Appeal No. UKEAT/0342/16/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6-8 December 2017

Before

THE HONOURABLE MR JUSTICE CHOUDHURY

(SITTING ALONE)

MR P HALE — APPELLANT

BRIGHTON AND SUSSEX UNIVERSITY HOSPITALS NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS-APPEAL

APPEARANCES

For the Appellant	MR DANIEL MATOVU (of Counsel) Instructed by: Martin Searle Solicitors 9 Marlborough Place Brighton BN1 1UB
For the Respondent	MR THOMAS KIBLING (of Counsel) Instructed by: Cater Leydon Millard Ltd 68 Milton Park Abingdon Oxfordshire OX14 4RX

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

UNFAIR DISMISSAL - Procedural fairness/automatically unfair dismissal

RACE DISCRIMINATION - Direct

RACE DISCRIMINATION - Comparison

JURISDICTIONAL POINTS - Extension of time: just and equitable

The Tribunal erred in treating the decision to instigate disciplinary procedures as a one-off act when that decision created an ongoing state of affairs to which the Claimant was subject. That part of the claim was therefore in time. The Tribunal did not err in concluding that there had been no discrimination in relation to the dismissal or in finding that the dismissal was not unfair.

THE HONOURABLE MR JUSTICE CHOUDHURY

1. This is an appeal against the Decision of the London (South) Employment Tribunal dismissing the Claimant's claims for discrimination on the grounds of race, unfair dismissal and wrongful dismissal.

Factual Background

2. The following summary of facts is taken from the Judgment of the Tribunal. The Claimant is a Consultant in General Surgery. He commenced employment with the Respondent on 1 June 1995. He held the position of Clinical Director, Digestive Diseases Unit, until his summary dismissal on 8 January 2015.

3. The Claimant had line management responsibility for a number of junior doctors and other clinical staff. These included four doctors described in the Judgment as "Asian". It appears that three of them were from India and one was from Pakistan. These four doctors, referred to in the Tribunal's Judgment as "the complainants", lodged a collective grievance of bullying and harassment against the Claimant. The grievance alleged unfair treatment by the Claimant in relation to their contractual status and other matters. It did not include, at that stage, any allegations of discrimination on the grounds of race.

4. The Respondent engaged an external Consultant, a Mr Abayomi Alemoru, to carry out an investigation into the collective grievance. This was conducted under the Respondent's Dignity at Work policy.

5. On 13 December 2013, the Claimant chaired a meeting to discuss the introduction of a new rota in the department. Those attending included the complainants. The meeting became heated. That was not unusual in itself. The complainants used the meeting as an opportunity to air their various grievances against the Respondent, which they attributed to the Claimant.

6. The complainants covertly recorded the meeting. A transcript of that recording was produced and it is not in dispute that that transcript accurately records what was said. The complainants' behaviour at the meeting was described as inappropriate and aggressive; so much so that another attendee, Jane McNevin, Clinical Services Manager, lodged a grievance about that conduct. It appears that she was discouraged from pursuing a formal grievance and ultimately the matter was dealt with informally.

7. After the meeting, the complainants left the room. There then followed an impromptu discussion about what had just occurred between the Claimant and some of those remaining. That discussion was also recorded. The complainants considered the recording of the impromptu discussion. They felt that the Claimant had made a number of remarks which were racially offensive. I shall come back to these remarks in due course.

8. On 18 February 2014, in the course of Mr Alemoru's investigation into their collective grievance, the complainants made a further complaint about these remarks. Mr Alemoru's terms of reference were extended to include four allegations of race discrimination and harassment against the Claimant arising from comments he made during the impromptu discussion. By this stage the Claimant had been signed off sick with work-related stress, later diagnosed as significant depression. He was signed off from 10 February 2014 until 13 June 2014.

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9. On 19 March 2014, the Claimant was informed that the additional allegations about his remarks were to form part of the Dignity at Work investigation being carried out by Mr Alemoru. On 13 June 2014 - that is to say the day on which the Claimant was due to return to work - he lodged a formal grievance of his own. There were five separate allegations, of which the fifth was the most relevant for present purposes. That allegation was one of racial harassment made against three of the complainants and was based on statements that they had made during the management meeting on 13 December.

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10. The allegedly offending comments made by the three doctors were that, "*Racism and Slavery are gone*", and "*we are just used like slaves*", and "*I can prove how you have destroyed our careers*". It was contended by the Claimant that the remarks had racial overtones given the context in which they were said. In particular, it was alleged that the combination of the words "*racism*" and "*slavery*" meant that the Claimant was being likened to a slave master in his treatment of the three doctors because he was white. He considered that the comments were made knowing that they would offend as he had complained about similar comments made by one of them previously.

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11. The Respondent's Deputy Medical Director, Mr Keith Altman, managed both the complainants' grievance and the Claimant's grievance. On 14 July 2014, he wrote to the Claimant informing him that the matter against him was to be investigated under the Respondent's disciplinary policy for medical staff under the auspices of the MHPS (Maintaining High Professional Standards) framework. He was also advised that because his grievance was inextricably linked to those of the complainants, it would be investigated by Mr Alemoru and there would be separate terms of reference for his grievance. Whilst Mr Alemoru

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A was asked to consider the Claimant's complaint, no revised terms of reference formalising this aspect were ever issued.

