Appeal No. UKEAT/0067/17/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 September 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

HER MAJESTY'S REVENUE AND CUSTOMS — APPELLANT

MR J SALDANHA — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS JANE RUSSELL (of Counsel) Instructed by: Government Legal Department Employment Group Quarry House Quarry Hill Leeds LS2 7UA
For the Respondent	MR JONATHAN DAVIES (of Counsel) Instructed by: Thompsons Solicitors LLP Congress House Great Russell Street London WC1B 3LW

SUMMARY

RACE DISCRIMINATION - Direct

The Claimant had been offered a posting in Italy, conditional upon his passing an assessment relating to his psychological resilience. In carrying out that assessment, the interviewer had pursued a number of questions relating to the Claimant's ability - as someone of Asian origin - to cope with racism in Italy. Reporting that the Claimant did not demonstrate the required level of resilience, the risk that he might suffer stress due to discrimination was one of the factors cited. On the basis of this assessment - including the discrimination factor - the Respondent withdrew the offer of the posting. On the Claimant's complaint, the ET found that both the assessment and the decision to withdraw the offer were inherently discriminatory - the Claimant's race being the criterion for the treatment of which he was complaining. In the circumstances, it concluded that both the assessment and the withdrawal of the posting were acts of unlawful race discrimination. The Respondent appealed.

Held: *dismissing the appeal*

The ET had been entitled to find that the Claimant's race was a reason (it did not need to be the only reason) for the less favourable treatment of which he complained. It had correctly analysed this as a criterion case: the relevant decisions (the assessment and then the decision to withdraw the offer of the posting in Italy) were explicitly based on a factor - the Claimant being of Asian origin - which was necessarily discriminatory (but for his race, there would have been no concern of his suffering discrimination); **Amnesty International v Ahmed** [2009] ICR 1450 EAT applied. In those circumstances, there was no reason to look further into the mental processes of the decision-takers: their decisions were explained by the Claimant's race and thus tainted by discrimination. The fact that they might also have had other, non-discriminatory, reasons in mind did not detract from this conclusion: the Respondent had not been able to demonstrate that the decisions in question were in no sense informed by race.

A **HER HONOUR JUDGE EADY QC**

Introduction

B 1. In this Judgment I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent's appeal from a Judgment of the Employment Tribunal sitting at Bury St Edmunds (Employment Judge Postle sitting with members, Mr North and Ms Kilner, over four days in September 2016 with a further two days in Chambers; "the ET"), sent
C to the parties on 16 November 2016. Representation below was as now. By its Judgment the ET held that the Claimant had been the subject of direct race discrimination contrary to the provisions of the **Equality Act 2010** ("the EqA"). The Respondent appeals.

D

The Relevant Background and the ET's Decision and Reasoning

2. The Claimant, who is of Asian origin, has had a career in the Civil Service since January
E 1980, having been employed in various Government departments. On 20 August 1990, following a probationary period, he joined HM Customs and Excise as a Higher VAT Assurance Officer. In 2005, HM Customs and Excise became known as HM Revenue and Customs. The Claimant's career thereafter saw him continue to progress through various posts,
F including postings as a Fiscal Crime Liaison Officer ("FCLO") abroad. He had a good work record and, on 3 September 2012, he had returned to the UK from a posting in Romania because he had passed a promotion exercise and had been appointed to Senior Investigation
G Officer. He was then based in Ipswich, where he managed a team of criminal investigators; a job subject to significant pressures and requiring a high level of resilience.

H 3. Within the Respondent there is a mandatory period of around two years that have to be spent in the UK between overseas postings. In 2014, the Claimant again applied for an FCLO

post abroad, stating on his application that he was prepared to serve in any country but would ask, if successful, that consideration be given to the effect of his ethnicity on operational effectiveness if he was posted to a country that had adverse racial attitudes. The ET accepted that this caveat in the Claimant's application was nothing to do with his fears about race and health and safety concerns, resilience or his suitability to be an FCLO; rather, because FCLOs operate in a highly competitive environment, the Claimant made this request because he wanted to remove practical barriers preventing him from achieving the best operational results. Previously, in his FCLO role, he had covered Ukraine, where he had found two individual Senior Ukrainian Customs Officials, whose cooperation he required to achieve operational objectives, held old-fashioned views about race, not that they were inherently racist.

