Appeal No. UKEAT/0192/13/SM
UKEAT/0193/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 November 2013
Judgment handed down on 7 November 2014

Before

HIS HONOUR JEFFREY BURKE QC

MR B BEYNON

MR T M HAYWOOD

UKEAT/0192/13/SM

MS J VERNON — APPELLANT

1) AZURE SUPPORT SERVICES LTD
2) PORT VALE (VALIANT 2001) FOOTBALL CLUB LTD
3) MR C BEDDING — RESPONDENTS

UKEAT/0193/13/SM

AZURE SUPPORT SERVICES LTD — APPELLANT

1) MS J VERNON
2) PORT VALE (VALIANT 2001) FOOTBALL CLUB LTD
3) MR C BEDDING — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For Ms J Vernon	MR MATTHEW JACKSON (Appearing under the Free Representation Unit) Instructed by: Stephensons Solicitors LLP 24 Lord Street Leigh Lancashire WN7 1AB
For Azure Support Services Ltd	MR MICHAEL DUGGAN (of Counsel) Instructed by: Messrs Astons Solicitors The Stables Manor Road Staverton Northamptonshire NN11 6JD

SUMMARY

SEX DISCRIMINATION

Continuing act

Direct

Comparison

The Claimant's appeal

The Claimant was employed by the Second Respondent (R2); her employment was transferred under TUPE to the First Respondent (R1). The Third Respondent (R3) was employed by R2. He carried out harassment of the Claimant before and after the TUPE transfer. The Employment Tribunal held that R2 (which was in liquidation) was vicariously liable for R3's acts while the Claimant was employed by R2 and that the claim in respect of R3's acts after the transfer could not succeed because the Claimant and R3 were not in the same employment. They did not make a finding that R2's liability had transferred to R1.

On the Claimant's appeal it was conceded that, but for time limits, R2's liability passed by the transfer to R1; but it was argued that time began to run from the date of the transfer and that acts of harassment which were committed subsequently could not extend that time.

Held that **Sodexho v Gutridge** [2009] ICR 1486 did not apply; the time provisions of the **Equal Pay Act** were different from those which applied to the present claims under the **Equality Act**. The ET had found that the harassment was an act extending over a period and that the last act was less than 3 months before the claim was lodged; and the claim in respect of harassment was not out of time. In any event the Employment Tribunal was entitled to find that it was just and equitable to extend time. Appeal allowed.

R1's appeal

The Claimant was dismissed after she had or was accused of having some kind of relationship with one of R2's footballers--which was forbidden. No steps were taken against the footballer. The Employment Tribunal found that the Claimant's dismissal was on the grounds of her sex.

R1 attacked that finding on the basis that the Employment Tribunal had used the wrong comparator and had reached their decision by applying a "but for" test when they should have asked themselves what was the "reason why" the Clamant was dismissed. As to comparator, it was argued that the Employment Tribunal should have taken a hypothetical homosexual man in the position of the Claimant who had a relationship with a homosexual footballer.

Held. Considering **B v A** [2007] IRLR 576, **Martin v Lancehawk** (EAT/0523/03), **Schofield v Stuart Kauffman** (EAT 11.10.02) and **Chief Constable of South Yorkshire v Vento** [2001] IRLR 126 that it was not necessary for the Employment Tribunal to construct the particular hypothetical comparator proposed; they had used a sufficiently close comparator - a male in similar circumstances.

As to the second argument, there was nothing which indicates that the Employment Tribunal had applied the wrong test or the "but for" test. Appeal dismissed.

HIS HONOUR JEFFREY BURKE QC

The Parties

1. The Employment Appeal Tribunal has before it two appeals arising from the Judgment of the Employment Tribunal, sitting at Stoke on Trent, presided over by Employment Judge Gilroy QC, and sent to the parties on 22 January 2013. The route by which the points in the two appeals arise is complex; we will set out that route in what follows; for the sake of clarity, it is necessary, first, to identify the parties.

2. The Claimant before the Tribunal was Mrs Vernon, who was employed by the Second Respondent, Port Vale (Valiant 2001) Football Club Ltd, as their Sales Manager Conference and Events. The Second Respondent was, at that time, the owner and operator of Port Vale Football Club, which competed in League 2 of the Football League. With effect from 4 July 2011, the catering function of the football club, including the duties in which the Claimant was engaged, was transferred to the First Respondent, Azure Support Services Ltd. The Tribunal found, and it is not in dispute, that the Claimant's employment was transferred to the First Respondent under the **TUPE Regulations**; she continued in the employment of the First Respondent until dismissed on 19 October 2011.

3. The Third Respondent, Mr Bedding, was the club's Sales Manager on the football side. He was at all material times employed by the Second Respondent until his employment ended on 1 October 2011.

4. In this Judgment we will describe Mrs Vernon as "the Claimant", the First Respondent as "R1", the Second Respondent as "R2" and Mr Bedding as "R3".

5. By the time of the Tribunal hearing, R2 had gone into administration; the receiver had consented to the Claimant's proceeding against R2; but it had no funds and has since gone into liquidation. Although R1 and R2 had put in a joint answer, by solicitors, to the Claimant's claims, R2 was not represented at the hearing; nor was R3. The Claimant was also not represented. R1 was represented by their solicitor, Mr Aston. R2 and R3 played no part in the substantive hearing, having both been debarred.

6. Before us, the Claimant was represented by Mr Jackson under the aegis of the Free Representation Unit. R1 was represented by Mr Duggan. We are grateful to both for the substantial help which they gave to us.