B 12. On 9 September 2014, Mr Alemoru produced three separate reports. The first was the Dignity at Work report into the complainants' grievance. The second was the MHPS report into the Claimant's conduct. The third was the report into the Claimant's grievance. The complainants' Dignity at Work complaint was rejected save for one minor allegation. The C MHPS report concluded that the Claimant had a case to answer in respect of race discrimination as his comments were overtly about race and/or referred to the ethnicity of the complainants when describing what he regarded as their unreasonable behaviour. In relation to the D Claimant's grievance against the three complainants, Mr Alemoru found that there was no case to answer. In reaching that decision he concluded that the reference to slavery, whilst inappropriate, was not inherently a reference to race. Based on the MHPS report, Mr Altman concluded that the case of misconduct against the Claimant should be put before a disciplinary E panel.

13. On 6 November 2014, the Claimant was invited to attend a disciplinary hearing to F answer three allegations: 1) that his remarks at the impromptu discussion amounted to discrimination on the grounds on race; 2) that they had amounted to harassment; and 3) that he had made unfounded and derogatory remarks about colleagues.

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14. The disciplinary hearing was held on 16 December 2014. The Tribunal referred to this as follows:

H **"37. The disciplinary hearing took place on the 16 December 2014, chaired by Dominic Ford, Director of Corporate Affairs. Mr Altman presented the management case [626-634] and Mr Alemoru attended as a witness. The claimant was supported by Mark Briggs of the BMA [662-691]. The outcome of the hearing was the claimant's summary dismissal. Mr Ford concluded that a number of the comments made by the claimant in the transcript amounted to**

discrimination on grounds of race, nationality or ethnicity and that others were derogatory. These remarks are set out below and follow the numbering in the dismissal letter [692-696]

> ***1. … You're a straight forward Australian, good person who talks the truth in a ruthless and efficient way***
>
> ***2. … However, there are a significant number of people in this room this afternoon who do that very rarely. Okay? So a swap will occur. An on-call goes down and everyone's got to be at the airport etc etc Okay?***
>
> ***3. For Lola, you know what this will mean? Lola will fly to Nigeria and I will put 50 quid …***
>
> ***4. For you a cup of tea - [that] the plane - there will be a problem with the plane coming back.***
>
> ***5. Yes it's part of the punishment rota***
>
> ***6. Someone like Clifford who is nothing but a good human being and delightful and easy to do business with and straightforward and honest …***
>
> ***7. It's about managing groups, which is this sort of highly egocentric group***
>
> ***8. … some of these sub-continent elements, what you end up with long-term resentments and grievances and all sorts of stuff. They are their own worst enemies. You could see that today.***
>
> ***9. They mix and match in their heads differently. They're not clear thinkers***
>
> ***10. He needs a bloody long walk off a short pier***
>
> ***11. Chill pill? He needs a good slap***
>
> ***12. An unbelievable group. Vile actually"***

15. Of those remarks, those numbered 3 and 4, and 8 and 9, were considered particularly serious by Mr Ford, the dismissing officer. In respect of remarks 3 and 4, Mr Ford said as follows in the dismissal letter:

> **"Remarks (3 and 4) relate to Ms Arimouku and are without foundation in that her reliability in returning from a visit to her family in Nigeria is questioned. In your evidence to Mr Alemoru you stated you had no knowledge of Ms Arimouku failing to reciprocate a swap. Mr Ridings, in his evidence to the disciplinary hearing, also referred to Ms Arimouku's competence and good character. This was a racially offensive and derogatory remark about her because of race, nationality or ethnicity."**

16. As to remarks 8 and 9, Mr Ford found as follows:

> **"Remark (8) refers to the 4 Trust Grade Doctors who are said to be 'sub-continent elements'. I conclude that this remark was racially offensive and a derogatory remark about them because of race, nationality or ethnicity.**
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> **Remark (9) follows closely in the discussion from remark (8) and can reasonably be related to that comment which referred to sub-continent elements. I conclude that this remark about them was racially offensive and derogatory because of race, nationality or ethnicity."**

17. There was then a conclusion about the unfavourable comparison drawn between Ms Arimouku and the complainants, and an Australian colleague, Ms Martin.

18. The Claimant appealed against his dismissal, challenging both the findings and the severity of the sanction. The Claimant's appeal was heard by Mr Julian Lee, Chair of the NHS Trust Board on 15 April 2015. The appeal was dismissed.

19. It was in those circumstances that the Claimant lodged his complaint in the Employment Tribunal on 22 May 2015. At a case management hearing on 5 August 2015, the parties agreed the issues to be determined. Issue 4 dealt with direct discrimination on the grounds of race. Issue 4.1 was in the following terms: "*Has the Respondent subjected the Claimant to the following treatment falling within section 39* ***Equality Act****, namely subjecting the Claimant to disciplinary procedures and ultimately dismissing him*". The comparators relied upon were identified in 4.2 of the List of Issues, referred to as the complainants.

20. It was recognised that there was a limitation issue. Accordingly, Issue 5 required the Tribunal to consider whether the Claimant had shown that there was conduct extending over a period within the meaning of section 123 of the **Equality Act 2010** ("EqA"), and also whether any complaint was presented within such other period as the Employment Tribunal considers just and equitable.

The Tribunal's Decision

21. The Tribunal first considered Issue 4.1. As to that issue, the Tribunal was satisfied that the complainants were the right comparators. The Tribunal dealt with this as follows:

> **"43. Dealing first with the issue of comparators, it was submitted by the respondent that the doctors were not the right comparators and that the correct comparator was a hypothetical non white senor clinician with management responsibilities, addressing subordinate staff in a**

> **closed meeting and in doing so making racist remarks. We disagree. Section 23 EqA does not require the [comparators'] circumstances to be identical in every way, which is what the respondent has sought to achieve by its hypothetical construct. Further, the respondent's hypothetical comparator includes features that are not material i.e. the seniority of the claimant, which was not a factor in the decision to carry out an MHPS investigation.**
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> **44. In our view, the circumstances relevant to the claimant's treatment i.e. being investigated under the MHPS disciplinary process, were that a complaint of racism had been made against him based on comments he had made in the presence of other staff. Those circumstances applied equally to the comparators in that the claimant made a complaint of racism based on comments made by the 3 Complainants. In both cases, the comments in question were not in dispute and were evidenced by a transcript of a recording of those events. We are satisfied that there were no material differences between their circumstances and find that the Complainants were the right comparators for this part of the claim."**

22. The Tribunal concluded that the fact the complaint against the Claimant was investigated under the MHPS procedure, whereas the Claimant's complaint against the complainants was not, gave rise to a difference in treatment and a difference in race. However, the Tribunal formed the view that that was not enough to shift the burden of proof and they looked to see whether there was something more.

23. Having regard to the historically poor relations between the Respondent and its BME staff, the fact that three of the complainants were not interviewed about the Claimant's allegations and were not even made aware of them, and the fact that Ms McNevin had been dissuaded from pursing a formal complaint against the doctors, the Tribunal concluded as follows:

> **"49. All of this gives the impression of the respondent wanting to keep the claimant's grievance below the radar in order not to rock the boat of its fragile relationship with the BME. We consider this to be the "something more" that shifts the burden to the respondent to provide an explanation for the difference in treatment of the claimant, vis a vis the MHPS investigation."**

24. The Respondent's explanation for not opening an MHPS investigation against the three complainants was that the remarks they were alleged to have made were not as serious as the ones they had alleged against the Claimant. The Tribunal dealt with this aspect as follows:

> **"51. In the case of the claimant's grievance against the 3 Complainants, the respondent's reason for not opening an MHPS investigation was because it was felt that their comments were not racially offensive or serious enough to warrant this. The way Mr Altman put it when giving evidence was that the claimant's comments on their face were objectively offensive and**

> **potentially racist whereas the comments of the Complainants were adjectives which were not objectively offensive on their face. It is unclear whether the matter was analysed in that way at the time or after the fact but what this demonstrates is that the respondent had effectively dismissed the claimant's grievance before the matter had been investigated or reported on by Mr Alemoru.**
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> **52. We feel that the subjective opinions of the respondent's officers (Altman and White) were very much influenced by race. The claimant is not an ethnic minority, he is white British and does not fit the normal profile of a person subjected to racial harassment and we believe that this unconsciously affected the respondent's attitude towards his complaint. It is inconceivable that the respondent would have been dismissive of his complaint had he been an ethnic minority, mindful, no doubt of the backlash that this would create from the BME network. We have already referred to the respondent's concerns about potential victimisation of the Complainants in respect of Ms McNevin's complaint. We consider that that would also have been a factor in the respondent's decision.**
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> **53. In light of the above, we are not satisfied that the respondent's explanation has nothing whatsoever to do with race and for that reason, we find that it has not discharged the burden of proving that it did not discriminate against the claimant in its decision to open an MHPS investigation."**

25. However, although this was found to be an act of discrimination, the Tribunal regarded it as a one-off act and said the "*arguments about acts extending over a period do not arise*" (paragraph 58). They did go on to consider whether there were just and equitable reasons to extend time but found that there were none.

26. The Tribunal then considered whether there was less favourable treatment in requiring the Claimant to attend a disciplinary hearing. As to that issue, the Tribunal considered that the comparative circumstances were, by this stage, materially different because Mr Alemoru had concluded that they had no case to answer:

> **"56. We also find that, having instructed Mr Alemoru for his expertise, it was reasonable for Mr Altman to rely on the conclusions in the MHPS report as the basis for inviting the claimant to a disciplinary hearing. That decision was separate from and not reliant on the initial decision to instigate the MHPS investigation, which we have found to be discriminatory. The conclusion of the report would have led to a disciplinary hearing regardless of the initial decision. Had Mr Alemoru concluded that the claimant had no case to answer, as it did in respect of the Complainants' Dignity at Work complaint, the MHPS investigation would have ended at that point and there would have been no disciplinary action. Taking all of this into account, we are satisfied that the decision to invite the claimant to a disciplinary was not an act of direct race discrimination."**

27. As to whether the dismissal itself was an act of race discrimination, the Tribunal found that the Claimant was dismissed because of his conduct. As for the comparators, the Tribunal said as follows:

> **"57. The claimant was dismissed for gross misconduct because the respondent concluded, following a disciplinary hearing, that he was guilty of race discrimination and racial harassment. The disciplinary hearing was conducted by Dominic Ford, Director of Corporate Affairs and Company Secretary, who had had no involvement in the earlier investigations. He sets out his findings in detail in the dismissal letter [692-697]. The claimant raised a number of criticisms about the dismissal decision though it is trite law that unreasonableness does not equate to discrimination. We are satisfied that the claimant was dismissed because of his conduct. The circumstances of his comparators were materially different in that they were not facing similar conduct charges and we are satisfied that a non white hypothetical comparator would have been dismissed in similar circumstances. The direct discrimination claim relating to the dismissal is not made out."**

28. As to the complaint of unfair dismissal, the Tribunal concluded that the Respondent had carried out a reasonable investigation and that the test in **British Home Stores Ltd v Burchell** [1980] ICR 303 was made out. In relation to the sanction, the Tribunal considered that although the decision to dismiss the Claimant was harsh, given the provocation the Claimant was subjected to from the complainants at the meeting and given his length of service, the dismissal was, in all the circumstances, fair.

29. Finally, in relation to wrongful dismissal there was a brief conclusion that the Tribunal was satisfied the conduct amounted to gross misconduct, and that the Respondent was contractually entitled to dismiss the Claimant without notice.

The Grounds of Appeal

30. The Claimant was given permission to appeal on 11 separate grounds, although ground 4 was not in the event pursued. I shall deal with each of the remaining grounds in turn, although several of them are paired as they are related.

Grounds 1 and 2

31. The challenge here is that the Tribunal was wrong to treat the decision to instigate the MHPS procedure as a one-off act of discrimination, rather than as part of an act extending over a period. Alternatively, it is said that if the Tribunal was correct to treat it as a one-off act, it erred in deciding that it was not just and equitable to extend time.

32. Mr Matovu, who appeared on behalf of the Claimant, submitted that the Tribunal should have dealt with the issue in the form that was agreed by the parties at the CMH, and should not have reformulated that issue as three separate acts; namely the decision to instigate the MHPS procedure, the decision to invite the Claimant to a disciplinary hearing, and then the decision to dismiss.

33. By illegitimately reformulating the issue, says Mr Matovu, the Tribunal took what was clearly an allegation of a continuing state of affairs and turned it into three separate acts. Mr Matovu complains that by doing so the Tribunal was taking an overly technical approach to the issues, something which has been deprecated by the authorities.

34. In **Sougrin v Haringey Health Authority** [1992] ICR 650, the issue was whether a decision not to regrade the applicant was a one-off act, or whether the fact that she continued to be paid less salary than the comparator rendered it an act extending over a period. The Court of Appeal, Balcombe LJ, after setting out the relevant provisions under the previous legislation (which are for present purposes in identical terms) said as follows:

> **"In order to see what is "the act complained of" within the meaning of section 68(1) it is necessary to look at the originating application. Since these are frequently prepared by an applicant acting without the benefit of professional advice the industrial tribunal should not approach the originating application in a technical manner, but should look at it to see what is the substance of the complaint. Looked at in this way it is clear that the applicant's complaint is what while a white nurse was grade F, she (the applicant) was graded E, and that the employer finally discriminated against her when on 13 November 1989 it rejected her appeal against her grade. That this is indeed the substance of the applicant's complaint is confirmed**

> **by her notice of appeal to the appeal tribunal, settled by counsel, which states in paragraph 5(2): "The applicant's complaint related to the basis upon which she was graded E as opposed to a white nurse who was graded F." " (Page 653F-H)**

The Master of the Rolls said as follows:

> **"In applying section 68(1) the first step must be to identify "the act complained of". Industrial tribunals are "shop floor" courts whose procedures and approaches must be attuned to the needs of litigants in person. Accordingly a tribunal should not take a narrow or legalistic view of the terms in which the complaint is couched. …" (Page 658G)**

35. I was also referred to the well-known decision of the Court of Appeal in **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96, which also emphasised the need to focus on the substance of the complaints before the Tribunal.

> **"52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be sidetracked by focusing on whether a 'policy' could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."**

36. Mr Kibling submitted that by separating the agreed issue into three distinct matters, the Tribunal was doing no more than unpacking a broad issue. In any case, he submits the Tribunal made a finding of fact that there was a one-off act in respect of the decision to instigate the MHPS procedure, and that conclusion cannot be undermined absent a challenge of perversity.

37. In my judgment, the Tribunal did not fall into error by subdividing the agreed issue into three separate questions. Issue 4.1 required the Tribunal to consider whether the Respondent had discriminated against the Claimant by subjecting him to disciplinary procedures and ultimately dismissing him. At the very least, that issue involves the determination of two distinct issues; namely, whether on the grounds of race the Claimant was subjected to disciplinary procedures and whether he was dismissed. Furthermore, the allegation that he was

A subjected to disciplinary procedures could, if there are several stages to those procedures, involve a number of sub-issues. Thus, there may be an initial decision to instigate the procedure; there may be a meeting to investigate; there may be a decision to require the individual to attend a disciplinary hearing; there may be a decision to dismiss and there may be an appeal. The Tribunal, in this case, focussed on three of those potential sub-issues. In my judgment, it was doing no more than trying to focus on the key questions which arise out of the broadly defined issue. Parties will often agree issues in fairly broad terms. The Tribunal should not be strait-jacketed into considering that issue in only those terms if there are sensible questions which may be answered as part of the determination of the overall issue. To do so is not, in my view, to take an overly technical approach to the complaint; it is simply making the task of determining the broadly defined issue more manageable. However, having identified and answered the three separate questions which properly appeared to be contained within the issue, the Tribunal should not have lost sight of the issue as formulated.

38. The issue as formulated complains of being subjected to disciplinary procedures and *ultimately* being dismissed. That formulation suggests that the complaint is about a continuing act commencing with a decision to instigate the process and ending with a dismissal. There can be no doubt that that is the way in which the allegations were put before the Tribunal. As the Tribunal notes at paragraph 61 of the Reasons, there were extensive submissions on whether there was a continuing act of discrimination extending over a period. It is also a matter identified in the List of Issues. The Tribunal's answer to those submissions was that they had found the discrimination at the first stage amounted to a one-off act. The question is whether it was correct to do so.

39. In the case of **Sougrin** mentioned above, the distinction was drawn between a continuing act and a one-off act which has continuing consequences:

> **"In *Amies'* case [*Amies v Inner London Education Authority* [1977] ICR 308] the complaint was of sex discrimination, but section 76(6)(b) of the Sex Discrimination Act 1975 is in identical terms to section 68(7)(b) of the Race Relations Act 1976 and the decision is therefore directly applicable. A male art teacher was appointed departmental head at a school in preference to a female teacher. In that case, as in this, the female applicant continued thereafter to be paid at a lower rate than would have been the case if she had been appointed departmental head. However, Bristow J, giving the judgment of the appeal tribunal, drew a clear distinction between a continuing act, that is, an "act extending over a period" and the continuing consequences of a non-continuing act. The discriminatory act was the appointment which was a once and for all act. The loss of pay was but a consequence. It would have been otherwise if the employers had operated a rule or policy that only men were eligible for appointment as departmental heads, since this would have been a continuing "act".**
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> **In *Calder's* case [*Calder v James Finlay Corporation Ltd (Note)* [1989] ICR 157] the employers operated a scheme whereby they granted mortgage interest subsidies to male employees over the age of 25, but it does not appear that any employee was contractually entitled to benefit. The complainant applied for such a subsidy and was refused upon the grounds that she was female, although otherwise she qualified. She continued in the same employment for a few more months and then left. Her complaint to the industrial tribunal was made within three months of her leaving her employment, but more than three months after the refusal. Browne-Wilkinson J, giving the judgment of the appeal tribunal, held that so long as the scheme was in operation and the complainant continued in her employment, there was continuing discrimination and that it followed that "the case does fall within section 76(6)(b)". In the citation in *Barclays Bank plc v Kapur* [1991] ICR 208, 215 the word "not" has been erroneously included so that it reads "does not fall". See also [1991] 2 AC 355, 369.**
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> **In *Kapur's* case it was unnecessary to consider the scope of section 68(7)(a), because the contracts of employment pre-dated the Act. The argument was therefore concerned solely with paragraphs (b) and (c). It is however, reasonably clear that if this had not been the case paragraph (a) would have applied: see [1991] ICR 208, 213C-E. The House of Lords refused to regard the failure by the employers to include a "European pension" term in the employees' contracts as "a deliberate omission" within paragraph (c) and so constituting a non-continuing act, but regarded the existence of a differential pension right as constituting a continuing act within the intendment of paragraph (b).**
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> **If the matter had stopped there, I would have had no doubt that the applicant's complaint was of a non-continuing discriminatory act which had continuing consequences and was therefore unaffected by section 68(7). In other words it would be governed by the decision in *Amies'* case. But Lord Griffiths concluded his speech with the following passage, at p215:**
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> > **"In the present case the Court of Appeal were in my view right to approve these two decisions [*Amies* and *Calder*] and to classify the pension provisions as a continuing act lasting throughout the period of employment and so governed by subsection (7)(b). The matter can be further tested by taking the case of an employer who before the Act was passed paid lower wages to his coloured employees than to his white employees. Once the Act came into force the employer would be guilty of racial discrimination if he did not pay the same wages to both coloured and white employees. *If he continued to pay lower wages to the coloured employees it would be a continuing act lasting throughout the period of a coloured employee's employment within the meaning of subsection (7)(b)*. A man who works not only for his current wage but also for his pension and to require him to work on less favourable terms as to pension is as much a continuing act as to require him to work for lower current wages." (Emphasis supplied.)**
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> **The emphasised sentence enabled it to be argued that the health authority had continued to pay the applicant lower wages than were paid to a comparable European employee (Miss Mobey) and that this act continued throughout her employment. Indeed it was still continuing.**
>
> **The fallacy in this submission lies in failing to identify and differentiate between the discriminatory acts relied upon by the applicant and by Lord Griffiths' hypothetical claimant. In Lord Griffiths' example it was the employer's *policy* not to pay the same wages to the**

> **coloured and white employees. It was that *policy* which constituted the discriminatory act. In the present case it has never been suggested that the local health authority had any such policy. Its policy was quite clearly to pay the same wages to every employee in the same grade regardless of racial distinctions. The applicant's complaint was quite different, namely, that she had been refused an F regrading for racially discriminatory reasons." (Pages 659F-661C)**

40. In the case of **Littlewoods Organisation plc v Traynor** [1993] IRLR 154, Lord Coulsfield (using somewhat outdated language) considered the same distinction:

> **"11. In our view it is not necessary to cite the cases referred to in any detail. It is clear from all of them that the problem which an Industrial Tribunal has to address, in circumstances such as this, is how to distinguish between a single act, which may have consequences extending over a period of time, on the one hand, and a continuing act, on the other. In *Barclays Bank v Kapur* Lord Griffiths, in dealing with the case of employers who had kept in operation a system whereby coloured employees were less favourably treated in relation to pension than white employees, expressed the position by saying that the correct approach was to classify the pension provisions as a continuing act lasting throughout the period of employment, and therefore as falling within subsection (7)(b) of s.68. Lord Griffiths then continued:**
>
> > **'The matter can be further tested by taking the case of an employer who before the Act was passed paid lower wages to his coloured employees than to his white employees. Once the Act came into force the employer would be guilty of racial discrimination if he did not pay the same wages to both coloured and white employees. If he continued to pay lower wages to the coloured employees it would be a continuing act lasting throughout the period of a coloured employee's employment within the meaning of subsection (7)(b). A man works not only for his current wage but also for his pension, and to require him to work on less favourable terms as to pension is as much a continuing act as to require him to work for lower current wages.'**
>
> **On the other hand, in the case of *Sougrin v Haringey Health Authority* the situation was that the employer decided, upon a particular occasion, not to grant a regrading to a coloured employee, with the result that thereafter the coloured employee continued to receive lower wages than she would have done if she had been regraded; in that case the act complained of was an act which took place at the time of the refusal of the regrading. The decision whether there is a single act having continuing consequences or a continuing act is one that must involve consideration of the particular circumstances. It was submitted to us that the distinction between cases such as *Kapur* and the present case was that in *Kapur* there was a continuing omission to pay a proper wage during every week in which the employment continued, whereas there was no such continuing act in the present case. In our view, however, the situation in the present case can properly be described in the same manner as Lord Griffiths expressed the situation in *Kapur*. So long as the remedial measures which had been agreed on in November 1989 were not actually taken, a situation involving racial discrimination continued and allowing that situation to continue amounted to a continuing act. Of course, at this stage in the proceedings, the Industrial Tribunal have not decided that the employers' actions in allowing the situation to continue were, in fact, racially discriminatory or gave a good ground for complaint. We have to proceed upon the assumption that the situation which continued to prevail after November 1989 and up to the date on which the respondent's employment was terminated may be capable of amounting to a continuation of discrimination. On that footing, we see nothing wrong with the decision of the Industrial Tribunal."**

41. It was not suggested by the Claimant, in this case, that there was some policy, rule, practice, scheme or regime in place as a result of which he was subjected to less favourable treatment. Instead, it was said that there was an ongoing state of affairs; namely being

A subjected to disciplinary procedures, which culminated in dismissal. The question is whether there was, as the Tribunal found, a one-off act which had continuing consequences; namely being subjected to further stages in the disciplinary process, or whether this was part of an act extending over a period.

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42. By taking the decision to instigate disciplinary procedures, it seems to me that the Respondent created a state of affairs that would continue until the conclusion of the disciplinary process. This is not merely a one-off act with continuing consequences. That much is evident from the fact that once the process is initiated, the Respondent would subject the Claimant to further steps under it from time to time. Alternatively, it may be said that each of the steps taken in accordance with the procedures is such that it cannot be said that those steps comprise "*a succession of unconnected or isolated specific acts*" as per the decision in **Hendricks**, paragraph 52.

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43. In my judgment, the Tribunal erred in treating the first stage of the process as a one-off act. Mr Kibling submits that this is a clear finding of fact and notes that the decision is not challenged on the basis of perversity. However, the Tribunal here, for reasons already set out, lost sight of the substance of the complaint as defined by the agreed issue. Having done so, it then incorrectly treated the subdivided issue as a one-off, when it undoubtedly formed part of an ongoing state of affairs created by the initial decision.

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44. That outcome avoids a multiplicity of claims. If an employee is not permitted to rely upon an ongoing state of affairs in situations such as this, then time would begin to run as soon as each step is taken under the procedure. Disciplinary procedures in some employment contexts - including the medical profession - can take many months, if not years, to complete.

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In such contexts, in order to avoid losing the right to claim in respect of an act of discrimination at an earlier stage, the employee would have to lodge a claim after each stage unless he could be confident that time would be extended on just and equitable grounds. It seems to me that that would impose an unnecessary burden on claimants when they could rely upon the act extending over a period provision. It seems to me that that provision can encompass situations such as the one in question.

45. Ground 1, therefore, succeeds.

Ground 2

46. This ground is pleaded in the alternative if ground 1 is unsuccessful. As I have found that ground 1 succeeds, it is not strictly necessary to deal with it. However, given that there have been extensive submissions on this issue, I shall make some brief observations about it.

47. Mr Matovu accepts that there were no express submissions below seeking an extension on just and equitable grounds, and the matter was not pleaded in that way. This is because of the operative assumption on the Claimant's part that there was a continuing act. Notwithstanding the absence of a plea for extension, the Tribunal did consider whether there ought to be an extension on those grounds. It directed itself in accordance with the decision in **Robertson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434, which provides that it is for the claimant to prove his case as to the reason for the delay.

48. The Tribunal also took into account the judgment of Smith J in **British Coal Corporation v Keeble** [1997] IRLR 336. That judgment indicates that the factors derived

A from section 33 of the **Limitation Act** may be relevant to a decision on extension of time. The Tribunal addressed the matter as follows:

> **"61. The claim was presented 7 months out of time, more than double the primary time limit, and no reasons were put forward by the claimant for the delay. Counsel for the claimant made submissions on the time issue but these were focused solely on whether there was a continuous act of discrimination extending over a period. That argument of course fell by the wayside following our findings.**
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> **62. In our view, the absence of any explanation is the overriding factor in this case and it is difficult to see how, in those circumstances, it can be just and equitable to extend time. *Habinteg Housing Association Limited v Holleron* UKEAT/0274/14/BA**
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> **63. We have therefore decided not to extend time and in those circumstances have no jurisdiction to deal with this particular allegation."**

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49. Mr Matovu submits that the Tribunal ought to have taken into account the fact that, having found there was discrimination at the first stage, the merits of the claim were substantially in the Claimant's favour, and that the balance of prejudice lies entirely in favour of time being extended. I was referred to the decision in **Bahous v Pizza Express Restaurant Ltd** UKEAT/0029/11/DA:

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> **"19. Our approach is this. The question of the balance of prejudice is plainly a material factor and one that is significant in this case. We prefer not to treat the merits as a separate consideration but as part of the prejudice balancing exercise. We agree with Mr Khan that there is no indication on the face of the Tribunal's Reasons that it took this matter into account.**
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> **20. It is significant because on the one hand the Claimant has lost, not simply a speculative claim, but a good claim on its merits. Conversely the Respondent has suffered no prejudice in conducting its defence to the claim. In these circumstances the balance of prejudice is all one way. It impacts solely against the Claimant's interest.**
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> **21. The tribunal's failure to take this significant matter into account represents, in our judgment, an error of law, just as was the case in *Baynton v South West Trains Ltd* [2005] ICR 1730, EAT, HHJ Burke QC presiding (see particularly para 59)."**

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50. Mr Matovu submits that, similarly, the prejudice in this case is all one way. Mr Kibling submits that the Tribunal did consider all the relevant factors in assessing whether it would be just or equitable to extend time. This is notwithstanding the fact that it was not obliged to do so, given the absence of any pleaded case on extension.

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51. In my judgment, the Tribunal did properly consider the balance of prejudice. At paragraph 60 they said as follows:

> **"60. We have considered the balance of prejudice, which neither party addressed us on. If we refuse an extension, it will not simply be a case of the claimant losing the opportunity to pursue his claim; he will not receive a remedy for a claim we have concluded is well founded. On the other hand, as we have heard all of the evidence, the respondent will suffer no prejudice over and above having to pay compensation in respect of an out of time claim."**

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52. That appears to recognise that the prejudice all runs one way and also that the Claimant had a well-founded claim. It cannot be said, therefore, that the Tribunal did not take into account a relevant and material factor. It plainly did. However, the Tribunal's decision was based squarely on the absence of any explanation. Whilst that might appear a little unfair, given the fact that the case was being put on a continuing act basis, it was something that the Tribunal was entitled to take into account.

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53. I can see that some Tribunals might have exercised their discretion somewhat differently on this issue than this Tribunal did. However, given that the Tribunal took into account all the relevant factors, including the absence of any explanation for the delay, it would not be for this Court to interfere with the exercise of the Tribunal's broad discretion on the question of extension.

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54. Accordingly, had ground 1 not been upheld, the claim in this regard would not have been saved by reference to the just and equitable ground.

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Grounds 3 and 5

55. The complaint here is that the Tribunal, having found that the complainants were proper comparators for the first question, erred by treating them as in a materially different position by the time the Claimant was required to attend a disciplinary hearing. Mr Matovu submits that

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the material difference - namely the fact that the Claimant had a case to answer whereas the complainants did not - was fallacious.

56. The Tribunal found that the complainants were proper comparators on the basis that a complaint of racism had been made against the Claimant, based on comments he had made in the presence of other staff. The Tribunal expressly found that those "*circumstances applied equally to the comparators in that the claimant made a complaint of racism based on comments made by the 3 Complainants*" (paragraph 44). The only basis, it would appear, for the complainants ceasing to be comparators was the fact that Mr Alemoru had concluded that the three complainants had no case to answer. But, submits Mr Matovu, it is wrong to rely upon the absence of a case to answer when that was the result of an investigatory process which was not the same as that applied to the Claimant.

57. Mr Kibling submits that the finding that there was no case to answer introduces a fundamental change of circumstances and that it is a fallacy to consider that the two sets of allegations were similar. It is said that the finding of discrimination in respect of the decision to instigate the procedure does not taint the later decision as to a disciplinary hearing because Mr Alemoru's assessment that there was no case to answer introduced a break in the chain of causation.

58. In my judgment, the Tribunal's conclusions in respect of the appropriateness of the comparators are internally inconsistent. The Tribunal expressly found that the circumstances relevant to the decision to instigate an MHPS investigation were that the complaint of racism against the Claimant had been based on comments he made in the presence of other staff. The Tribunal went on to conclude that those circumstances applied equally to the comparators. It

A was satisfied that there were no material differences between their circumstances and that of the Claimant at that stage.

B 59. What then changed at the second stage? The only identified change is that there was an assessment of no case to answer against the complainants. Mr Altman then relied upon that assessment. However, Mr Altman's decision was made in the following circumstances:

C 1. He had, as the Tribunal found, effectively reached a preliminary decision that the allegations against the complainants were not serious and dismissed them even before Mr Alemoru's investigation.

D 2. Furthermore, he did not take steps to expand Mr Alemoru's terms of reference despite saying that he would do so. Such expansion might have ensured that Mr Alemoru's investigation fully and properly addressed the Claimant's allegations. As it was, the investigation was limited to a desktop-analysis of the complaints.

E 3. Mr Alemoru's analysis on the face of it appeared to focus on the use of the word "*slavery*" rather than its use in conjunction with the word "*racism*" in the phrase "*racism and slavery are gone*". This could have been a consequence of the absence of proper terms of reference.

F 4. Mr Altman, who the Tribunal had already found was "*very much influenced by race*" (paragraph 52) was involved in both decisions.

G 60. In those circumstances it is perhaps not surprising that Mr Alemoru concluded that there was no case to answer. Insofar as that is the only significant difference between the circumstances of the Claimant and the comparators at the stage of inviting the Claimant to a

H disciplinary hearing, it was a difference that seemed to be a direct consequence of the discriminatory decision taken at the outset of the process. As such, it may be a difference, but it

is not a material one for these purposes. The Tribunal ought to have recognised that the necessary consequence of the discriminatory act at the first stage was that Mr Altman's decision, ostensibly based on Mr Alemoru's assessment, was potentially tainted.

61. The Tribunal did state that the decision to invite the Claimant to a disciplinary hearing was separate from, and not reliant on, the initial decision to instigate the MHPS investigation. However, whilst it may not have been reliant on that initial decision, the two matters were clearly not unconnected. It might be said that the failure to treat the complainants as proper comparators makes no difference because of the conclusion that the MHPS report would have led to a disciplinary hearing in any event. However, that would not address the Claimant's essential complaint that he was treated less favourably by being subjected to disciplinary procedures in circumstances where others, potentially guilty of (as the Tribunal found) similar conduct, were not.

62. Had the Tribunal proceeded on the basis that the complainants were proper comparators, it is possible that the Tribunal would have concluded that there was sufficient material to shift the burden of proof to the Respondent. The Respondent might then seek to explain its decision on the basis of the MHPS report. It is possible that in that scenario the Tribunal would reach a similar conclusion to that which it had reached in respect of the decision to instigate the MHPS process against the Claimant. That is to say that the same rigour was not applied to the complaint against the complainants because of the Respondent's desire "*not to rock the boat of its fragile relationship with [BME staff]*" (paragraph 49).

63. There appears to be no consideration of the possibility that Mr Altman's readiness to rely on Mr Alemoru's report was similarly so influenced. This internal inconsistency, and/or error in relation to the comparators, vitiates the Tribunal's decision in this respect.

64. Grounds 3 and 5 therefore succeed.

Ground 6

65. The complaint here is that the Tribunal erred once again in failing to treat the complainants as proper comparators in relation to the decision to dismiss. Mr Matovu placed reliance on the case of **Newbound v Thames Water Utilities Ltd** [2015] IRLR 734. That was an unfair dismissal case where disparity of treatment was alleged. As to that issue, Bean LJ said as follows:

> **"62. The employment tribunal found that the dismissal of the claimant was unfair not only in its own right but also because of the difference between his treatment and that of Mr Andrews. Before doing so the judge cited the well-known cautionary words of Waterhouse J, giving the judgment of the EAT in *Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352, that 'Industrial Tribunals would be wise to scrutinize arguments based on disparity with particular care'.**
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> **63. There are two types of disparity argument. The first is where the employer has previously treated similar behaviour less seriously: if such behaviour has on previous occasions not even been treated as a disciplinary offence, this is often described as condonation. The second is where two employees involved in the same incident are treated differently. Both were in play in this case.**
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> **…**
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> **79. In the alternative, the judge went on in paragraph 52 to find the dismissal unfair based on the disparate treatment of the claimant and Mr Andrews. His findings of fact included the following: (a) Mr Andrews was in overall charge on the day at the Albert Road sewer; (b) he allowed the claimant and Mr King to enter the sewer twice without a Didsbury winch being on site and without breathing apparatus; (c) Mr Andrews was only charged with misconduct, not gross misconduct, which avoided the possibility of his dismissal; (d) Mr Andrews was interviewed prior to the disciplinary hearings while the claimant was not; (e) Mr Andrews was given a written warning while the claimant was dismissed. On those facts the judge was entitled to find that this was not an appropriate case for disparity in treatment and that the dismissal was also unfair on this ground. For my part I have rarely seen such an obvious case of unjustified disparity."**

66. Mr Matovu submits that by contrast in the instant case the Claimant's comparators did not have to face any investigation, which avoided the possibility of their dismissals. The

A Claimant's comparators were not interviewed at all nor subjected to any disciplinary process while he was, and the Claimant's comparators were not given any disciplinary sanction whilst he was dismissed. Moreover, it is submitted that while the comments made by the Claimant's comparators were made in his presence and were directed at him, those made by him were not made in the presence of his comparators. Mr Matovu further submits that the Respondent's witnesses made various concessions in evidence, which established that the complainants' conduct was serious and ought to have been pursued with the same rigour as with the allegations against the Claimant.

67. I do not find the **Newbound** decision helpful in the context of this ground of appeal which is concerned with race discrimination. The present case was not one where two or more individuals are involved in the same incident and are treated differently. In **Newbound**, the person treated more leniently was the supervising officer, where the person dismissed had entered the sewer without proper apparatus. That is entirely different from the present scenario where the Claimant and the complainants said different things at two separate stages of a meeting. Whilst the position of the Claimant might be said to be comparable in some respects to that of the complainants, it does not amount to their involvement in the same incident.

68. Although I have concluded that the Tribunal erred in finding that there was a material difference in respect of the comparators at the second stage, I do not consider that there was any error in finding that there was such a difference rendering the complainants inappropriate comparators at the stage of dismissal. I say that for the following reasons. First, it is important to bear in mind that the allegation here is that the decision to dismiss was an act of direct race discrimination. That decision was taken by Mr Ford having concluded that the charges against the Claimant were made out. There were, of course, no such conclusions in respect of the

A complainants. Whilst it may be right that the reason for that was because of the failure to undertake a proper investigation (see grounds 3 and 5 above), Mr Ford's decision was not tainted or potentially tainted in the same way. This is for the simple reason that Mr Ford conducted his own analysis of the charges and reached his own conclusions. It is abundantly B clear from reading the dismissal letter that Mr Ford did not simply transpose Mr Alemoru's reasoning in support of the case to answer to his decision to dismiss. Thus, insofar as any decisions said to be based on Mr Alemoru's report might also be said to be tainted by the C discrimination at the first stage, the same cannot be said of Mr Ford's decision.

69. Second, the Tribunal said that there was a material difference in that the complainants D were not facing similar conduct charges. That is correct. However, the Tribunal went on to conclude that there was no race discrimination on the basis of the hypothetical comparator. They said, "*we are satisfied that a non white hypothetical comparator would have been dismissed in similar circumstances*" (paragraph 57). An analysis of the reason why Mr Ford E took the decision to dismiss is relevant in determining the appropriateness of comparators.

70. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337, F Lord Nicholls of Birkenhead said as follows:

> **"8. No doubt there are cases where it is convenient and helpful to adopt this two step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined.**
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> **9. The present case is a good example. The relevant provisions in the Sex Discrimination (Northern Ireland) Order 1976 are in all material respects the same as those in the [Sex Discrimination Act 1975] which, for ease of discussion, I have so far referred to. Chief Inspector Shamoon claimed she was treated less favourably than two male chief inspectors. Unlike her, they retained their counselling responsibilities. