Appellant	MR ANDREW ALLEN (of Counsel) Direct Public Access
For the Respondents	MS JANE RUSSELL (of Counsel) Instructed by: Fletcher Day Limited 56 Conduit Street Mayfair London W1S 2YZ

SUMMARY

RACE DISCRIMINATION - Direct

VICTIMISATION DISCRIMINATION

RACE DISCRIMINATION - Detriment

JURISDICTIONAL POINTS - Claim in time and effective date of termination

The ET rejected claims of direct discrimination (race) in circumstances where it had found the alleged discriminator to have subjected the Claimant to harassment related to his race, and victimised him for having complained about it. It did so in respect of two allegations by concluding that although the acts complained of had occurred, the employer and its Head of Alternative Investments had not done them for any reason of race. The logic was that the employer had engaged two employees of the same race on similar work, and therefore could not have been motivated by race. This was a misdirection. Further, the ET had not identified that the treatment was less favourable than that which had or would have been given to another not of the Claimant's race, nor had it identified a comparator for the purposes of any such comparison, nor had it found what the reason was for the treatment (it purported to find what it had not been, but had done so on a false basis), nor did it seek to see whether the burden of proof may have passed to the Respondents to provide such an explanation given the context of the claims and the other findings in respect of the behaviour of the alleged discriminator, to which other conduct it had made no reference when reaching its conclusion that there was no direct discrimination. Appeal in respect of the dismissal of two allegations of direct discrimination allowed.

An appeal against findings that there had been no victimisation by paying the Claimant a bonus "only" of a certain amount was rejected: the ET had been entitled to determine that there had been no detriment, even if, had it done so, its additional reason that there would still have been

no finding of victimisation could not have been supported. A cross-appeal seeking to reargue the question whether a finding that the employer had conducted a disciplinary hearing in respect of the employee's conduct was in revenge for his having complained that the Respondents' conduct was discriminatory, was dismissed as raising in truth no point of law, but one in respect of the ET concluding that time should be extended on the just and equitable footing for the late bringing of a claim was allowed: the ET should have identified why it was the Claimant was late, and did not appear to have done so, nor clearly evaluate his actual reasons for being late (whatever they were).

The issues in question on the successful appeals to be reheard before the same ET, on the same evidence as adduced previously, though leaving it open to either party to ask the ET if it would consider further evidence, and for the ET to permit them to do so should it consider that appropriate.

THE HONOURABLE MR JUSTICE LANGSTAFF

1. This is an appeal against a Decision of the Employment Tribunal sitting at London (Central) - Employment Judge Glennie, Mr Buckley and Ms Dasey - which on 22 October 2015, by Reasons promulgated on that date, rejected both the Claimant's complaint that he had been directly discriminated against on the ground of his race (he being northern Indian, Punjabi in origin and a UK national) and his complaint that he had been indirectly discriminated against on the same ground. There were nine Respondents to his claim. On this appeal, there are four; his previous employer, Tullett Prebon plc (whom I shall call "Tullett"), Mr Campbell, Mr Dunkley and Mr Chico.

2. In its Decision, apart from rejecting the complaints of direct and indirect discrimination, the Tribunal upheld a number of allegations that the Claimant had been subject to harassment related to his race. It accepted seven allegations that that was the case and rejected six. However, in five of those six, the ET accepted that the incidents that the Claimant alleged had happened as he said, but concluded that their happening was not related to race. It upheld, in addition, seven allegations that the Claimant had suffered detriment in victimisation for his complaining about the treatment to which he had been subjected by the Respondents. As to that, again, a number of such allegations were rejected - around eight of them and half of another - on the basis that there was no causal link between the treatment of which the Claimant complained and the protected act which he had done. As to his complaint that he had been subject to detriment on the grounds of making a disclosure in the public interest, the Tribunal upheld four of the matters about which he complained as being such detriments.

3. In reaching its decision broadly in favour of the complaints, as I have described, the Tribunal dismissed the suggestion that the complaints of harassment had simply been raised too late since the claim was brought more than three months after the last of the incidents to occur. It thought it just and equitable to permit the complaints to continue.

4. The Claimant appeals in respect of two specific findings of direct discrimination, and one specific incident of victimisation, which were rejected. The Respondents cross-appeal in respect of the acceptance by the Tribunal of one of the incidents of victimisation where it found in favour of the Claimant and complains in respect of the decision to extend time.

The Background

5. The background is this. The Claimant was employed for a period of some 20 months by Tullett as Head of Private Equity Risk Solutions after he had been, in effect, head hunted to perform that role. As such, he was responsible to Neil Campbell, who was the Head of Alternative Investments. He complained that almost from the outset of his employment on 7 June 2012 Mr Campbell made remarks which were derogatory so far as those who were not of his (Mr Campbell's) ethnicity but in particular in respect of those who came from the Indian subcontinent.

6. The Tribunal upheld the submission that though none of these remarks save one was directed specifically at the Claimant himself, they nonetheless had the effect of creating the environment at work which is proscribed by the **Equality Act 2010**, namely an intimidating, hostile, degrading, humiliating or offensive one.

7. More specifically, the matters which the Tribunal found upheld were that he, Mr Campbell, made fun of the accent of a Pakistani co-employee, or a person of Pakistani ethnic origin, and described him as "the terrorist". Separately, he suggested that that employee had secretly attended a terrorist training camp in Pakistan and implied that he was a member of a terror cell. He spoke of "ragheads" in an offensive sense to refer to Muslims. He ridiculed the fact that a fellow employee, Mr Elkington had a Chinese flatmate, and called him "Mr Chow" and made impressions of Chinese characters from films including "The Hangover". He invited the Claimant to join in with the team jokes, of which, apparently, such comments as these formed part, and told him that he needed to "lighten up" when it became apparent that he was reluctant to do so.

8. Mr Campbell's attitude to others went beyond their race to their sexual orientation, see paragraph 27 of the Judgment. However, plainly, that was not related to race. He suggested that black people were guilty of more crimes than most and observed: "You need to be careful when near them". Directly referring to the Claimant he said on one occasion, "You know I get bored at these conversations. I have them all of the time with you brown people …".

9. It was against that background, submitted Mr Allen for the Claimant on this appeal, that the issues relating to direct discrimination fell to be decided.

10. There were nine specific complaints which were identified as issues for direct discrimination. The issues list was one to which the Tribunal scrupulously confined its decision. Only two of these were in issue on this appeal, there being no issue with the Tribunal's rejection of the other seven. The first was that in paragraph 5(a) of the issues list: that towards the end of August 2013, the Claimant began to be significantly side-lined and

A excluded from transactions, including in particular the Global Endowment, the Irish National Pension Reserve Fund and the Amundi Private Equity proposals, and even the HSBC Private Client transaction which he had helped originate, which were obviously private equity related, despite his role. The second was that at 5(f): that towards the end of November 2013, Neil Campbell instructed the Claimant that he would not be permitted to work from home any longer.

B

C

11. The issues list went on to ask, as issues, the questions which any perusal of section 13 of the **Equality Act** would show were the appropriate legal questions. Section 13 is in these terms:

D

> **"13. *Direct discrimination***
>
> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**

This has to be read with section 23:

E

> **"(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case."**

12. The issues list reflected those provisions by asking first whether the two matters complained about had occurred: whether the Claimant had been excluded from the proposals or "pitches" to Global, Irish National and Amundi; and whether he had been instructed not to work at home any more. At issue 6, the issues list reads:

F

G

> **"6. In respect of any of the conduct complained of at paragraph 6 [that must be 5] above, did any of the Respondents treat the Claimant less favourably than it [sic] treated or would have treated an actual or hypothetical comparator? The Claimant relies on the following comparators:**
>
> **a. Neil Campbell;**
>
> **b. William Arnold;**
>
> **c. Dan Nolan;**
>
> **d. Kipp Elkington, and**
>
> **hypothetical comparators and such other comparators as identified following disclosure."**

H

In passing, I note that in the originating application no comparator had been identified at all because it had been suggested by a similar form of words that the identity of comparators would be supplied later.

13. At the stage of the issues list, to refer to "such other comparators as identified following disclosure" makes no practical sense. It purports to reserve a position which it should be noted a Claimant has no right to reserve. It is an intrinsic part of any complaint under section 13 that there has been less favourable treatment. Less favourable treatment has to be less favourable to the Claimant than it is to others. Those others either have to be identified by specific reference to a person or to an hypothetical comparator and it is always wise, although not strictly required, for a complainant to identify the particular characteristics which would make an hypothetical comparator an appropriate comparison to draw, applying the terms of section 23.

14. To some extent, the Claimant's case fell short in these respects although, by the time of the issues list, the comparators were clearly set out and the need for a comparison was clearly indicated by the issues list, and the Judgment would have reflected this if the Tribunal had indeed followed those issues to the letter.

15. After asking the question at paragraph 6 of the issues list, at paragraph 7 the list asked:

> **"7. If so [that is, if less favourable treatment than any of the named or hypothetical comparators have been established], has the Claimant proved primary facts from which the Tribunal could conclude that the difference in treatment was because of the protected characteristic?**
>
> **8. If so, what is the Respondent's [sic] explanation? Has the Respondent [sic] proved a non-discriminatory reason for any proven treatment?"**

16. The Employment Tribunal's decision as to the first of the grounds for consideration under this peg of the appeal related to his purported exclusion from the deals referred to. As to

this, the Tribunal first rejected an argument by the Respondents that because there had been no deal, there was no substance in the Claimant's complaint. It found that it was no answer to a complaint about being excluded from a pitch to say that there was no deal. Plainly, in my view, that is right.

17. Its central reasoning, however, was in paragraph 148, in these terms.

> **"148. However, the Tribunal also concluded that there was no basis on which the Claimant's exclusion from the pitch could be discriminatory because of race. In paragraph 14 of her witness statement Ms Nayar stated that she took part in the limited degree of contact with Global Endowment that she said took place, and the Claimant accepted that she was involved. Ms Nayar is of Indian ethnic origin. The Tribunal found that, whatever the reason for the Claimant's non-participation in the pitch, it cannot have been his race, as the same would have applied to Ms Nayar."**

18. It turned to the Irish National Pension Reserve Fund - as to which no issue now arises directly on this appeal - to make the point that in respect of the pitch for that business, a Mr Patel may have been involved. However, it concluded the allegation that the Claimant had been excluded from a proposal to that Fund had not been made out on the facts. With that in mind, it turned to the third of the three particular pitches which had featured in the complaint: the Amundi proposal. As to that, it concluded that the Claimant might have been expected to be involved. He was not.

19. At paragraph 152, it said this.

> **"152. The Tribunal therefore asked itself whether the facts were such that it could properly make a finding of discrimination in relation to this aspect, and concluded that they were not. The participation of Ms Nayar in the Global Endowment proposal, and Mr Patel's involvement with the Irish National Pension Reserve Fund, indicated that Tullett Prebon did not exclude employees from transactions because of their Indian ethnic origins: there was therefore no reason to infer that the Claimant was excluded from the Amundi proposal for that reason."**

20. It went on to note that the complaint about the HSBC transaction was not referred to in the submissions of counsel for the Claimant at the conclusion of the hearing and that therefore considered that allegation was not being pursued.

21. The Tribunal's reasoning thus did not identify whether the treatment of which the Claimant complained was less favourable than the treatment given to any other comparator, whether actual or hypothetical, despite the issues list calling for this. The reasoning did not identify what the reason was for the exclusion which it had found to have occurred in respect of the Global and the Amundi proposals. Instead of finding what that reason was, it found what it was not. It did that by noting that two people who broadly viewed shared the Claimant's ethnicity had been involved in pitches - one of them in relation to one of the two pitches but not the other - and that therefore, as a generality, Tullett did not exclude employees from transactions because of their Indian ethnic origins.

22. It went on to say, "There was no reason to infer …" as though the question was one of inference. There is no evidence internal to the Decision that the Tribunal had regard to the context in which these particular matters occurred beyond the context of pitches to clients. There is no evidence that the Tribunal addressed issues 6, 7 and 8 in any specific terms, though they had been posed as issues in the issues list. There is no evidence from the Decision that the Tribunal had asked itself the questions which it was necessary to ask in applying section 13.

23. I shall return to these observations having dealt with the nature of the submissions made to me by respectively Mr Allen appearing now, though he did not do so below, for the Claimant and Ms Russell for the Respondents, who had the advantage that she both does and did.

24. The second issue in respect of alleged direct discrimination was addressed between paragraphs 162 and 166. The parties had agreed that the Claimant had been instructed not to work from home. It might be thought that again applying the words of the statute, remembering that identifying discrimination so as to give rise to remedy is a statutory issue, it would have to be shown that the Respondent had treated the Claimant less favourably than it treated or would treat others because of a protected characteristic; in this case, race.

25. The Tribunal again did not find precisely why the Claimant had been instructed not to work from home, in the sense that it did not in specific terms say what the employer's reason at the time was for giving that instruction. The relevant paragraphs of the Decision read as follows:

> **"164. There were weaknesses in the positions of both the Claimant and Mr Campbell on this issue. The Tribunal found that the Claimant had been guilty of abusing the system that allowed for working from home and/or flexibility in working hours. For example, he accepted that on a particular day when he was "working from home" he had his washing machine fixed (which, the Tribunal considered, might not be a cause of great complaint) and viewed a property that he was considering buying for his own portfolio (which would give grounds for complaint). He also accepted that he had been accompanied by a junior employee, Mr Shankster, on a visit to view a property.**
>
> **165. The Tribunal accepted Mr Campbell's evidence that the Claimant's absences were causing discontent within the team: one would expect them to do so. However, the Tribunal also found that Mr Campbell had failed to check what he was being told against the company's records before giving the instruction to the Claimant. When cross-examined on the point, he said that he had checked what the team were telling him about the Claimant's absences, as he did not want to take their word for it (transcript, 6 November, page 199) but a little later stated that he did not check this at the time, but months later (transcript, 6 November, page 201). The Tribunal found that, at the relevant time, he did not check what he was being told, and evidently realised later that he should have done so.**
>
> **166. That said, the Tribunal found that there was no reason to link Mr Campbell's instruction to the Claimant's race. There was no reason to take the situation other than at face value, whereby the Claimant had been abusing the facility to work at home, and Mr Campbell intervened because of this, albeit without carefully checking the precise facts."**

26. The Claimant, I understand, had raised the question of the treatment of Mr Arnold. It had been said that Mr Arnold, a fellow employee, had worked at home and whilst doing so had, to the knowledge of the employer, taken steps to view a property for his intended purchase for occupation. There is no reference in its Decision to Mr Arnold. Nor, by way of observation,

did the Tribunal here ask whether the way in which the Claimant was treated was less favourable than the treatment which would have been given to somebody not of his ethnicity or to an hypothetical construct who had done what he did.