4. In the 2014 FCLO selection process, the Claimant passed both the initial competency sift and a demanding assessments stage carried out by Mr Pavlinic, an Assistant Director within the Respondent. On 22 October 2014 he received a letter confirming his conditional appointment in Rome.

5. The ET records the next stage of the process as follows:

> **"19. The order of events prior to posting would be: a surveillance course, followed by a psychological resilience assessment and finally a mandatory series of pass/failure FCLO foundation training modules commencing in early January. The Claimant would also have to undertake a language training course. Clearly until all the elements of the selection process have been completed, the appointment to Rome was conditional. The Claimant's understanding of the resilience assessment procedure was that it would consist of a self presentation narrative interview with a psychologist followed by the completion of a paper based self assessment questionnaire (133d to 133m in that order). If there was a discrepancy between the result of the interview and the subsequently completed questionnaire, a follow up discussion is arranged to deal with any concerns."**

6. In the Claimant's case, due to circumstances beyond anyone's control, he in fact undertook the self-assessment questionnaire on 12 November, prior to his resilience interview

with Dr Rogers (the Managing Director of Prompt UK - the organisation that conducts this stage of the assessment for the Respondent) on 3 December 2014.

7. Thus at the outset of the interview, Dr Rogers was aware of the results of the Claimant's questionnaire assessment which suggested that "*the Claimant was high on neuroticism, low on extraversion, (sic) average of openness and agreeableness and below to very low on conscientiousness*". As the ET observed:

> **"24. … This was notwithstanding the Claimant's previous experience in the role and abilities which had not been found wanting in two FCLO postings. Furthermore, the Claimant had recently been awarded a Director's award (168) for outstanding achievement in criminal investigation, outstanding effort, commitment and team work in support of Operation Barbados."**

8. At the interview, as a way of evidencing how he had successfully coped with a particular difficulty, the Claimant had given examples of having been subjected to racism in his early life albeit he had not sought to discuss racism more generally. Dr Rogers had, however, then taken forward the discussion to focus on what she apparently contended would be the racism the Claimant would suffer in Italy. Although the Claimant responded that he had previously both worked and holidayed in Italy without difficulty, Dr Rogers continued to push him on this point, suggesting it would cause him stress. The Claimant considered this to be a turning point in the interview, such that he was no longer self-presenting but was being assessed on his race and ability to cope with race as an FCLO in Italy.

9. Having heard the accounts of both the Claimant and Dr Rogers about the interview, the ET concluded that there was "*a common theme … that Dr Rogers was suggesting that the Claimant, given his ethnicity, would face racism in Italy. And that would lead to potential stress*" (paragraph 52).

10. On 8 December Dr Rogers duly sent a bullet point summary, headed "*Some strong concerns regarding psychological resilience*", to Mr Pavlinic. She did not send him her full report. The bullet point summary is further summarised itself in the ET's findings, as follows:

> **"33. … The specific concerns regarding the Claimant's psychological resilience are set out … They mention the Claimant's NEO results, reflecting high levels of negative thinking, the potential for discrimination triggering stress symptoms, the fact that the Claimant had questioned the validity of the results of the NEO questionnaire, the fact that the Claimant had significantly low levels of conscientiousness, strong concerns as to the Claimant's ability to be sufficiently resilient in this particular post, namely Italy and finally the fact that Dr Rogers had asked the Claimant to reflect on their discussions and further contact would be made with the Claimant in the second week of December."**

11. Given the importance of the second bullet point to the ET's decision in this case, it is worth setting it out in full:

> **"• The potential for discrimination (something which Julian consistently raised during the narrative interview) may well trigger some stress symptoms for Julian, were he to go to a location where this is a known issue/risk."**

12. On 19 December, Mr Pavlinic had a telephone conversation with the Claimant about Dr Rogers' assessment during which the Claimant reported on the surprise he and his friends had felt regarding his test results and asking for the psychometric graph, as he would better understand the results. That was apparently ultimately sent to him as a part of the ET disclosure some two years later.

