EMPLOYMENT TRIBUNALS

Between:

Claimant: **Ms P Kuranchie**

Respondent: **Home Office (UK Visas & Immigration)**

Heard at London South Employment Tribunal on 14 December 2017

REASONS

1 At the conclusion of the hearing the judgment and reasons for it were given by the Tribunal orally. These written reasons have been prepared at the request of the Respondent. The request was dated 15 December 2017 and made reference to *Law Society v. Bahl* [2004] EWCA Civ 1070, [2004] IRLR 799. The hearing was held to decide an application for a reconsideration made on behalf of the Respondent, and also to consider one element remitted by the Employment Appeal Tribunal. *Bahl* was mentioned only in connection with the second aspect and therefore these Reasons do not include any further reference to the reconsideration application.

2 One factual allegation of direct race discrimination made by the Claimant was as follows:

> On or about 26 July 2013 the Claimant's end of year assessment was downgraded from the top 20% to the middle 70%.

3 At the original hearing in November 2015 this Tribunal decided that there was insufficient evidence because the Claimant had not proved facts from which we could have reasonably concluded that the downgrading was because of her race. The EAT held that we were wrong in that conclusion, and that a memorandum issued by Mark Sedwill, the Permanent Secretary, dated 13 November 2014 was sufficient to move the burden of proof to the Respondent in accordance with the *Igen* Stage 1 'process'. At the outset of the relevant part of this hearing Mr Paulin specifically agreed that the burden of proof had as a consequence moved to the Respondent to show that the downgrading was to no extent because of the Claimant's race.[1]

4 Mr Paulin made the following additional points in his written submissions:

4.1 The contents of Mr Sedwill's memorandum did not alter the fact that there was no evidence of the downgrading having been because of the Claimant's race.

[1] Mr Paulin also stated in some detail why he considered that the decision of the Employment Appeal Tribunal was wrong, but he accepted that that was academic.

4.2 The reference by the EAT to 'the possibility of unconscious discrimination' again did not change the fact that there was no evidence of unlawful discrimination.

4.3 Mr Paulin pointed out that the EAT had referred to *Rihal v. London Borough of Ealing* [2004] IRLR 642 CA. HHJ Peter Clark in the EAT had indeed referred to that case saying that it was an example of racial statistics being a relevant consideration. Mr Paulin emphasised that Sedley LJ had referred in *Rihal* to the statistics as being 'disturbing' and showing an 'almost complete racial divide between upper management and the remainder of the staff.'

4.4 That the Respondent had in its closing submissions at the original hearing said that core aspects of the Claimant's case were inconsistent. That related to the grading given by the Claimant for Mrs Johnson.

4.5 In paragraph 10 of the submissions Mr Paulin said the following:

> A so-called 'holistic' approach to evidence cannot cure the absence of anything upon which a reasonable claim for direct race discrimination could be made. . . . . In the present case, there was simply no evidence that the moderation panel in question treated the Claimant less favourably (whether consciously or unconsciously on the grounds of her race.

4.6 Paragraph 11 of the submissions is as follows:

> Finally, it is submitted that even if the burden of proof could be said to have shifted to the Respondent in any artificial or technical sense, the Respondent has provided an alternative explanation, namely that the purpose of the moderation panel was to moderate line manager's assessments, which is precisely what the evidence reveals to have happened in the Claimant's case.

5 Although not mentioned in his written submissions, Mr Paulin referred to *Bahl* in oral submissions, although we were not provided with a copy of it. He said that we were in *Bahl* territory, and that the Tribunal needed to consider what was the reason for the treatment in question. We have assumed that the point which Mr Paulin was seeking to make is as set out in the following extract from the headnote to the IRLR report:

> The EAT correctly took the view that unreasonable treatment of a complainant alleging discrimination by an employer, if there is nothing else to explain it, cannot in itself lead to an inference of discrimination even in the absence of evidence from the employer that equally unreasonable treatment would have been meted out to the comparator.
>
> Lord Justice Sedley's observation in *Anya v University of Oxford* that unreasonableness may justify an inference of discrimination if there is no explanation, and whether there is an explanation will depend on evidence that the employer behaves equally badly, did not place a gloss on *Glasgow City Council v Zafar* to the effect that an alleged discriminator who acts unreasonably can only avoid an inference of race or sex discrimination by proving by evidence that equally unreasonable treatment would have been applied to a white person or a man. Racial or sex discrimination may be inferred if there is no explanation for unreasonable treatment. However, this is not an inference from unreasonable treatment itself but from the absence of any explanation for it. Proof of equally unreasonable treatment of all is merely one way of avoiding an inference of unlawful discrimination. It is not the only way.

6 Mr Paulin then focussed on the grading by the Claimant of Mrs Johnson, saying that if the reason for Mrs Johnson in turn having downgraded the Claimant was because of the Claimant having given Mrs Johnson a low

grade then that was an entirely non-discriminatory reason. However he accepted that the Tribunal had found, as he had submitted at the original hearing, that the Claimant had given Mrs Johnson a good grading.

7 Mr Paulin then referred to a history of poor relationships and a 'personality clash writ large'. He mentioned the judgment of Elias J in the EAT in *Bahl*, but again without going into details. Mr Paulin submitted that the reason for the downgrading of the Claimant was the moderation process and taking into account the poor personal relationships. He then asked rhetorically whether the Tribunal could infer that the downgrading decision was because of the Claimant's race, and submitted that it would be a leap of faith to do so. The circumstances in which the Claimant was downgraded, he said, had nothing to do with the Claimant's race.

8 Miss Gore replied on behalf of the Claimant. She said that she had understood that the Respondent had accepted that the result of the judgment of HHJ Peter Clark was that the *Igen* Stage 1 test had been passed, and she was surprised that submissions were now being made on the basis of the Tribunal drawing inferences of discrimination. The only issue, she said, was whether the Respondent had discharged the burden now placed on it. She submitted that any points about Mrs Johnson's PDR were red herrings. What the Respondent had to do was to show that the downgrading was to no extent because of the Claimant's race, and there was no evidence to that effect. Neither of the individuals particularly involved in making the decision had been called to give evidence.

9 The provisions of section 136 of the Equality Act 2010 were set out in the reasons for our original judgment, and as both parties are professionally represented we are not setting them out again.

10 We state very firmly that it was specifically agreed that the result of the decision of the EAT was that the *Igen* Stage 1 test had been passed. Consequently we are in the territory starting with paragraph numbered 9 in the Annex to the judgment in *Igen*. We entirely agree with Miss Gore that anything to do with the Tribunal having to find facts from which inferences of race discrimination could be withdrawn is not relevant. We consider the judgment in *Bahl* to be of no assistance and we do not understand why there was specific reference to it in the request for these Reasons. That case involved what we might describe as the Stage 1 issue. That was over and done with as a consequence of the judgment of the EAT. Those submissions by Mr Paulin relating to the drawing of inferences to show that there could have been unlawful discrimination are simply not relevant.

11 The task for the Respondent is set out in paragraphs 10 and 11 of the *Igen* annex.

> (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
>
> (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
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> (11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

> (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
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> (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

12 In this case the EAT had ordered that the matter be decided on the basis of the evidence already before the Tribunal. We are unable to ascertain from the submissions made by Mr Paulin any facts sufficient to tilt the scales on the basis of a balance of probabilities that the decision to downgrade the Claimant was not in any way influenced by her race. The Respondent was not helped at this hearing by the fact that we did not hear evidence at the original hearing which could have been material, but we are bound by the outcome of the appeal to the EAT.

13 We entirely accept the point that the purpose of the moderation panel was to moderate the assessments by the line managers. That in our view is not of the slightest relevance to the question as to what factors were taken into account in coming to any decision.

14 The issue as to the grading by the Claimant of Mrs Johnson does not assist the Respondent either. The fact that it was accepted ultimately by the Claimant that she had given Mrs Johnson a good grading does not in our view place even the slightest weight in the pan on the side of the Respondent in the scales of the balance of probabilities.

Employment Judge Baron

15 December 2017