27. All this, however, also assumes what the reason was, which the Tribunal found established, for requiring him no longer to work at home. As to this, Mr Allen argues that the Tribunal had of its own motion concluded that the Claimant had been guilty of "abusing the system" despite Mr Campbell in his evidence saying (on a number of occasions to which Mr Allen draw the Court's attention) that he did not consider what had been done by the Claimant to have been an abuse.

28. It might be thought, as Ms Russell argued, that it was implicit in what the Tribunal said about the facts that the employer's reason, or Mr Campbell's reason, for giving the instruction was that he thought that the Claimant had been guilty of an abuse. This is however unclear from the way in which the Tribunal approached the matter, as is evident from the quotation above.

29. The Tribunal again followed the same pattern as previously in paragraph 166 by failing to identify what reason it accepted the employer had actually had for giving the instruction, as opposed to giving the reason which the employer might have had, had it thought about it - i.e. abuse. Rather, the Tribunal decided what was ***not*** the reason, which was race. This was the same approach as it had adopted when dealing with the Claimant's exclusion from the pitches to Global Equity (paragraph 148) and Amundi (paragraph 152).

30. As to those decisions, the Appellant argued that as a matter of general approach the Tribunal was wrong in law. Mr Allen complained that, first, the Tribunal had adopted a fragmented approach; second, that it had failed properly to address causation; thirdly, that it had failed to apply the law in relation to the burden of proof.

31. As to fragmented approach, the point raised was essentially that which has become trite in a number of cases - see **Qureshi v Victoria University of Manchester** [2001] ICR 863; **X v Y** [2013] a decision of the EAT (UKEAT/0322/12/GE); **Ealing London Borough Council v Rihal** [2004] IRLR 642, see paragraphs 30 to 31 - and, in my view, cannot sensibly be put in dispute. The point is simply this. Complaints made of discrimination rarely deal with facts which exist in a vacuum. To understand them, a Tribunal has to place them in the context revealed by the whole of the evidence. It might be said, for instance, that one cannot understand a scene in act III of a play without first having understood what has happened in acts I and II and, it may be, having understood what happens in later scenes too, since these both provide the context for and cast light on the overall picture. That principle is not seriously disputed by Ms Russell.

32. Mr Allen argues too that in **Talbot v Costain Oil** UKEAT/0283/16/LA, a decision of the EAT of 14 March 2017 before His Honour Judge Shanks, sitting alone, the Tribunal had said in paragraph 15, headed "The Proper Approach to the Facts in Equality Act Cases", that amongst the principles to be derived from the authorities cited to the EAT - HHJ Shanks said no less than 10 - that:

> **"(5) Assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities; and, where there are a number of allegations of discrimination involving one personality, conclusions about that personality are obviously going to be relevant in relation to all the allegations"**

A

33. On the face of it, subject to one point, the principle seems unexceptionable. The one issue is what is meant by the word "personality" in this context. Mr Allen had read it as meaning no more than one person or individual. Ms Russell had read it by referring to the psychological personality of a given party. She supported that by referring back within the same Judgment to paragraph 8, referring to frequent and open questioning and criticism of "Mrs Talbot's personality …". It may be said in support of her approach that the Judgment was a Reserved Judgment in which one would expect words to be chosen with care and that if the word "person" were intended, it is surprising that the word "personality" were adopted.

B

C

34. Though there is much which is slightly theoretical about this dispute, which appears to be the only dispute of any real significance between counsel as to the applicable law, it, in my view, would be appropriate for any Court referring to this passage in future to read "personality" in the sense for which Ms Russell contends. A personality is unlikely, highly, to change over the short time within which most allegations of discrimination arise. Conclusions about a person as opposed to that individual's personality are less likely to be helpful in determining whether that person has discriminated or not, though information about what that person has or has not done previously would plainly be of some relevance. However, a decision maker has to remember that a Court is not only entitled to accept all or reject all that a party says, but also to accept some and reject the rest of what a party has to say. It is frequently the case that decisions are nuanced.

D

E

F

G

35. Here, for instance, and there is some force in it, Ms Russell argues that one simply cannot read across from the Tribunal's findings in respect of harassment to a conclusion that Mr Campbell would deliberately (or subconsciously) make a decision which disadvantaged the Claimant on the basis of his race, which she argued was a different category altogether than

H

poking fun, however distasteful and unpleasant it might be, at those who did not share his own race and social attitudes.

36. The essential answer to this is, in my view, that which the cases emphasise: that sensitive regard has to be had to the entirety of the evidence before a Tribunal and that it is rare to the point of being exceptional that individual acts can be so insulated from the totality of the whole of the context as to be seen entirely on their own. It is wise for a Tribunal to recognise that in the course of its Judgment and in a case such as this, where it is invited by the nature of the issues list to look at individual occurrences, to place them expressly within the context of the whole of the facts. This is something which this Tribunal did not do, and the failure to do it lends weight to the criticism which Mr Allen makes of it. On appeal, this Tribunal simply does not know if the Tribunal below in dealing with the issues of direct discrimination had regard to what it had learned of Mr Campbell and his possible approach from other parts of the case. It is likely, in my view, that it did so; however, it does not say that it did.

37. As to causation, Mr Allen argues that seeking to understand the cause of an act for the purpose of identifying whether that act gives rise to liability and remedy does not involve merely seeking the main or principal cause. It is sufficient to identify that which is an effective cause. He argued that the Courts had to have regard to not only to conscious and deliberate discrimination but to unconscious or subconscious discrimination. He complains (see paragraph 18 of his skeleton argument) that the Employment Tribunal here failed to consider both conscious and subconscious motivations. He quoted from that which Lord Nicholls said at paragraph 17 of **Nagarajan v London Regional Transport** [1999] IRLR 572, referring to the need for members of racial groups to have protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination, and suggested it was a

principle of law that it was necessary for an Employment Tribunal to go on to consider and exclude subconscious or unconscious discrimination before any conclusion in favour of a Respondent could be definitively reached, relying upon what was said by the Employment Appeal Tribunal in **Geller v Yeshurun Hebrew Congregation** UKEAT/0190/15/JOJ, [2016] ICR 1028 at paragraphs 17, 49 and 52.

38. He suggested that taking account of that law and that which Lady Hale had expressed in **R (E) v Governing Body of JFS and Another** [2010] 2 AC 728 at paragraph 64 where she said:

> **"64. The distinction between the two types of "why" question is plain enough: one is what caused the treatment in question and one is its motive or purpose. The former is important and the latter is not. …"**

that the Tribunal was obliged to look beyond the conscious motivation of Mr Campbell and to draw inferences from the nature of the objectively less favourable treatment the Claimant received, in the light of the cogency and credibility of Mr Campbell's explanations. In submitting this, of course, Mr Allen was assuming that less favourable treatment had indeed objectively been established.