13. Subsequently, on 23 December, Mr Pavlinic informed the Claimant that as a result of what Dr Rogers had written in her resilience assessment report - which had also been viewed by the Respondent's Head of Intelligence and Senior HR Partner - he was withdrawing the offer of the FCLO post to the Claimant.

14. The Claimant was afforded an opportunity to speak with Dr Rogers on 24 December. There appears to have been some discussion about the possibility of a second opinion, but that

sat uneasily with the Respondent's internal communications, recording Mr Pavlinic's observation that:

> **"we introduced this very costly intrusive psychological resilience testing as part of the redeployment process precisely to attempt to prevent people without the right frame of mind from going to these posts and then struggling with all the incumbent problems a subsequent return to the UK entails." (Paragraph 36)**

15. In any event, the ET found it was clear by 19 December that there was no chance of the Claimant successfully appealing the Respondent's decision or of management going behind Dr Rogers' assessment. By 31 December, Mr Pavlinic had confirmed that the Respondent was going to stand by the professional opinion of Dr Rogers and would seek no second opinion, as that would not overcome the fact of the first assessment. He concluded:

> **"Dr Rogers is retained by the department to provide professional advice which the department intends to follow. I am not qualified to second a clinician's opinion and therefore have to give continued weight to Dr Rogers' conclusions which are supported by the fact that you do not appear to have fully engaged with the assessment in the proper way." (Paragraph 40)**

16. In his evidence to the ET, it is recorded that:

> **"41. Mr Pavlinic accepted that in withdrawing the offer he had taken into account the bullet points provided by Dr Rogers, including the second bullet point which was the potential for discrimination, which must have been a reference to race discrimination given the Claimant's ethnic background."**

I understand then there is a reference to the second of the bullet point observations of Dr Rogers as set out above.

17. The Respondent draws my attention to the explanation given by Mr Pavlinic at the time of his decision, as recorded in an internal email of 22 December 2014 in which he stated:

> **"As for examples of issues in post, it would be a very long shot to have the same circumstances in every case. However the elements of Dr Rogers' assessment that especially concern are the low conscientiousness, susceptibility to stress, lethargy, difficulty operating without immediate support and so on. To paraphrase … it is hard to envisage any assessment which so manifestly indicates future problems as this one. …" (Page 86A of my bundle)**

18. I have also been taken to the notes of the cross-examination of Mr Pavlinic before the ET, in which he confirmed that he took all the bullet points provided in Dr Rogers' summary into account including the second point which he allowed referred to discrimination which might well include race.

19. The ET considered that the fact that this underpinned the decision in issue in this case, meant that this was a criterion rather than a mental process form of discrimination; in the circumstances it concluded it "*does not need to carry out the investigation into the mental process of Dr Rogers or Mr Pavlinic*" (paragraph 55). Specifically:

> **"56. Mr Pavlinic, in receiving the bullet points summary report from Dr Rogers, effectively adopted what she had said and the reason for the Claimant not proceeding further in the application process was the second bullet point which was not discarded by Mr Pavlinic, and that was the potential for discrimination may well trigger some stress symptoms were he to go to a location where this is a known issue or risk. That is clearly tainted by race. It is accepted there were other concerns by Mr Pavlinic by adopting Dr Rogers' summary bullet point report."**

20. On that basis the ET found the Claimant's case of less favourable treatment because of race was made out; the Respondent having failed to discharge the burden necessary to prove on the balance of probability that the Claimant's treatment in not being put forward for the FCLO post in Rome was in no sense whatsoever on the grounds of his race (see paragraph 57). It held that the Claimant's claims of direct race discrimination were made out in respect of (1) Dr Rogers' assessment of the Claimant as having failed the psychological resilience assessment and (2) Mr Pavlinic's decision not to proceed with the Claimant's application for the FCLO post. The ET rejected other claims of race discrimination pursued by the Claimant, but they are not relevant for the purposes of this appeal.