The Claims before the Tribunal

7. The Claimant put forward the following claims, that:

1) Her dismissal by R1 was an act of direct discrimination on the grounds of her sex.

2) She had been subjected by R3 to a series of acts which constituted sexual harassment; there were numerous allegations of such acts.

3) Both R1 and R2 failed to take any action in respect of her complaint of harassment and were, by so failing, guilty of direct discrimination on the grounds of sex from June 2011 until R3 left.

4) The failure set out at 3 above amounted to indirect discrimination on the grounds of sex.

5) The dismissal constituted victimisation against the Claimant for her having committed the protected act of complaining about R3's harassment of her.

6) There had been an unlawful deduction from the Claimant's pay in that a bonus to which she was entitled had not been paid.

The Tribunal's Decision

8. The Tribunal decided that:

1) The Claimant would not have been dismissed for the reasons or in the circumstances in which she was dismissed had she been a man; the dismissal amounted to direct discrimination; R1 and R2 had made a joint decision that the Claimant should be dismissed and were both jointly and severally liable in respect of that discrimination. See paragraphs 49 to 51 of the Tribunal's Reasons.

2) From the date of the transfer of the Claimant's employment from R2 to R1, the Claimant and R3 had been employed by different employers; therefore R2 could not be liable to the Claimant in respect of any acts of harassment after that date; see paragraphs 53(1) and (2) of the Reasons.

3) Subject to time limits, R3 was liable to the Claimant in respect of acts of harassment prior to that transfer; and his employers, R2, were jointly and severally liable with him. See paragraphs 53(3) and (4) of the Reasons.

4) As to time limits, R3's harassment of the Claimant was a "continuing act" which continued to 1 October; the ET1 was lodged on 29 December 2011; therefore, the claim in respect of the harassment up to the date of transfer was in time. Alternatively, the claim should proceed on the "just and equitable" basis set out in section 123(1) of the **Employment Act 2010**. See paragraph 53(5) of the Reasons.

5) The claims that R1 had been guilty of direct and indirect discrimination in failing to take action in respect of the Claimant's complaints of harassment were

dismissed; the Claimant's evidence that she had told R1 of her complaints was rejected. See paragraphs 52 to 57 of the Reasons.

6) The victimisation claim was dismissed; see paragraph 58 of the Reasons.

7) The unlawful deduction claim was also dismissed; the Claimant had not proved her case as to entitlement to the bonus.

The Nature of the Appeals

9. As appears from the history of the proceedings as described in the Reasons, it could not have been easy for the Tribunal to arrive at a clear identification of the Claimant's claims and a clear evaluation of the evidence presented by the Claimant and by R1. The Claimant put in letters from ex-employees of R1 and R2 which had been altered from those originally provided by those employees, at least in some cases. She was found by the Tribunal to have been untruthful in her explanation of those alterations and to have been herself responsible for them. Resolution of that issue and the strike-out application which followed, unsuccessfully, could not have been straightforward; and the need to consider the positions of 4 parties, only 2 of which were taking any part in the hearing and only one of which was represented must have added to the difficulties. We would like to pay tribute to the clear and comprehensive decision, which the Tribunal reached and which has given rise to only the two points which are now before us.

10. The Claimant's appeal can be briefly summarised. It is that the Tribunal, having found that R3 was guilty of harassment during the period when the Claimant and he were both employed by R2, failed to find that R2's vicarious liability for that harassment transferred to R1 pursuant to the **TUPE Regulations** and that R1 should have been found, for that reason, liable to her for that harassment.

11. The appeal of R1 attacks the Tribunal's conclusion that the dismissal constituted direct discrimination on the grounds of sex.

The Claimant's Appeal

12. Mr Jackson on behalf of the Claimant advanced in his Notice of Appeal (settled by solicitors) and his skeleton argument a straightforward point. Regulation 4(2) of the **TUPE Regulations 2006**, provides as follows:

> **"without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15 (9), on the completion of a relevant transfer**
>
> **(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee-; and**
>
> **(b) any act or omission before that transfer is completed, of or in relation to the transfer in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee."**

In reliance on that provision, he submitted that, by the date of the TUPE transfer of the Claimant's employment with R2 to R1 on 4 July 2011, R3 had committed harassment found by the Tribunal to have taken place in the course of his employment by R2. Therefore the vicarious liability to the Claimant in respect of the harassment which fell on R2 in respect of that harassment must be treated as having been transferred by virtue of Regulation 4(2) to R1; the Tribunal had failed to make but should have made a finding to that effect.

13. At the beginning of the hearing before us, we were told that, subject to points as to the time limit, Mr Jackson's argument that liability was transferred under TUPE as a matter of law was accepted as being correct; and Mr Jackson and Mr Duggan, who sought to resist the appeal on the basis of his time limit points, had agreed, appropriately, that Mr Duggan should go first – as he did.

14. Mr Duggan began by accepting, realistically, that although it was not entirely clear in the case of all three of the respects in which the Tribunal had found R3 to have been guilty of harassment, as identified at paragraph 3(a) to (c) of the Tribunal's formal Judgment, the conduct had been found by the Tribunal to have been continuing conduct as opposed to an isolated episode or isolated episodes of such conduct. The Tribunal's findings established that there had been a continuing course of harassment, whether of all or some of the types specified in those paragraphs, from June 2 October 2011.

15. He also accepted that the issue of transfer to R1 of any liability of R2 for harassment by R3 prior to 4 July had been raised before the Tribunal and that R1's solicitor, Mr Aston had not put forward any arguments against such transfer.

16. However, he submitted that the Claimant's claim that that liability devolved by reason of the transfer onto and thereafter rested with R1 was, as a matter of law, defeated by the time issue, even though Mr Aston had not raised that issue; his argument was that the continuing nature of R3's conduct was stopped in its tracks by the transfer; the analogy put by us in the course of argument of the dropping of the bar of a bar billiards table was accurate; the acts of R3 could only amount to an actionable wrong under the **Equality Act** while R3 was an employee of R2; and that legal wrong and the acts of R3 which constituted it could not be said to have been continuing from 4 July. Therefore the Tribunal could not have found in favour of the Claimant's claim that R1 was liable in respect of the pre-transfer harassment; that part of the harassment claim was out of time.

17. In support of that analysis Mr Duggan referred us to **Sodexho v Gutridge** [2009] ICR 1486 in which the Court of Appeal, by a majority, upheld the decision of the EAT (Elias J)

which had allowed in part an appeal from the Employment Tribunal. In brief, the Claimants in that case were employed by a NHS Foundation Trust until a date in 2001, when their cleaning work was contracted out to and their employment was transferred pursuant to TUPE to **Sodexho**. In 2006 the Claimants made equal pay claims, using as comparators male employees who were still employed by the Trust. It was assumed that the male comparators were doing work of equal value to that of the Claimants and that there was no objective justification for the higher remuneration which the male employees had received throughout.

18. Pursuant to section 2(4) of the **Equal Pay Act 1970** the Tribunal had no jurisdiction to hear a claim under that **Act** if the proceedings were not commenced on or before the qualifying date; that date was defined in section 2ZA(3) of the **Act** as:

> **"the date falling six months after the last day on which the woman was employed in the employment."**

19. The EAT allowed **Sodexho**'s appeal against the Tribunal's finding in favour of the Claimants in respect of the pre-transfer employment but dismissed the appeal in respect of the post-transfer period. The Court of Appeal (Wall and Pill LJJ, Smith LJ dissenting in respect of the former period) held, as had Elias J, that, in relation to the equality clause imposed by the **1970 Act**, the Claimants had to bring their claims arising from the pre-transfer period within 6 months after the termination of their employment by the Trust; but the 6 months period had not begun to run in respect of their employment by **Sodexho** in the post-transfer period.

20. Mr Jackson submitted that the limitation provisions of the **1970 Act** were very different from those applicable to the present claims: sections 2(4) and 2ZA of that **Act** established a bar based on a fixed period from the date when the relevant employment ended. In contrast, section 123 of the **Equality Act** established a primary limitation period of 3 months from the date of

the conduct complained of, but that, if the conduct complained of extended over a period, it was to be treated as done at the end of that period – from which point the 3 months primary limit would commence. The question – "when did the employment with R2 end" does not arise for the purposes of the **Equality Act**; the issue was whether 3 months had elapsed from the date of the conduct complained of, or, if that conduct extended over a period, from the date on which such that continuous contact ended.

21. In our Judgment, the decision in **Sodexho** does not inform the position in the present case. The relevant provisions of the **1970 Act** were wholly different from the relevant provisions of the **Equality Act**. Whether the employment of the Claimant by R2 ended or did not end on 4 July 2011 does not determine when the primary time limit started to run against the Claimant in the present case. That question fell to be decided by the application of the provisions of section 123 of the **2010 Act**. Applying those provisions, it is clear that the primary time limit would have expired in respect of acts of harassment which preceded the transfer – and also in respect of acts of harassment which were subsequent to the transfer, but before 30 September 2011 (3 months before the lodging of the ET1 on 29 December 2011) - unless the conduct was found to have been "conduct extending over a period", as it was in this case.

22. In an equal pay case under the **1970 Act**, we acknowledge that a bar could be said to have dropped after 6 months from the termination of the employment during which the equality clause was said to have been infringed; but the limitation regime for equal pay claims is, in our Judgment, very different from that which applies to a discrimination claim or a harassment claim; and we see no reason why the transfer of an employee from one employer to another should bar him or her from making a claim respect of discrimination by the transferor employer before the transfer, for which, by reason of the provisions of the **TUPE Regulations**, it is

accepted that, but for limitation, the transferee-would be liable. The Tribunal's conclusion that the acts of harassment which were proved were continuing acts was not challenged and had the effect that the primary time limit had not expired by the time the ET1 was presented.

23. There was some discussion as to the fact that Mr Duggan's principal point had not been raised before the Tribunal (as he accepted) and might therefore be a new point which could not be relied upon, on the basis of the familiar principle established in **Kumchyk v Derby City Council** [1978] ICR 1116 and many subsequent authorities; Mr Duggan told us on instructions from Mr Aston that, at the Tribunal hearing, there were no arguments about any time point at all; but, having decided that the point is not persuasive for the reasons we have set out, it is not necessary to take that aspect of this appeal further. There is the argument that, in the relevant field, time points go to jurisdiction; but we need not develop that argument for present purposes.

24. Mr Jackson relied, in the alternative, on the Tribunal's conclusion, in the same paragraph of their Reasons, that, if necessary, it would have concluded that it was just and equitable for the Claimant's harassment claims to be determined, despite the expiry of the primary limitation period. Section 123(1) of the **Equality Act** provides that proceedings must be bought within the period of 3 months from the act to which the proceedings relate or such other period as the Tribunal thinks just and equitable. Accordingly, the argument put forward by Mr Duggan could not succeed in the light of that conclusion of the Tribunal. Mr Duggan submitted that the Claimant had not raised the issue of an extension of time on the just and equitable basis and that therefore R1 had not had an opportunity to deal with it. That submission led to consideration of **Dimtsu v Westminster City Council** [1991] IRLR 450 (Knox J presiding) in which the Claimant relied on 2 pre-employment interviews as occasions on which that there had been

direct racial discrimination against him; it was conceded that the first interview was out of time by the Claimant's trade union representative who subsequently admitted that he had not been aware of the just and equitable extension provisions. The EAT rejected the Claimant's argument on appeal that the Tribunal ought to have itself raised the extension of time issue. However, at paragraph 14, the EAT said:

> **"Thirdly, we regard it as important that the principles set out in (Kumchyk) be upheld, and not eroded by qualifications based upon inferences which a chairman of an Industrial Tribunal might make. In saying this, the majority would not wish to cast doubt on the propriety of the long-established practice whereby chairmen of Industrial Tribunals give assistance where it is needed in the formulation and presentation of the cases of persons before them, be they applicant or respondent, who have not got the benefit of professional representation and, indeed, on some occasions when they have such representation. But this must be a matter for the judgment of the Industrial Tribunal in each individual case and should not be erected into an obligation which if not fully complied with leads to a conclusion as an error of law has been committed."**

25. It was, therefore, open to the Tribunal to take the just and equitable point, even if it was not raised by the Claimant, particularly so when she was unrepresented in a case of not inconsiderable complexity. In **Hereford and Worcester County Council v Neale** [1986] IRLR 168 frequently cited for a wholly different purpose, Ralph Gibson LJ said that paragraph 54 (not in the context of time specifically):

> **"Further, if a point has not been mentioned, or if little or no weight has been attached to it, the tribunal is entitled and should have regard to the point, according to their own assessment but, in forming that assessment, the industrial tribunal should, in my judgment, pay careful and proper attention to the course of the hearing and the way in which and the extent to which a point has been made or relied upon."**

But in this case the ET3 had raised the time issue, although it was not referred to at the hearing, and, the Claimant being unrepresented, it should have been apparent to R1's advocate that a just and equitable issue might arise as a result. He was not deprived of an opportunity to address the issue; he could have done so if he had wished. It is understood that he did not consciously choose not to do so; the point had not expressly arisen. However it was an issue in the case; and the Tribunal were entitled to address it.

26. For these reasons we are not persuaded by Mr Duggan's arguments against what would otherwise be a straightforward application of section 109(1) of the **Equality Act** and Regulation 4(2) of the **2006 TUPE Regulations**. The Claimant's appeal against the Tribunal's failure to hold R1 liable for the acts of harassment committed by R3 before the Claimant's transfer from the employment of R2 to the employment of R1 must be allowed; and it must be declared that R1 are liable to the Claimant for that harassment.

R1's Appeal

27. It is necessary for the purposes of R1's appeal to go into more detail of the history of the Claimant's dismissal. We take that history from the Tribunal's findings of fact.

28. Part of the arrangements between R1 and R2 was that R1's employees should not have any personal relationship with R2's footballers. It was not in dispute that the Claimant knew of that requirement and that it applied to her. On 13 September 2011 Ms Herridge, R1's Group General Manager and the Claimant's line manager, discussed with her rumours which were circulating in the workplace - the football stadium - that the Claimant was having a personal relationship with one of R2's players. The discussion followed information provided by R2's Chief Executive, Mr Deakin. The Claimant assured Ms Herridge that nothing was going on between her and the player or any other player. Ms Herridge asked the Claimant to make it clear to the player that she was not interested in advances from him, to avoid any contact with him and to inform her if anything relevant occurred. The Claimant agreed. She told the Claimant that she would support her, but could only do so if she knew all the facts and that the Claimant had to be honest with her; the Claimant said that she understood. The rumours continued to circulate; the Tribunal found that Mr Deakin was actively seeking the Claimant's suspension and that Ms Herridge was asked to comply swiftly with his request. On 3 October

Mr Deakin formally requested the "removal" of the Claimant on the grounds that her behaviour was unacceptable and, shortly afterwards Ms Herridge met the Claimant and suspended her pending an investigation. The Claimant's reaction was to say that she was not stupid and would "never do anything like that".

29. The investigation was undertaken; and as a result, Ms Herridge met the Claimant again on 6 October. She informed her that, due to a lack of evidence, the allegations against her could not be sustained and told her to come back to work next day. The Claimant then "opened up", as what she did was described by the Tribunal. She told Ms Herridge that (1) the player concerned had contacted her on Facebook, (2) he had obtained her telephone number, (3) he had written his name in the dirt on her car, (4), he had on one occasion followed her to the bank, (5) on her lieu day off he had come round to her house, and (6) she had been communicating with him by text messages. Of those events the Claimant had previously informed Ms Herridge of only the third.

30. It was Ms Herridge's evidence that, on hearing this and reflecting upon it, she took the view that the Claimant had broken the duty of mutual trust and confidence and had jeopardised R1's contract with R2. On the following day she called the Claimant in and dismissed her. The dismissal was subsequently confirmed in a letter which said:

> **"As discussed and, as set out below, unfortunately the Company does not consider that you are suitable for the role of Sales Manager. Your conduct in the workplace with regards to professional relationships with colleagues and Club associates has been a cause of great concern to both the Client and us."**

The Claimant appealed against her dismissal to R1's General Manager; the appeal was rejected. In her letter seeking an appeal hearing and at that hearing, she told the General Manager that she had never spoken to the player by phone and had taken Ms Herridge through the text

messages between them. In cross-examination before the Tribunal she admitted that that was not true. The Claimant also claimed in that letter that she had been the victim of discrimination on the grounds of her sex, her sexual orientation and her physical appearance. Those allegations were also rejected. The latter 2 forms of discrimination did not form part of the Claimant's case before the Tribunal; but it was her case that her dismissal was discriminatory on the grounds of her sex.

31. It was R1's case, as set out in their ET3, that the Claimant was dismissed, not because of rumours of her personal relationship with the player, as to the truth of which Ms Herridge had reached no conclusion, but because of her breach of the duty of mutual trust and confidence and for potentially jeopardising R1's contract with R2. See paragraph 22 of the ET3.

32. The Tribunal's conclusions on the dismissal issue were set out at paragraphs 49 to 51 of the Reasons, in these terms:

> **"49. The Tribunal upheld Allegation 25.**
>
> **(1) The Tribunal rejected the First Respondent's case that the Claimant was dismissed because of trust and confidence issues.**
>
> **(2) Throughout the period with which the Tribunal was concerned, the Second Respondent had in place a requirement of the First Respondent that its staff were not to have personal relationships with football players of the Second Respondent. A gender-neutral rule that employees should not engage in personal relationships with each other may well make good sense. However, a requirement that no employees of the First Respondent should have personal relationships with the Second Respondent's players would immediately appear to be a rule that is slanted against women. The First Respondent had no control over what steps the Second Respondent took in relation to its employees (which is, as is set out below, to be contrasted with the influence the Second Respondent exerted in relation to the First Respondent's employees). However, the evidence demonstrated that the First and Second Respondents worked very closely together, and the Tribunal found it striking that in such an environment, the Claimant should have been subjected to suspension and investigation (and ultimately dismissal - albeit the First Respondent maintains that this was because all trust and confidence had been lost), whilst it would appear that no action whatsoever was taken against AB.**
>
> **(3) Mr Deakin was plainly behind the Claimant's suspension, as demonstrated by his exchange of e-mails with Ms Herridge on the afternoon of 3 October 2011. At the beginning of the suspension meeting, Ms Herridge openly stated that the meeting *"was at the request of Perry Deakin"* and that *"he was very unhappy about (the Claimant's) friendships with (AB) (Port Vale football player)"*.**
>
> **(4) In the dismissal letter of 19 October 2011, the Claimant was informed:**

> ***"Your conduct in the workplace with regards to professional relationships with a colleague and the Club associates has been a cause of great concern to both the Client and us."***
>
> **The Tribunal heard no evidence of unacceptable conduct on the part of the Claimant other than (allegedly) in relation to AB. The Tribunal could not understand, therefore, what the reference to "Club Associates" could be.**
>
> **50. The Tribunal concluded that a man who had (a) been the subject of such rumours as the Claimant had been subject to, and who had (b) given the explanations the Claimant had given during the course of the investigatory meetings she attended, including the meeting on 6 October 20111, when she "opened up" about matters concerning herself and AB, would not have been treated in the way the Claimant was treated (i.e. dismissed).**
>
> **51. In all circumstances, the Tribunal found that Allegation 25 was made out as against the First and Second Respondents. The First Respondent was liable on the basis that it discriminated against the Claimant in dismissing her. The Second Respondent was jointly and severally liable in respect of that act of discrimination."**

The Submissions

33. Mr Duggan directed his attack at paragraph 50 of the Tribunal's Reasons which, he submitted, were flawed in two respects. The first flaw was that the Tribunal had not, as was required by section 23 of the **Equality Act**, made a comparison between the Claimant on the one hand and a male employee in the same or not materially different circumstances, but had simply used any male employee as the comparator. The proper comparator, Mr Duggan submitted, should have been a homosexual employee who had a relationship with one of R2's footballers. The second flaw was that the Tribunal had not asked themselves what was the reason for the dismissal, as required by authority, and had adopted a "but for" approach to the question whether any differential treatment was by reason of the Claimant's sex.

34. Mr Jackson's principal submission by way of response was that the Tribunal had, at paragraph 50, used a comparator who was sufficiently similar, namely a male employee who had been subject to the requirement to which the Claimant had been subject and had given the same information to his employers, as had the Claimant and that it was unnecessary for the comparator to be such an employee who was homosexual. As to the absence of any satisfactory explanation of the differential treatment of the Claimant, as compared with the notional

comparator, the explanation given by R1, that the Claimant had been dismissed because of trust and confidence issues, was expressly rejected by the Tribunal on the facts at paragraph 49 (1); the Tribunal had not made any error of law in its approach to the question of discrimination once the differential treatment had been established.

Discussion

35. In support of his submission as to the correct comparator, Mr Duggan relied upon the Judgment of the EAT, presided over by Lady Smith, in **B v A** [2007] IRLR 576. In that case B, a solicitor, employed A as his personal assistant; they began a relationship which continued for some time; but when B saw A out walking with another man, he dismissed her forthwith. The Tribunal found as fact that the reason for the dismissal was B's jealousy on his discovery of A's relationship with another man. The Tribunal found that the dismissal would not have occurred had A been a male. The EAT allowed B's appeal against the conclusion that the dismissal was an act of sex discrimination principally because the Tribunal had applied a "but for" test; see paragraph 13 of the EAT's Judgment. However, at paragraph 26 the EAT addressed B's argument that the Tribunal had erred in failing to postulate a homosexual male employer and able homosexual male employee for the purposes of comparison, in these terms:

> **"The tribunal's error may well have been compounded by the fact that they failed to carry out an exercise in comparison. In the circumstances of this case we consider that it *was* incumbent on them to construct a hypothetical comparator … we agree with Mr Purchase that the appropriate comparator would have been a homosexual sexual male employer and a homosexual male employee. On the tribunal's findings, such an employee would have received exactly the same treatment, namely, he would have suffered dismissal when his apparent infidelity was discovered driven by feelings of jealousy. Further, we note the hypothetical comparator suggested on behalf of the claimant but cannot see that reversal of the male/female roles as between the respondent and the claimant would have made any difference to the outcome. It seems to us that dismissal for the same reason would still have resulted."**

In that paragraph the EAT cannot be taken to have accepted in full the submission as to the nature of the comparator; the criticism is of the failure of the Tribunal to construct a comparator

at all. As we see it, in such a case or in a case such as the present the EAT cannot be said to have decided that the correct comparator must be a homosexual male. Why, for instance, we may ask, could it not have been a heterosexual male, about whom the employer had, sexual feelings, who was found with a heterosexual female?

36. The argument that in a case in which a female employee has been dismissed in circumstances in which she had been in a sexual relationship with the employer or the principle of the employer was considered in **Martin v Lancehawk Ltd** (EAT/0525/03), Rimer J presiding, Judgment 22 March 2004. The Claimant was an employee of the Respondent; she began an affair with the Respondent's Managing Director. She was married; he had a partner. Eventually she told her husband of the affair, although she had told the Managing Director that she would not do so. The Managing Director learnt that the Claimant's husband was going to reveal what had happened to his partner. A week later he dismissed the Claimant on the basis that there had been a breakdown in trust and confidence. The Tribunal found that the dismissal was unfair, but that it did not amount to direct sex discrimination. The Claimant appealed against the latter conclusion; it was argued that the Tribunal should have considered how the Managing Director would have dealt with a heterosexual male employee in the same circumstances; such an employee could not have had an affair with the Managing Director and would not have been dismissed. The EAT rejected that argument, which confused the "but for" test with the "reason why" test. The reason for the dismissal was the breakdown of the relationship between the Claimant and the Managing Director and not the fact that she was a woman.

37. The EAT said, at paragraph 12, that if a hypothetical comparator had to be constructed its instinctive reaction would be that such a comparator should be a male employee with whom the

Managing Director had a homosexual relationship; but it did not so hold; and it is not easy to see why the correct comparator should be a homosexual employee; he could also be a heterosexual employee who had had an affair which had gone wrong with another senior executive who was a female. We do not regard Mr Duggan's point as to the appropriate comparator in this case as able to derive support from **Lancehawk**.

38. In the report of that decision, reference was made to **Schofield v Stuart Kaufmann**, in which, on 11 October 2002, the EAT upheld the decision of the Employment Tribunal in a case of a similar nature but a different result. The Tribunal's decision in favour of the Claimant on her sex discrimination claim was appealed to the EAT; but that appeal was dismissed at a preliminary hearing. The Claimant had a relationship with P, a fee earner in the Respondent firm. The relationship ended. P made it clear to the sole practitioner who owned the firm that, unless the Claimant was dismissed, he would leave. As a result, she was dismissed on a pretext. The Tribunal took as its comparator a heterosexual male and rejected the argument that the correct comparator was a homosexual male who had had an affair with a homosexual male employee. The Tribunal found that the dismissal was discriminatory on the grounds of sex.

39. On appeal it was held that the Tribunal had plainly chosen the correct comparator. The EAT in **Lancehawk** said that they did not agree with that analysis and thought, if a comparator had to be constructed, that are more apt comparator in that case would have been a homosexual male with whom the Managing Director had had a relationship; but the EAT also made it clear, at paragraph 32, that the construction of such a comparator would not have provided much assistance in answering the crucial question – why was the Claimant dismissed.

40. We will shortly come back to the submissions as to the "reason why" question in the present case; but as to comparator, we are unpersuaded that the Tribunal fell into error of law in taking as a hypothetical comparator a male employee in the circumstances described in paragraph 50 of the Tribunal's Reasons. That comparator could have been a hypothetical heterosexual male who had been in some relationship with a hypothetical female footballer (in due course perhaps, such a person will not be inevitably hypothetical) or a hypothetical homosexual male employee who had a relationship with a hypothetical homosexual male footballer. It was not necessary, in our Judgment, for the Tribunal to choose between those two hypothetical constructs. Either construct would have been sufficiently close as a comparator to satisfy section 23 of the **Equality Act**; whether there was sufficient similarity was a question of fact for the Tribunal.

41. It is helpful to look at what the EAT held on the comparator issue in **Chief Constable of West Yorkshire v Vento** [2001] IRLR 124 Lindsay P presiding (a case in which subsequent decisions on compensation are much more familiar than its decision as to comparators). The EAT's view is aptly summarised in the second paragraph of the headnote, as follows:

> **"Where there is no evidence as to the treatment of an actual male comparator whose position is wholly akin to the applicants, the tribunal has to construct a picture of how a hypothetical male comparator would have been treated in comparable surrounding circumstances. Inferences will frequently need to be drawn. One permissible way of judging a question such as that is to see how identical but not wholly dissimilar cases were treated in relation to other individual cases. It is not required that a minutely exact actual comparator has to be found. If that were the case then isolated cases of discrimination would almost invariably go uncompensated."**

That principle, in our Judgment, applies to a hypothetical comparator. The Tribunal used a hypothetical comparator, who had been the subject of rumours, as had the Claimant and who had given the explanations which the Claimant gave. Whether that comparator was a homosexual male who was rumoured to have a relationship with a homosexual footballer or a

heterosexual male who was rumoured to have a relationship with a heterosexual female footballer was not material; what was material was that the circumstances of the hypothetical comparator should be sufficiently similar, but for gender, to fall within the words of section 23. The Tribunal were entitled to use the comparator which they did; but whether that comparator was sufficiently similar or not, was a matter of fact for them. We see no error of law in their approach to this issue.