39. Thirdly, he relied on the burden of proof: that the Employment Tribunal had "failed to grasp that the burden of proof had shifted and that it was required to reach a determination on whether the Respondents had provided a cogent explanation for their actions" (skeleton argument, paragraph 19). He reminded me of what Her Honour Judge Eady QC said in **Ladiende & Others v Royal Mail Group Ltd** UKEAT/0197/15/DA, a judgment of 27 May 2016, at paragraph 31. Though a Tribunal was entitled to move straight to the decision why question, rather than adopt the two stage approach of first asking whether the burden had shifted, and then, if it had, what was the reason for the treatment complained about, by noting

A that in paragraph 31 HHJ Eady noted that where a Tribunal moves straight to an explanation "that must be on the assumption that the burden may have shifted to the Respondent".

B 40. It is that assumption, to be made when considering an explanation for less favourable treatment, that means there will be no prejudice to the Claimant in moving straight to the second stage of the assessment. If so, then the words of this Tribunal in **Kowalewska-Zietek v Lancashire Teaching Hospitals NHS Foundation Trust** UKEAT/0269/15/JOJ, a decision of

C 21 January 2016, paragraph 32, came into play.

> **"32. It seemed to me that there may be an element of discipline that is of assistance to a Tribunal in reaching its conclusions for it to recognise that absent an explanation from the employer a finding of discrimination would be made, which is the effect of the reversal of the burden of proof under section 136(2). This, however, is to emphasise the requirement that proof should be cogent and that a Tribunal in this area should give any attempted explanation a high degree of scrutiny before accepting it too easily. …"**

D

41. In essence, Mr Allen argues that here the burden of proof must have shifted and a decision that it had not done so was plainly wrong, though he did not use the word "perverse".

E He argued that it is plain here, once one had established a difference of race and a difference of treatment, that there was the "something more" which Lord Justice Mummery had regarded in paragraph 56 of **Madarassy v Nomura International plc** [2007] ICR 867 as requisite. The

F something more was provided by the evidence of the attitude in general terms of Mr Campbell, described in the Tribunal's findings as the acts of his which amounted to harassment. In such a situation, it became incumbent on the Tribunal to seek an explanation for the reason why the

G acts which it found to have happened had occurred. It had simply found an absence of reason - it had not found the reason why the act had occurred but had expressed itself satisfied that it had not.

H 42. In turning to that in more detail, he argued that the approach which the Tribunal took, by in effect saying that because some who shared the Claimant's ethnicity had been involved in the

deals about which he complained, or an analogous deal, therefore there could not be any discrimination against the Claimant was flawed. His arguments were to the effect that it is not conclusive in defence of an accusation of discrimination for a person to say such as "my best friend is so and so" - describing whatever the protected characteristic might be - when that person is accused of treating someone other than the best friend in a discriminatory manner. The issue is not how well an alleged discriminator treats others. It is how and why the alleged discriminator has treated the individual who is complaining.

43. Ms Russell accepted that in taking the approach the Tribunal did, relying purely upon the fact that Mr Campbell and the Respondent had treated Ms Nayar and Mr Patel as he and it did, it was in error. In my view, this is plainly right. It cannot be conclusive to say in respect of an allegation of discrimination that because the discriminator has treated somebody else in a non-discriminatory manner they therefore have not discriminated against the complainant in question. It is highly relevant evidence, of course. However, the Tribunal treated it as conclusive and it had no warrant to do so. A claim of sex discrimination in pay is not to be defeated because there is one token member of the opposite sex paid the same as the Claimants, any more than the fact that one member of a specified racial group sits on the board of a company means that the company is insulated from any claim that it has discriminated against others who are within that group: no more, here, can it be said with certainty that because two people of the same general ethnicity as the Claimant were involved in two of three pitches at the same time as the Claimant was excluded from a different two of those three that this establishes that the exclusion had nothing to do with his race. It is relevant material, but not conclusive.

44. Ms Russell argues nonetheless that the Tribunal was entitled to conclude that there was no reason which could be discriminatory for the exclusion of the Claimant from the two deals from which he was in fact excluded. It was impossible, she suggested, to think of any reason why that would have been a decision taken by reference to the race of the Claimant. She argued that the internal evidence of the way in which the Respondent and Mr Campbell dealt with the pitches did not establish any hint or suggestion or race. The Claimant had not got off first base. He could not bring himself within section 136 of the **Equality Act** so as to require a shifting of the burden of proof. It was open, she argued, to a Tribunal to go straight to the question why. She noted, following on from observations by the Court in the course of argument, that where there is a direct comparator one might expect a direct comparison to be made, but often there may be situations in which there is only an hypothetical comparator and there is no one with whom the complainant can easily be compared. In such a case, it might not be easy to construct an hypothetical comparator, purely for the sake of shifting the burden of proof in a two-stage process. Take for instance this case. There was no other person who was Head of Private Equity. To envisage someone who might be, who would have to be such a head at the same time and in the same circumstances as the Claimant, would be to create a wholly theoretical construct. In such circumstances, rather than seek to establish the artificial - and perhaps to engage in sterile argument about the precise characteristics as such an hypothetical comparator should have - it was more realistic, more practical and more just for a Tribunal to move straight to the question why the complainant was treated in the manner about which he complained. Asking that question might, and she submitted in this case did, result in an answer which, if accepted, might of its nature exclude the protected characteristic complained about having been an effective cause of the treatment.

Discussion as to the Appeal on Direct Discrimination

45. An appeal to this Tribunal must be on a point of law. The issue here is whether the Tribunal took the correct approach to its determination of whether there had been direct discrimination. As I have already observed, it did not faithfully go through the steps which are implicit in section 13 of the **Equality Act 2010**. It had reminded itself of those steps. It had before it an issues list which required it to take those steps if it was to resolve the issues which had been agreed by the parties. It simply did not do so. It did not identify that there had been less favourable treatment and what precisely that was. It is insufficient to say that what the Claimant complained about was factually correct - that is that he was excluded from the pitches. That does not of itself show that excluding him was less favourable treatment than was or would have been given to another. It might have been. There is great strength in the suggestion that where someone is Head of Private Equity, he might be expected to participate in major deals, but that is an insufficient basis without the Tribunal making it clear that it accepts that is the case, and that the comparison is therefore with the hypothetical person of a different race who is also assumed to be the Head of Private Equity. Without identifying clearly the less favourable treatment it is impossible to ask why that less favourable treatment was provided. It is possible of course to identify whether and if so why the conduct of which the complainant complained occurred. I accept the way in which Ms Russell suggests a case such as this may often best be approached, as explained at paragraph 44 above. However, if a Tribunal is to proceed by not asking whether the treatment it finds to have been given was less favourable than was or would have been given to another but going straight to ask why the conduct of which the Claimant has made complaint occurred, it must be very clear to find what that reason was.

A

46. In this case, the Tribunal found what it was not but they did not decide what it was. That seems to me to be a particular difficulty with its Decision. Indeed, in paragraph 148, the Tribunal flagged up the difficulty itself in the final sentence by using the phrase, "whatever the reason for the Claimant's non-participation in the pitch, it cannot have been his race …". In other words, it was deliberately not finding a reason. The reason it gave for saying it could not be race was, it is accepted between the parties, a flawed reason (see paragraph 43). The effect is that the Tribunal never gave any acceptable reason why the conduct in dispute - which might in this context, taking a broader view of the case, have been on the basis his race - had occurred. It may be that it was because of his race. It may be that it was not. But the Tribunal did not approach the determination of that question by any structured approach to the questions to which section 13 invited its attention. Instead it gave a reason for its decision which was simply erroneous. It was not a logical basis for excluding race. It was relevant and deserved to be taken into account, but as part of a wider assessment involving an attempt, at any rate, to understand what were the true reasons for the behaviour of the Respondents.

B

C

D

E

47. No issue, as it seems to me, of the reversal of the burden of proof arises in determining that here the Tribunal made an error of law. Plainly, if the Tribunal had reached the stage that it considered that there was a difference of treatment and a difference of race, it would be open to the Tribunal in this case to consider that the other findings it had made in its Decision might offer the something more to which Lord Justice Mummery referred in **Madarassy**, bearing in mind that the "something more" need not be of any very great weight. After all, what it requires is the seeking of an explanation. It is only, in general terms, if the explanation is offered and accepted and is compelling before it even gets to the question of the reversal of the burden of proof that there is in effect no need to consider section 136 at all: it is only where that reason is compelling as the sole reason, and there is no taint of race to what has occurred, that

F

G

H

moving straight to the "reason why" will be sufficient. For that reason, it seems to me that the Tribunal's conclusion as to the Global and the Amundi contracts is in error: the reason was never found, and nor was it found whether, even if not the primary cause of the treatment complained about, an effective cause was the Claimant's race.

48. I turn to the question of working from home. Here again, it seems to me that the Tribunal did not examine whether there had been less favourable treatment and in particular, in this respect, did have in evidence a comparator. It did not consider the comparator. It should have done so. Without it doing so, the Claimant could not know how the Tribunal could have reached the decision it did. Ms Russell tells me that the comparator had sought permission from the Respondent before he went to view the property - it is plain he did go to view it. That, in itself, may beg questions as to the extent to which it was regarded as beyond the pale to view a property whilst working from home. But it would require consideration by the Tribunal before reaching a conclusion about it. The Tribunal again did not identify the reason for the treatment but was able to say with confidence that race was not one - which for the reasons I have given, similar to those in respect of the two pitches, was insufficient. I have therefore come to the conclusion that in respect of that too the appeal should succeed.

Victimisation

49. I turn to the second question on the appeal, which is that of victimisation. Here, what the complainant complains about is that the Tribunal had to address issues 15(i) and 15(j). Those issues were:

> **"i. … on 30 January 2014, The First Respondent [that is Tullett] decided on a gross bonus for the Claimant of only £28,643.**
>
> **j. … that Neil Campbell was not willing to provide any written response to the Claimant's request for information on his bonus."**

50. The Tribunal regarded the first issue as setting up a detriment: that being that he was awarded no more than £28,643. It explained the matter in these terms:

> **"217. … As has already been stated, the contractual position was that the bonus was discretionary, so the question for the Tribunal was whether a proper exercise of the discretion would have resulted in the Claimant being awarded a greater sum. …"**

51. It then described how the Claimant had given evidence about what he thought his bonus should be and what he suggested had been received by other employees. What was received by others was only of indirect evidential relevance in this context because the question is whether the Claimant had received less than he should have done under his scheme, which was admittedly discretionary. There was in consequence quite extensive cross-examination of Mr Dunkley who was responsible for the attribution of the bonus. He was given the figures upon which to calculate the bonus, it appears, by Mr Campbell. It was not however suggested to Mr Campbell in cross-examination that he had given wrong figures to Mr Dunkley. Accordingly, the question was whether Mr Dunkley, on the basis of those figures, had performed a calculation which was inappropriate.

52. The central reasoning of the Tribunal is in two paragraphs. The first reason for its decision adverse to the Claimant was at paragraph 219:

> **"219. The Tribunal was left unconvinced that the Claimant had been paid less than he should properly have been. For the Claimant to establish that he had suffered this detriment, there would have to be a consideration of evidence about the transactions involved and his part in them, with relevant disclosure, that went beyond the evidence presented in this hearing. The Claimant had not shown that he should rightly have been paid more than he was."**

53. The Tribunal then turned to the question of the reason why the Claimant had suffered a detriment, this being on the implicit assumption that there had indeed been a detriment. Having established that Mr Dunkley had been uncertain as to whether he had made his decision as to the amount to be attributed to the Claimant's bonus before or after a second protected act was made, the Tribunal said, at paragraph 222:

> **"222. This evidence assisted the Tribunal in accepting Mr Dunkley's evidence that the fact that the Claimant had raised a grievance or grievances did not affect the calculation of his bonus. His uncertainty about the precise timing suggested that his explanation was true: otherwise, one might have expected him to take the opportunity of asserting that the decision definitely was made before receipt of the second grievance.**
>
> **223. The Tribunal therefore accepted Mr Dunkley's explanation on this point and found that the Respondents had shown that the protected act or acts were not a factor in the decision about the Claimant's bonus."**

54. The two protected acts in play were one which it appears the Tribunal did in the event treat as a protected act, which was done on 7 January. On that date, in an opening statement at a grievance hearing, the complainant made complaints that he "might have been" the victim of discrimination or harassment related to discrimination. That slightly imprecise formulation was treated however as a protected act, though it was made more explicit later in January, that being the second protected act.

55. It follows that simply as a matter of timing, Mr Dunkley's calculation of the bonus occurred after the first act which the Tribunal appears to have accepted as a protected act. I am bound to say that on the ground in paragraphs 222 and 223 for its decision to accept Mr Dunkley's evidence, I do not think that the Tribunal's conclusion was one which follows logically from its reasoning. It does not follow, as was stated in paragraph 222, that Mr Dunkley might (if dissembling) have been expected to assert firmly that the decision was made before receipt of the second grievance - because the receipt of the second grievance in fact told him nothing new. It was the first that would have alerted him to the fact that the Claimant was complaining he had been treated badly because of his race. The assumption is that he did know of the first protected act.

56. Notwithstanding advancing a reason for accepting Mr Dunkley's evidence which does not stand up to scrutiny once it is remembered that he knew of the first protected act when he subjected the Claimant to detriment, there is a difficulty with the Claimant's case. That is what

A the Tribunal said at paragraph 219. Mr Allen argues that the establishment of the proper sum to be paid to the Claimant was entirely within the control and knowledge of the Respondents. It is therefore he submitted for the Respondents to show what the proper sum of bonus was. Ms Russell does not accept this.

B

57. The first question in what was a complaint of victimisation is whether the statute has been made out. Section 27, "Victimisation", says:

C

> **"1. A person (A) victimises another person (B) if A subjects B to a detriment because -**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act."**

D

It is necessary to therefore to establish that A has subjected B to a detriment. That is for the Claimant to prove, absent any grounds upon which the burden of proof can be reversed.

E

58. Mr Allen pursues the complaint by arguing that a detriment exists where a Claimant has a justified sense of grievance. This, in my view, does not faithfully represent the law because the test is not an entirely subjective one, as this argument implies. Rather as expressed by Lord Hope of Craighead in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11, [2003] ICR 337 at paragraph 34:

F

> **"34. … the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work."**

G

The critical words are "a reasonable worker…". Lord Hope went on to say, at paragraph 35:

> **"35. … one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment" …"**

H

59. The question, therefore, is to identify what the reasonable worker would have been justified in regarding with a sense of grievance. It is not asking whether the Claimant did so. The hypothetical reasonable Claimant has to be placed in the position in which the Claimant actually was: the issue has a degree of objectivity about it.

60. The Tribunal therefore, in my view, were right to say that the issue was whether the Claimant should have been awarded a greater sum. At times during the argument, the Claimant's counsel tried to broaden the base to argue that what was in issue was the way in which the bonus had been calculated as opposed to the result - the result being the eventual sum, and not the mechanics of its calculation. The way in which it was calculated involved Mr Campbell and Mr Dunkley, two individuals in respect of whom the Claimant had ongoing (and, subsequently, to a considerable extent, justified) complaints as to their conduct towards him, certainly in the case of Mr Campbell, that would give anyone, he submitted, a sense of justified grievance.

61. The issue here, however, is restricted by the agreement of the parties in the issues list to what was "only" £28,643: this clearly put the amount, rather than its method of calculation, in issue. There was, I am told and I have been shown, a detailed calculation on paper of the bonus which was adduced in evidence by the Respondent. The Tribunal expressed itself as it did (paragraph 219), because although it was not required to establish the exact amount that should have been paid by way of bonus, detriment would be shown if it should have been any more than the £28,643 awarded. It recognised there may yet be issues about the extent to which under his contract discretion should or should not have been exercised favourably towards him, which it was in no position to resolve: that was for another Court, being a contractual claim, as the Tribunal recognised. But for the purpose of victimisation in this respect under the **Equality**

Act the Claimant had the burden of showing either by direct evidence (which he did not have) or by cross-examination (which he took full advantage of) that the Tribunal should hold, on balance, that he must have been paid less than he should have been. The Tribunal say (paragraph 219) he had not satisfied that burden. It is always slightly unsatisfactory for a Tribunal to conclude a matter by relying upon the burden of proof, but it is ultimately entitled to do so. I cannot therefore here hold that the Tribunal, which heard the evidence and considered the several issues which it had to consider with very obvious care, was not entitled to reach the conclusion that there was no sufficient evidence to show that the Claimant had established evidentially that which the burden lay upon him to do.

62. For that reason, though, as I have said, I would have rejected the second ground of the Tribunal's Decision, I accept that the first is a finding which the Tribunal was entitled to make. Since it amounts to a finding that there was no detriment, that concludes that particular issue.

63. In the course of the hearing, it emerged that the Tribunal had not made a decision about 15(i). No point was taken on the appeal about that specifically. Therefore, I just note the omission and pass on.

The Cross-Appeal

64. In cross-appeal Ms Russell argues first that the Tribunal was not entitled to reach the decision it did as to victimisation of the Claimant by instituting a disciplinary case against him after the end of his employment, threatening him with a charge of gross misconduct dismissal and a negative impact on his FCA registration. She queries its decision in respect of issue 15(m): refusing to accept the end of the Claimant's employment and continuing to treat him as

A an employee, and issue 15(n): informing third party clients that the Claimant was away sick rather than no longer working for Tullett Prebon.

B 65. The background to this is that the Claimant purported to treat the contract of employment which had hitherto bound him as repudiated by the conduct of the employer towards him. He did so in terms which asserted repudiatory conduct rather than referred to what he was doing as resignation, but it was plain from what he said that he regarded his C obligation to continue working for the Respondent employer as being at an end. Nonetheless, as a matter of fact, Tullett argued that he remained in employment, not accepting that there had been repudiatory conduct on its part, though there may well have been repudiatory conduct on D his part, which the Respondent employer did not accept as terminating the contract.

66. It went on to hold a disciplinary hearing to which the Claimant did not attend since he did not regard himself as any longer being in employment. The disciplinary hearing resulted in E findings adverse to the Claimant. Almost immediately, and before there had been any opportunity to appeal if the Claimant had in fact been in employment and would have wished to do so, the Respondent made reference to the FCA with its findings against the Claimant, F making some derogatory comments about him in the course of doing so.

67. The Tribunal considered (paragraph 231) that to continue with the disciplinary process G where an employee had already left work, and asserted he was not going to return to it, was an unusual approach for an employer to take.

> **"231. … Whatever the feelings on either side, and whatever disputes may subsequently arise, an employer will not often insist that an employee's employment is continuing after he has purported to resign. The Tribunal found it inescapable that the Respondents' motivation for taking this stance was a desire to complete the disciplinary process. It was necessary to determine why they wished to do this. There was no obvious advantage to Tullett Prebon or the individual respondents themselves in bringing the disciplinary process to a conclusion: any outcome (dismissal, some other sanction, or exoneration of the Claimant) would be irrelevant in practical terms in the sense that the Claimant had left Tullett Prebon."**

H

68. The Tribunal went on to say that it found the sequence and timing of events on the day in which the disciplinary panel came to its conclusion to be significant; that it had not waited for any appeal before sending a letter to the FCA. Indeed, the employer notified the FCA only eight minutes after the letter of dismissal was sent to the complainant. The content of that letter, which the Tribunal was told in evidence was not a formal notification for the FCA but intended to brief the Relationship Manager there about what was happening, was not restricted to a factual account, but added references to blackmail, bad faith, and the complainant lacking integrity, competence and capability.

69. The Tribunal observed that there were no grounds for questioning his competence or capability, and those features:

> **"234. … led the Tribunal to conclude that the letter was an act of retaliation, and that it was in response to all three of the data/competition issues; the second grievance; and the protected disclosures that will be discussed below. …"**

It therefore found that all three allegations - (l), (m) and (n) - were made out.

70. Ms Russell argues that the Tribunal set off on the wrong foot at paragraph 231 and, in doing so, took the wrong approach to its conclusion. She argued that it was not an unusual approach as the Tribunal had supposed; that there were many cases in which it would be in an employer's interest to maintain a contract in effect because of the restrictive covenants which it might contain. That would particularly be the case where, as here, there were reasons for concern about whether the Claimant had armed himself with information, properly regarded as confidential to the employer, with a purpose of using it in competition with his former employer. It was known here that the Claimant was inclined to compete. Accordingly, she submitted, the Tribunal's speculation at paragraph 231 was simply misplaced. That led inevitably to its conclusion, as I have described.

71. For my part, I do not see that an issue of law truly arises here. That is because I do not see there is any error of legal approach. The Tribunal is entitled, using its general experience, to evaluate the evidence which is before it. Part of that evidence as part of the material it is entitled to take into account is its own general knowledge as to how rare or common it is for an employer to seek to discipline someone who has left its employment. There seems nothing exceptional to me about the Tribunal's conclusion that it is unusual. In seeking to establish the reason why this occurred, the Tribunal was establishing a matter of fact. As to the inferences it drew, they cannot individually be flawed and the conclusion was not illogical. The conclusion as a matter of totality seems to me to be within its entitlement to decide. Accordingly, I see no real force in this ground of cross-appeal and I reject it.

72. Secondly, the cross-appeal took issue with the conclusion as to time. At paragraphs 283 to 289 of its Judgment, the Tribunal dealt with limitation issues. The claim had been presented on 9 April 2014. That was three months after 9 January 2014, with the result that any act committed prior to 9 January 2014 or any series of acts which ended before that date would be such that if the Tribunal were to have jurisdiction it would have to find that it was just and equitable to assume it. The Tribunal found that the burden was on a party seeking an extension of time to establish that it should be granted. That is so. Indeed the default position, as recognised by **Robertson v Bexley Community Centre** [2003] IRLR 434, is to the effect that an extension will not be granted unless the Court is persuaded that it is appropriate to do so.

73. The Tribunal noted that, on the face of the matter, the complainant could have presented a complaint of harassment in January 2014 and been within the primary time limit. It then went on to say this.

> **"286. … Against this, he was still employed by Tullett Prebon and his grievances were in progress: the Tribunal considered that an employee might reasonably await the outcome of the grievance process before deciding whether to commence proceedings.**

287. The Tribunal considered it an important factor that there was no prejudice to the Respondents if the harassment complaints were heard. No party or witness involved claimed to have an impaired recollection of events because of the passage of time. In practice, the evidence about the harassment allegations took a greater part of the hearing than any other single element.

288. The Tribunal therefore concluded that, even if the harassment complaint was presented out of time, it would be just and equitable to hear it in any event. It was not therefore necessary to determine any question as to conduct extending over a period."

74. What is noticeable by its absence is any consideration of the Claimant's own case as to why it was that he was late in putting in his claim. There is a hint that it might have been because he wished to await the outcome of the grievance procedure but the Tribunal do not say that that was the approach which he took.

75. Without identifying the reason, submits Ms Russell, a Tribunal cannot properly say that it is just and equitable to extend time. She points to the importance of time limits, see **Costellow v Somerset County Council** [1993] 1 WLR 256 per Lord Bingham MR at 263G and the well known expression in respect of time limits on appeal to the EAT in **United Arab Emirates v Abdelghafar** [1995] ICR 65 at 70H, but, in particular on this point, relies upon the necessity for there to be some evidence before the Tribunal as to why the earlier claims were not presented in time (**Accurist Watches Ltd v Wadher** UKEAT/0102/09/MAA). Indeed subsequent cases have more recently emphasised that before a Tribunal can properly address issues of time it should, and in general terms would, be expected to consider the explanation given by the Claimant for having missed the time limit.

76. Whether in the absence of any explanation there can be an extension of time is not the issue which arises in this case. However, the Tribunal ought to have looked for the explanation. Unless it clearly did so, its approach would be in error. It may be that the Tribunal considered that on the evidence before it the reason was that he wished to wait until the conclusion of the grievance proceedings, although it would then have to consider why he waited for the period of

time after that that he did. It may well be that ultimately a Tribunal would come to no different a conclusion given the absence of prejudice and the persuasive effect of there being some merit in some of the complaints which were raised - although, technically, the merits of a claim will be relevant to a decision on time limits only if the claim were of such little merit that it should not proceed: it should not be regarded as the law that a person with a good claim may be entitled to make it, whereas a person with not such a good claim must get his claim in on time.

77. However, it follows from what I have said that in my view the Tribunal did not take the proper approach. Or, if it did take the proper approach, it has not demonstrated that it did so. For that reason, I would uphold the cross-appeal on this second ground.

Conclusions

78. In conclusion, I have decided that the appeal by the Claimant in respect of the two grounds of direct discrimination which he argues is well founded, and that his complaint in respect of the decision as to victimisation is not. As to the cross-appeal the first ground is to be rejected, but the second ground as to time succeeds.

The Consequence

79. The consequence of this decision is not any longer seriously argued before me to be that I should substitute a decision of my own as to direct discrimination. It is inevitable therefore that the matter has to be remitted to the Tribunal. The parties are agreed that the Tribunal should be the same Tribunal. I am content to accept their joint view.

The Scope of the Remission

80. As to the issues of direct discrimination, it seems to me that it should be open to the parties, should they wish, to re-argue the issues and to invite the Tribunal - and I leave the decision up to the Tribunal - to decide whether it should hear any further evidence or consider any further documentation upon the matter. Otherwise, it would seem to me, the evidence has been given to the Tribunal and the Tribunal will be reasonably well aware of it. Though it was some time ago that some of the evidence was given, the Tribunal can be helped by the fact that a comprehensive transcript appears to have been taken of what was said below.

81. As to the question of time, it seems to me that is open, again, to the Claimant to apply to adduce evidence. It may be that the Tribunal would wish to consider that, given the very great number of issues which it had to deal with below which may have obscured this one. It may take the view, but it may not, that it should do so - and it seems to me that may be a necessary preliminary matter to determine.

82. It must then consider its discretion to extend time on the basis that it is just and equitable to do so. It should as a preliminary matter, rather than as a question of justice and equity, decide whether there was indeed a continuing act, if that is seriously to be argued, as a first question. For understandable reasons, the Tribunal here put that to one side, having come to a conclusion that it would treat an extension as just and equitable on the basis on which it did. However, technically, it might now wish to resolve that question, unless the parties decide that they do not invite it to do so.

Discussion on Remission

JUSTICE LANGSTAFF: Now, Mr Kansal, Ms Russell, is there any particular matter that you would like me to say beyond what I have already said as to the scope of the remission?

MS RUSSELL: Sir, only this. You may not need to spell it out, but do you think you need to ask the Tribunal to specifically identify whether there was less favourable treatment in respect of direct discrimination and identify the comparator?

JUSTICE LANGSTAFF: That, I think, would follow from what I have said in my Reasons.

MS RUSSELL: Yes.

JUSTICE LANGSTAFF: And they should have a transcript of them - I am sorry it is so long - but there should be a transcript of this Decision.

MS RUSSELL: Yes. It will be in there. And so, I am content that they will have sufficient guidance there. In respect of the time limit issue, is it sufficiently clear that the Tribunal are going to be focussing on the Claimant's default in not submitting his claim? And whether or not that justifies the Tribunal in taking the exceptional step of extending time on the basis that it's just and equitable to do so? I think it is from what you have said. In relation to the time limit issue, it's your decision, as I understand it, that there is going to be further argument, possibly further evidence and further argument?

JUSTICE LANGSTAFF: It seems to be open to the parties to apply to adduce further evidence. And I leave it up to the Tribunal to decide whether it accepts that. But beyond that, plainly further argument, open to both sides to put their points of view. There will inevitably be a much greater focus on the issue now than there was at the tail end of what was a very long Judgment.

MS RUSSELL: Yes, of course. And it is envisaged that this will take place in a further hearing?

JUSTICE LANGSTAFF: Yes. That is inevitable, I think.

MS RUSSELL: Yes.

JUSTICE LANGSTAFF: The parties can agree it beforehand if they wish. And I do not wish anything that I have said to preclude the parties reaching an appropriate agreement, if there is one, because I am mindful of the expense and inconvenience of further hearings.

MS RUSSELL: Sir, yes. Thank you for that.

JUSTICE LANGSTAFF: But that is a matter for the parties. I cannot compel it and I do not.

MS RUSSELL: Yes.

JUSTICE LANGSTAFF: Is there anything that you would wish me to clarify, Mr Kansal, at all?

MR KANSAL: Yes. There is actually one question.

JUSTICE LANGSTAFF: Yes, sure.

MR KANSAL: I am fine with everything else. You comment in your Judgment on the victimisation, on the bonus side, and you quote section 27 of the **Equality Act**, and you say, "It is necessary to establish A has subjected B to a detriment. That is for the Claimant to prove".

JUSTICE LANGSTAFF: Yes.

MR KANSAL: So, in that case the burden is on me. But then you also add this comment. "Absent any grounds upon which the burden is reversed". And then you say, "It is not argued here".

JUSTICE LANGSTAFF: Yes.

MR KANSAL: So, just to clarify, your understanding was that I did not argue that the burden had shifted on to the Respondents?

JUSTICE LANGSTAFF: Not in the sense of section 136. I think the argument was made that because, as matter of fact, the amount of the bonus is determined by the employer, only the employer can say why. That certainly was made. And I hope I made that clear.

MR KANSAL: Yes, you did.

JUSTICE LANGSTAFF: In my view, that is a matter of evidence. It is not a matter of law because the burden, in the sense of showing that you have got less than you should have had, rests on you. The way you establish it is by asking questions of the decision maker. And saying to the Tribunal "Well, look, given those answers, plainly I should have had more".

MR KANSAL: I guess my question is this. In the skeleton argument, I think we are quite clear to say, "Look, the bonus was decided by Paul Dunkley. And he had victimised me three days earlier", as found by the Tribunal. Was that not sufficient for the burden to be placed on them to demonstrate that then?

JUSTICE LANGSTAFF: I think what was in the Tribunal's decision was they listened to the evidence that was given. And they did not deal with any question of the shifting of the burden of proof under section 136. They concluded that you had not established that you were getting less than you might have been entitled to under what was a very discretionary scheme. That it seemed to me was a decision they were entitled to reach because the burden of proof of showing there was a detriment rested upon you. And you have to show a detriment before you can shift the burden to say, "Look, why was there a detriment? Why did it arise?"

MR KANSAL: Okay.

JUSTICE LANGSTAFF: And the burden of proof really comes in by saying, once a detriment is established in these circumstances you are to assume absent an explanation that it was for the reason of victimisation.

MR KANSAL: Okay. And then just one final point, linked to that, because obviously it is an important part of the appeal. In the Rule 3(10) Hearing, HHJ Richardson gave his reasons and he stated that it was striking that the ET did not make findings when the

Preliminary Hearing, Regional Employment Judge Potter had instructed them to do so. And that was also in our skeleton. And from everything you have covered here, I do not think you have addressed that specific point. And if I can articulate it in a nutshell? Were the Tribunal bound by the Preliminary Hearing Decision, the earlier Preliminary Hearing Decision of Regional Employment Judge Potter - and that was the [inaudible]? And it is a question - I do not think you have covered that in this Judgment, I do not think?

JUSTICE LANGSTAFF: I am just reminding myself of what Judge Potter had to say, of what Judge Richardson had to say.

MS RUSSELL: It is page 180.

JUSTICE LANGSTAFF: Thank you. [Pause] This is the question of, "It is striking that it took this course in the case where [the complainant] had applied for and had been refused specific disclosure"?

MR KANSAL: Yes.

JUSTICE LANGSTAFF: That is the point?

MR KANSAL: Yes.

JUSTICE LANGSTAFF: Yes, I did not deal with that in my Reasons. You are quite right. I did take into account what I had been told in the course of argument by Ms Russell that the only document that there was in relation to the bonus was this document at page 239; that there was extensive cross-examination about that. I did say that so far as the bonuses given to others were concerned, that was not strictly relevant, except as background in a case which is dealing with why you got less than you should have done. It is not a question of saying, "Should have done by comparison to somebody else because of race discrimination or something". It would really require a separate

complaint about that. And that is why, apart from the fact that there was no further appeal upon Judge Potter's Decision, that is why I did not say anything more about it.

MR KANSAL: But I think our point there is that we felt that we did not need to appeal Potter's Decision at the Preliminary Hearing stage because there was evidence before. There was a one page sheet etc. And so, the Tribunal in their Decision, they do not say, "The Claimant did not prove his point". They actually say, "We could not make findings because there was not enough evidence before us". And there seems to me a conflict between what Potter was saying in the Preliminary Hearing. I am just keen to hear your view on that.

JUSTICE LANGSTAFF: That I think the Tribunal is entitled to come to its own conclusion on the basis of the information in front of it and the argument it has. At the stage that it was examining all the facts, paragraph 219, it "was left unconvinced that the Claimant had been paid less than he should properly have been". It is a mealy mouthed phrase. It does not help very much. And I can understand why you do not like it very much. But it links with the last sentence, "The Claimant had not shown that he should rightly have been paid more than he was", and that is a burden of proof explanation. As I said in the Judgment, it feels unsatisfactory that a Tribunal relies on it. But if you have a principle of a standard of proof, whether the standard is beyond reasonable doubt or whether it is on the balance of probabilities, you will get cases where you simply are left in a position where you just do not really know. And you have to resolve it then on those sorts of factors. Judges do not like doing it much. But it does happen. Therefore, I have to ask at this level, not what I would have decided or what I would hope the Tribunal would have decided one way or another, but were the Tribunal entitled to come to that view. And they are looking at the information given by a witness before that Tribunal. They are not directly concerned with what Judge Potter said might be necessary. If Ms

Russell is right in her response, there was no other document disclosed in any event. And so there would not have been any further material and you are left back where you are, I think.

MR KANSAL: Thank you.

JUSTICE LANGSTAFF: Is there anything else?

MS RUSSELL: No.

JUSTICE LANGSTAFF: Can I once again thank the parties? Oh, there is something else. There is the question of costs.

Ruling on Costs

1. The question of costs in relation to the reimbursement of fees arises. I am asked to make an Order that a Claimant be repaid the amount of the fees which he has to pay to bring an appeal. The same rule does not apply to a Cross-Appellant because a Cross-Appellant does not have to pay any fee up front. Accordingly, the cost of the appeal may be viewed as being the £1,600 which the Claimant paid; both £400 as to the initial fee and £1,200 as to the hearing fee.

2. Mr Allen submits that the Claimant has succeeded upon the bulk of the argument and having won, should succeed. In general terms, I accept that the winning party should succeed. They had, after all, to launch the claim in the first place in order to succeed.

3. Here, indeed, in at least one respect, by the time the matter came to this Court, it had been accepted by Ms Russell that the Tribunal was in error in its approach: that is, in relying simply upon the fact that Ms Nayar and Mr Patel had been involved in transactions as demonstrating that race could not have been the reason for the Claimant's exclusion from those transactions. However, no concession was made in advance, as it might have been, between the

parties on that particular point and nor did Ms Russell in effect establish that the Decision was plainly and obviously right in any event, notwithstanding that fault.

4. Viewed as a matter of overall success and failure, the Claimant has succeeded on two out of three appeals and he has succeeded in defeating a major part of the cross-appeal. The Cross-Appellant has succeeded, and Respondent has succeeded in one point on the appeal and on the question of time on the cross-appeal.

5. I have regard to the extent of the argument and the substance of the victory. I have to have regard to the fact that I do not think that the matters upon which the Claimant failed have added significantly to the length of the hearing overall.

6. I have come, in the end, to the conclusion that the Claimant should be paid the entirety of the fees which he seeks by way of repayment. There is no other question of costs here because the appeal was perfectly properly brought and perfectly properly resisted and the cross-appeal, for that matter, perfectly properly brought as well. However, under the costs provisions, I order that the Respondent pay to the Claimant the sum of £1,600 by way of refunding of his costs.