The Appeal

21. The Respondent's appeal has been pursued on the following grounds:

(1) that the ET erred in its analysis of the correct test for direct discrimination, treating this as a criterion rather than a mental processes case;

(2) the ET further erred by conflating the decision making of Dr Rogers and Mr Pavlinic, thus taking a composite rather than a separate act approach;

(3) the ET further erred in its conclusion that the mere receipt by the relevant decision taker, Mr Pavlinic, of Dr Rogers' opinion was sufficient evidence that he had adopted the entirety of the assessment; and

(4) in any event, the ET had erred in concluding that Dr Rogers' assessment was discriminatory.

22. The Claimant resists the appeal, essentially relying on the ET's reasoning.

Submissions

The Respondent's Case

23. In submissions the Respondent has advanced its arguments on those grounds of appeal under the following heads:

(1) the ET erred incorrectly taking a composite rather than a separate acts approach (see **Reynolds v CLFIS (UK) Ltd** [2015] ICR 1010 CA);

(2) the ET had erroneously treated this as a criterion case (where the acts complained of are inherently discriminatory), rather than a mental processes case (where the reason for the treatment is not immediately apparent and some exploration of the conscious or subconscious thought processes of the decision taker is required), see **Amnesty International v Ahmed** [2009] ICR 1450 EAT;

(3) more generally, the ET adopted the wrong approach to causation, in particular in its approach to the assessment carried out by Dr Rogers.

24. Addressing the first heading, the Respondent argued that the separate act approach was plainly correct in this case; it was necessary to distinguish between information giving and participation in decision making (see paragraphs 33 and 36 **Reynolds**): the conduct of the person supplying the information (Dr Rogers) was a separate act from that of the person who acted upon it (Mr Pavlinic). This was a case where the decision was made based upon the views of someone else and it was necessary to draw a distinction between the decision taker and the information provider. Dr Rogers was not a party to the decision made and liability could only attach to an employer where the individual who did the act complained of - here, Mr Pavlinic - was himself motivated, consciously or subconsciously, by the protected characteristic. Mr Pavlinic was not and it would be unjust for the decision taker to be liable to the Claimant where he was personally innocent of any discriminatory motivation; the ET was blaming Mr Pavlinic for Dr Rogers' motivation and that was wrong. Moreover by adopting such a composite approach, the ET was led into making a perverse decision, ignoring Mr Pavlinic's evidence as to that which had influenced him.

25. Turning to the second way in which the ET is said to have erred - the criterion versus mental processes approach point - the correct distinction was between acts complained of that were inherently discriminatory (criterion cases) and those where the reason for the treatment is not immediately apparent and some exploration of the conscious and subconscious thought processes is required (mental processes cases). In the former - the criterion case - motivation or what was going on in the head of the putative discriminator was irrelevant; in the latter, it was not (see the Honourable Mr Justice Underhill (as he then was) in **Amnesty** at paragraphs 32 to 34). In **Amnesty** it was the decision taker who was clearly influenced or motivated by race; that, however, was not a composite decision case and could be contrasted with the position of Mr Pavlinic in the present case. Here, the evidence made clear that, even if Dr Rogers was a

tainted information giver, Mr Pavlinic was not a tainted decision taker. The Respondent accepted that if it was obvious that Dr Rogers' assessment was discriminatory - race being the criterion for her assessment - and that was the only reason in Mr Pavlinic's mind, that would give rise to a difficulty, but that would be on the basis that he had permitted a discriminatory state of affairs to come about. The present case was plainly not one of inherent discrimination (a criterion case) because the relevant decision maker was not motivated by the Claimant's protected characteristic of race. This was a mental processes case and the relevant enquiry should have been into the conscious and subconscious thought processes of Mr Pavlinic.