42. Recent authorities support the view expressed in **Lancehawk** that, at least in a case of that type and, therefore, in a case of the present type where there is no actual comparator, the exercise of constructing a hypothetical comparator may not be crucial or even, to quote the EAT at paragraph 32 of the Judgment in **Lancehawk** would "not have provided much help" in answering the "reason why" question. However, that is not to say that the 2-stage test set out in the Judgment of Peter Gibson LJ in **Igen v Wong** [2005] ICR 931 is no longer to be used by Tribunals; that has not been suggested in this appeal, and could not be, having regard to the terms of the burden of proof provisions in section 136 of the **2010 Act** and the predecessors of that section. The Tribunal in the present case were entitled to consider whether there had been differential treatment by constructing a hypothetical comparator; and in our Judgment, they made no error of law in their identification of the appropriate comparator.

The Reason Why Question

43. In the course of argument reference was made to the burden of proof provisions in discrimination claims which were previously contained in section 63 A of the **Sex Discrimination Act 1975** and section 54 A of the **Race Relations Act 1976** her and are now in section 136 of the **2010 Act**; and there were discussions about the relationship between those provisions, and the support, in decisions such as **Lancehawk**, for a tribunal's going directly to

the "reason why" question rather than undertaking the exercise of comparison to which we have just referred. A substantial number of authorities was contained in the parties' authorities bundle; and several of them were referred to in the course of argument. We do not in any sense criticise the advocates for that; the number of decisions in this area is large and growing; and we added to that number by asking whether guidance was to be found in the most recent authority of the Supreme Court, **Hewage v Grampian Health Board** [2012] ICR 1054.

44. Because neither side had considered **Hewage**, we invited, but did not require the advocates to provide us with written submissions on it within a limited time after the end of argument and our reserving this Judgment. Mr Duggan provided us with written supplemental submissions, for which we are grateful. Mr Jackson did not do so; he had made brief oral submissions; and we recognise that, acting under the aegis of the Free Representation Unit, making further written submissions may well have been, for him, very difficult; and we can assure the Claimant that the absence of any such submissions on her behalf, has not, in the event, handicapped her.

45. In **Hewage** the Supreme Court provided, at paragraph 29 to 32 of the Judgment of the court, guidance as to how those paragraphs should be applied in practice, in these terms:

> **"29. In *Igen Ltd v Wong* [2005] ICR 931, para 16, Peter Gibson LJ said that, while it was possible to offer practical help (as to which see para 17 of his judgment quoted in para 14, above), there was no substitute for the statutory language. And in *Madarassy v Nomura International plc* [2007] ICR 867, para 9, Mummery LJ emphasised that the Court of Appeal had gone out of its way in *Igen Ltd v Wong* to say that its guidance was not a substitute for statute. As he put it: "Courts do not supplant statutes. Judicial guidance is only guidance." In para 11 he said that there was really no need for another judgment giving general guidance: "Repetition is superfluous, qualification is unnecessary and contradiction is confusing." And in para 12:**
>
> > ***"Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts. It is vital that, as far as possible, the law on the burden of proof applied by the fact-finding body is clear and certain. The guidance in* Igen Ltd v Wong *meets these criteria. It does not need to be amended to make it work better."***
>
> **30. Nevertheless Mummery LJ went on in paras 56 and following of his judgment in *Madarassy* to offer his own comments as to how the guidance in *Igen Ltd v Wong* ought to be**

interpreted, which I would respectfully endorse. In para 70, having re-stated what the tribunal should and should not do at each stage in the two-stage process, he pointed out that, from a practical point of view, although the statute involved in a two-stage analysis, the tribunal does not in practice hear the evidence and the argument in two stages:

> ***"The employment tribunal will have heard all the evidence in the case before it embarks on the two-stage analysis in order to decide, first, whether the burden of proof has moved to the respondent and, if so, secondly, whether the respondent has discharged the burden of proof."***

31. In para 77, in a passage which is particularly in point in this case in view of the employment tribunal's reference in para 107 to its being required to make an assumption, he said:

> ***"In my judgment, it is unhelpful to introduce words like 'presume' into the first stage of establishing a prima facie case. Section 63A(2) makes no mention of any presumption. In the relevant passage in* Igen Ltd v Wong *… the court explained why the court does not, at the first stage, consider the absence of an adequate explanation. The tribunal is told by the section to assume the absence of an adequate explanation. The absence of an adequate explanation only becomes relevant to the burden of proof at the second stage when the respondent has to prove that he did not commit an unlawful act of discrimination."***

The assumption at that stage, in other words, is simply that there is no adequate explanation. There is no assumption as to whether or not a prima facie case has been established. The wording of sections 63A(2) and 54A(2) is quite explicit on this point. The complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. So the prima facie case must be *proved*, and it is for the claimant to discharge that burden.

32. The points made by the Court of Appeal about the effect of the statute in these two cases could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J (President) pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not be make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence on way or the other. That was the position that the tribunal found itself in in this case. It is regrettable that a final resolution of this case has been so long delayed by arguments about onus of proof which, on a fair reading of the judgment of the employment tribunal, were in the end of no real importance."

46. In his written submissions Mr Duggan submitted, as he had in oral argument, that the Tribunal must consider the "reason why" question or ask themselves on what grounds the employer had acted in every case. He submitted that the Tribunal had not done so in this case and that the Tribunal had fallen into error in paragraphs 49(2) of their Reasons, in expressing the view that a requirement that no employees of R1 should have a relationship with one of R2's players appeared to be a rule which was slanted against women; it was, he submitted, a gender neutral requirement; and from that the Tribunal had proceeded in paragraph 50 to adopt a "but for" approach rather than a "reason why" approach .

47. Mr Duggan helpfully referred to the decision of the EAT in **Martin v Devonshire Solicitors** [2011] ICR 352 (Underhill J presiding) in which the EAT, said, at paragraph 39:

> **"This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination – generally that is, facts about the respondent's motivation (in the sense described above) because of the notorious difficulty of knowing what goes on inside someone else's head…, But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other and still less where there is no real dispute about the respondents motivation and what is in issue is its correct characterisation in law…"**

That paragraph was referred to in paragraph 32 of the Judgment in **Hewage**; and the guidance given in **Hewage** and in **Martin** is important to Tribunals who are faced with difficulties in the resolution of discrimination claims. However, Mr Duggan justifiably reproved us, by implication, for raising the burden of proof issue which perhaps has little direct relevance to this appeal; for in this case the Tribunal were able to make positive findings as set out in paragraphs 49 and 50 of their Reasons and did not refer to the burden of proof.

48. We were referred to **Amnesty International v Ahmed** [2009] ICR 1450 in which the EAT (Underhill J presiding) considered that the effects of the decision of the **House of Lord's in Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337, **James v Eastleigh Borough Council** [1990] ICR 554 and **Nagarajan v London Regional Transport** [1999] ICR 877, the effect of which was to establish the importance of the "reason why" question. We do not seek for present purposes to examine the reasoning in those three decisions; that task was undertaken by our colleagues in **Amnesty International** at pages 1465 to 1468; at paragraph 30 the EAT referred to the following quotation from the speech of Lord Nicholls in **Chief Constable of West Yorkshire Police v Khan** [2001] ICR 1065:

> **"Contrary to view sometimes stated, the third ingredient ("by reason that") does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective"**

> **cause. Sometimes it may apply a "but for" approach. For the reasons I sought to explain in (*Nagarajan*) a causation exercise of this type is not required…"**

by the relevant sections of the **Race Relations Act**, which contained the statutory provisions relied upon in that case. At paragraph 36 the EAT concluded that there was no real difficulty in reconciling the authorities cited above, because the ultimate question is:

> **"What was the ground of the treatment complained of or if-you prefer-the reason why it occurred."**

49. The EAT's Judgment in **Amnesty International** made reference to **Lancehawk** which adds support to the importance of the "reason why" question and the distinction between that question and the "but for" question which, it was submitted, the Tribunal had answered in the present case. At paragraph 12 of its Judgment in **Lancehawk** the EAT said:

> **"The crucial issue … is whether Mr Lovering dismissed Mrs Martin "on the ground of her sex", an issue requiring a consideration of why he dismissed her. As we have said, we interpret the tribunal as having found that the dismissal was because of the breakdown of the relationship. That, therefore, was the reason for the dismissal, not because she was a woman. We accept that, but for her sex, there would have been no affair in the first place. It could, however, equally be said that there would have been no such affair "but for" the facts (for example), that she was, her parents' daughter, or that she had taken up the employment with Lancehawk. But it did not appear to us to follow that reason, such as those could fairly be regarded as providing the reason for her dismissal."**

50. It was pointed out to Mr Duggan at that stage of the argument that, on similar facts, the decision of the Tribunal in Schofield had been upheld; see paragraph 39 above. Mr Duggan responded that the essence of his argument was that the Tribunal had based themselves on the wrong comparator – an argument, which we have already addressed, and to which it is not necessary to return. Mr Duggan also referred again to **B v A** in that connection. This reinforced our view that the comparator point was, in reality, the fulcrum of the argument on behalf of R1.

51. Mr Jackson did not argue that a "but for" approach was appropriate in this case; he submitted that, in effect, the arguments put against him amounted to an attempt to overturn the factual findings of the Tribunal embodied in paragraphs 49 and 50 of their Reasons. He drew attention to the Tribunal's rejection on the facts of the "reason why" as put forward by R1, namely that the Claimant had acted in breach of her duty of trust and confidence. Having thus addressed the reasons for the dismissal given by R1, he submitted, the Tribunal had gone on to identify the appropriate comparator, to ask themselves what the reason for the dismissal was and had facts that the reason was the Claimant's sex.

52. Having considered the arguments on both sides, we have concluded that there is nothing in the Tribunal's Reasons which shows that they posed for themselves a "but for" as opposed to a "reasons why" question. Paragraphs 49 and 50 of those Reasons are entirely consistent with the Tribunal's having posed the correct question. They took into account the fact that no action had been taken against the footballer; they carried out a comparator exercise which, for the reasons we have set out, was open to them; they found as fact that a man in a comparable situation would not have been treated in the way the Claimant was treated; and their decision that the Claimant had been the victim of discrimination on the grounds of her sex was not based on a "but for" analysis; it was open to the Tribunal to reach the decision which they reached at by applying a "reason why" analysis. It is true that the Tribunal did not expressly set out what questions they were asking themselves; but they did not need to do so; it has not been demonstrated, in our Judgment, that they made the error of which R1 now complains. Essentially this is a case in which, if there was no error in the comparator exercise - as we have held- once the explanation put forward by R1 was rejected on the facts, it was open to the Tribunal to reach the decision which they reached.

53. Accordingly, the appeal of R1 fails.

Conclusion

54. For the reasons we have set out:-

1) The Claimant's appeal is allowed, with the consequences set out in paragraph 26 above.

2) R1's appeal is dismissed.