26. Moreover, the ET's characterisation of Dr Rogers' assessment as discriminatory was erroneous because the ET's analysis of causation was incorrect. The correct test was whether the protected characteristic had a significant influence on the outcome, not whether it formed part of the context in which the act complained of occurred. The primary basis for Dr Rogers' assessment was the result of the questionnaire which had led her to conclude that the Claimant was "*high on neuroticism, low on extraversion, (sic) average of openness and agreeableness and below to very low on conscientiousness*" (paragraph 24). The ET acknowledged the results of the questionnaire may have given Dr Rogers an unconscious and biased view of the Claimant (again, see paragraph 24). If so, that could not have been because of race: Dr Rogers had not at that time met the Claimant and the Claimant had made no complaint about the questionnaire. The ET's conclusions section further misrepresented the evidence as to what had led to Dr Rogers' negative assessment, which had included the results on the questionnaire (see paragraph 24) together with the fact that the Claimant himself had raised the issue of racism at the interview and Dr Rogers had then permissibly pushed on that issue when undertaking a resilience assessment. In any event, even if Dr Rogers had crossed the line, there was still no basis for concluding that Mr Pavlinic had reached his decision on a tainted basis.

The Claimant's Case

27. On behalf of the Claimant it was submitted that, having found less favourable treatment, the ET had correctly analysed the reason for that treatment, that was the second bullet point - that relating to discrimination - which was not discarded by Mr Pavlinic, "*That is clearly tainted by race*" (see paragraph 56). The ET had not confused the approach between a criterion versus mental processes case: this - like **Amnesty** - was a criterion case. As in **Amnesty**, the relevant decision was explicitly based on a factor which was necessarily discriminatory. The only material distinction with **Amnesty** was that in the present case the ET recognised there were other matters that had fed into Mr Pavlinic's decision (see the last line of paragraph 56) but that made no material difference. On the ET's finding, race was a significant factor and that was sufficient at the liability stage (see paragraph 56 of **Abbey National plc v Chagger** [2010] ICR 397 CA). Specifically the ET had permissibly found the Respondent had failed to discharge the burden upon it of showing the treatment of the Claimant was in no sense whatsoever because of race (see point 11 of the annex to **Igen Ltd v Wong** [2005] ICR 931 CA). In any event, the ET had here kept focussed on the real issue: the reason for the treatment complained of (see paragraph 8 of **Amnesty**).

28. As for the composite or separate act point, **Reynolds** could only apply to a mental processes case. In a case where the decision taker (X) had adopted the information giver's inherently discriminatory report, that reasoning did not apply: X had committed discrimination, there was no need to look into X's mental processes or motivations (see **Amnesty**). Otherwise, the Respondent had sought to rely on perversity challenges but it was not perverse for the ET to conclude that Mr Pavlinic had adopted Dr Rogers' report (see paragraph 56 and see the cross-examination before the ET). Similarly the ET had permissibly concluded that Dr Rogers' assessment was discriminatory (see its findings at paragraphs 26 to 30 and 52).

The Relevant Legal Principles

29. The Claimant was pursuing a complaint of direct race discrimination, so the ET was concerned with the test laid down by section 13(1) **EqA**:

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

30. The issues raised by this appeal concern the approach that is to be taken when seeking to determine whether the treatment complained of was because of the relevant protected characteristic (here, race). In some cases the answer to that question will be apparent from the simple description of the act about which the complaint is made: the discrimination will be inherent because the protected characteristic is itself the criterion for the treatment. In other cases, however, that will not be so but the protected act may still have informed the relevant actor's action, whether consciously or subconsciously, and thus amount to direct discrimination. The distinction was explained by the EAT, the Honourable Mr Justice Underhill (as he then was) presiding, in **Amnesty International v Ahmed** as follows:

> **"32. To begin at the beginning. The basic question in a direct discrimination case is what is or are the "ground" or "grounds" for the treatment complained of. That is the language of the definitions of direct discrimination in the main discrimination statutes and the various more recent employment equality regulations. It is also the terminology used in the underlying Directives: see, eg, article 2(2)(a) of Directive 2000/43/EC ("the Race Directive") (OJ 2000 L180, p22). There is however no difference between that formulation and asking what was the "reason" that the act complained of was done, which is the language used in the victimisation provisions (eg section 2(1) of the 1976 Act): see per Lord Nicholls in *Nagarajan v London Regional Transport* [1999] ICR 877, 886A-B (also, to the same effect, Lord Steyn, at p894F-G).**
>
> **33. In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. If an owner of premises puts up a sign saying "no blacks admitted", race is, necessarily, the ground on which (or the reason why) a black person is excluded. *James v Eastleigh Borough Council* [1990] ICR 554 is a case of this kind. There is a superficial complication, in that the rule which was claimed to be unlawful - namely that pensioners were entitled to free entry to the council's swimming-pools - was not explicitly discriminatory. But it nevertheless necessarily discriminated against men because men and women had different pensionable ages: the rule could entirely accurately have been stated as "free entry for women at 60 and men at 65". The council was therefore applying a criterion which was of its nature discriminatory: it was, as Lord Goff put it, a p574F, "gender based". In cases of this kind what was going on inside the head of the putative discriminator - whether described as his intention, his motive, his reason or his purpose - will be irrelevant. The "ground" of his action being inherent in the act itself, no further inquiry is needed. It follows that, as the majority in *James v Eastleigh Borough Council* decided, a respondent who has treated a claimant less favourably on the grounds of his or her sex or race cannot escape liability because he had a benign motive.**

> **34. But that is not the only kind of case. In other cases - of which *Nagarajan* is an example - the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in *James v Eastleigh Borough Council*, a benign motive is irrelevant. This is the point being made in the second paragraph of the passage which we have quoted from the speech of Lord Nicholls in *Nagarajan*: see para 29 above. The distinctions involved may seem subtle, but they are real, as the example given by Lord Nicholls at the end of that paragraph makes clear."**

31. The EAT then continued:

> **"37. … if the discriminator would not have done the act complained of but for the claimant's sex (or race), it does not matter whether you describe the mental process involved as his intention, his motive, his reason, his purpose or anything else - all that matters is that the proscribed factor operated on his mind. This is therefore a useful gloss on the statutory test; but it was propounded in order to make a particular point, and we do not believe that Lord Goff intended for a moment that it should be used as an all-purpose substitute for the statutory language. Indeed if it were, there would plainly be cases in which it was misleading. The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment. …**
>
> **38. … There is no "two-stage approach" such as he propounds. The only question for the tribunal was whether the ground of, or reason for, Amnesty's decision not to appoint the claimant as Sudan researcher was her ethnic origins. Once it had found that that was the case - as it did: see para 24(1) above - that was the end of the matter: specifically, the fact that its reason for not being prepared to appoint a person with the claimant's ethnic origins was its concern about conflict of interest is irrelevant. If it were necessary to categorise the case as "*James*-type" or "*Nagarajan*-type", it seems to us plainly to be the former: Amnesty's decision was explicitly based on the fact that she was by origin from (northern) Sudan, and any further inquiry into the mental processes of Mr Cordone or his colleagues is unnecessary. But the point would be the same even if it were characterised as *Nagarajan*-type: the relevant mental processes do not include any reason or motive, however legitimate or laudable, which Amnesty may have had for not wanting to appoint a Sudanese northerner."**

32. The crucial question is thus *why* did the less favourable treatment happen? There may, of course, be more than one reason for the treatment but liability will be established where the prohibited reason - the particular protected characteristic - is an effective, even if not the only, cause (see **Abbey National v Chagger** at paragraph 56). Moreover, where there is a *prima facie* case of unlawful discrimination, it will be for the Respondent to show that the treatment was in no sense whatsoever because of the relevant protected characteristic; see the guidance given on the burden of proof provided by the Court of Appeal in **Igen**.

33. In a criterion case, the answer to *the reason why* question will be inherent in the treatment in issue. Thus, the refusal to promote Miss Ahmed in the **Amnesty** case was because she was of North Sudanese origin; her ethnic origin was inherently part of the treatment and was the only explanation for it. Exploration of the mental processes of the individual decision taker was unnecessary, but, had it been undertaken, it could only have led to the same conclusion.

34. Where the discrimination is not however inherent in the treatment, then liability will only be established where the protected characteristic formed the motivation for the individual performing the act complained of; unwittingly acting on the basis of someone else's tainted decision will not be sufficient; see Underhill LJ in the **Reynolds** case, in particular at paragraphs 33 and 36:

> **"33. … Supplying information or opinions which are used for the purpose of a decision by someone else does not constitute participation in that decision. There may be cases where it is difficult to distinguish between the two situations, but the tribunal was fully entitled to treat this case as one where Mr Gilmour did indeed make the relevant decision on his own. …**
>
> **…**
>
> **36. In my view the composite approach is unacceptable in principle. I believe that it is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act he is responsible has done an act which satisfied the definition of discrimination. That means that the individual employee who did the act complained of must himself have been motivated by the protected characteristic. I see no basis on which his act can be said to be discriminatory on the basis of someone else's motivation. If it were otherwise very unfair consequences would follow. I can see the attraction, even if it is rather rough-and-ready, of putting X's act and Y's motivation together for the purpose of rendering E liable: after all, he is the employer of both. But the trouble is that, because of the way the 2006 Regulations work, rendering E liable would make X liable too: see the analysis at para 13 above. To spell it out: (a) E would be liable for X's act of dismissing C because X did the act in the course of his employment and - assuming we are applying the composite approach - that act was influenced by Y's discriminatorily-motivated report. (b) X would be an employee for whose discriminatory act E was liable under regulation 25 and would accordingly be deemed by regulation 26(2) to have aided the doing of that act and would be personally liable. It would be quite unjust for X to be liable to C where he personally was innocent of any discriminatory motivation."**

Discussion and Conclusions

35. In the present case the treatment about which the Claimant was complaining had been identified and agreed at an earlier case management Preliminary Hearing as follows: (1) the

psychological resilience assessment performed by Dr Rogers, for whom it was accepted the Respondent was vicariously liable; and (2) Mr Pavlinic's confirmation not to proceed with the Claimant's application for the FCLO post. It was not in dispute that the Claimant had been subjected to the less favourable treatment of which he was complaining; that is, the negative assessment of his psychological resilience by Dr Rogers and Mr Pavlinic's decision not to proceed with his application for the FCLO post. The issue between the parties was as to the reason for each act. And, as Mr Davies acknowledged in oral argument, this was not a case where there was only one reason for the treatment in issue.

36. Taking first the psychological resilience assessment carried out by Dr Rogers, as her bullet point summary made clear, there were a number of matters that led her to reach her negative conclusion. As Mr Pavlinic had relied on that assessment in making his decision, it can be taken that there were likewise a number of matters that influenced him. That said, as Mr Davies observes, the Claimant's protected characteristic - race - did not need to be the only motivating factor for the treatment in issue; it was sufficient that the ET found it was an effective cause. To use the language of the burden of proof: it was enough that the Respondent had failed to show that the treatment was in no sense whatsoever because of race, having failed to meet the burden upon it of showing that the tainted reason formed no part of (1) Dr Rogers' assessment and (2) Mr Pavlinic's ultimate decision.

37. For his part, the Claimant had put his case on the basis that the treatment of which he complained was Dr Rogers' assessment that he might suffer stress because of race discrimination and Mr Pavlinic's adoption of that assessment when making his decision. Accepting that there were a number of matters that weighed with Dr Rogers when carrying out her assessment, the ET found that the second bullet point - the potential for discrimination

triggering stress symptoms - was suggesting that the Claimant, given his ethnicity, would face racism in Italy and that could lead to potential stress. The ET saw this as inherently discriminatory - but for his being of Asian origin, it would not have been thought that he would suffer discrimination. A criterion case of discrimination required no further examination of the mental processes of the relevant actors and, as Mr Pavlinic had effectively adopted Dr Rogers' assessment, the ET concluded that his decision taking was also tainted: the second bullet point, which was not discarded by Mr Pavlinic, ("*the potential for discrimination … [that] may well trigger some stress symptoms … were he to go to a location where this is a known issue/risk*") being clearly tainted by race.

38. There is a certain conceptual difficulty in this case because it is apparent that the discrimination issue was not the only point of concern. That said, as Mr Davies has pointed out, that does not detract from the ET's finding that the relevant bullet point was an effective cause of the treatment (the fact that other matters may also have informed the decision taken might go to remedy but did not undermine the ET's finding on liability).

39. Allowing then that the second bullet point was an effective cause of the treatment complained of, I further agree with Mr Davies that it is hard to see how this was other than a criterion case: the negative assessment and the decision that flowed from it was informed by a concern that the Claimant - because of his race - would suffer discrimination.

40. Ms Russell says this is wrong and confuses context (a legitimate concern as to how an employee would cope with stresses in the field) with cause. She further objects to the ET's failure to look into the mind of Mr Pavlinic to see what really weighed with him when he made his decision.

41. The difficulty with the Respondent's case in this regard is that it seeks to bring in potentially exculpatory motivations (the desire to protect employees from having to cope with the discriminatory views of others), when what was in issue was the reason for the treatment, not the excuse.

42. Although the ET expressly (and, I consider, correctly) saw this as a criterion case, the error in the Respondent's approach is revealed if consideration is given as to how the reason for the treatment would be analysed if looking at this as a mental processes case. Allowing that there were other factors influencing Dr Rogers' assessment, the point in issue - the potential for discrimination - was something to which she had regard *because of* the Claimant's race. Even if that had not been apparent from the written summary of her reasoning, it was legitimate for the ET to reach that conclusion given its findings as to what had taken place at the interview. Allowing that the Claimant had himself given the example of dealing with racism in his interview, Dr Rogers had gone on to use that as a means of assessing him more generally and had expressly identified the potential for his (as someone of Asian origin) suffering discrimination as giving rise to a strong concern regarding his psychological resilience. Examining Dr Rogers' mental processes thus gives rise to the same answer: her concern regarding the Claimant's psychological resilience arose because of his race. The reason why the ET legitimately saw this as a criterion case is because there is no other way of describing the factor in play - the potential for discrimination - without seeing that as referring to race.

43. That, moreover, is also the answer to the Respondent's objection to the finding regarding Mr Pavlinic's decision. Allowing again that there may have been other matters in Dr Rogers' assessment that led him to reach the decision not to offer the Claimant the FCLO post in Italy, the ET permissibly found that his reasoning included the discrimination point; there

was no need to go further. Put at a more basic level, the ET was, at the very least, entitled to find that the Respondent had not discharged the burden upon it to show that the Claimant's race in no sense informed the decision, which was, at least in part, reached because of a concern about the Claimant suffering discrimination (a concern that had - on the ET's findings of fact - arisen after a discussion about the potential for race discrimination suffered by someone of Asian origin in Italy).

44. For all those reasons I therefore dismiss this appeal.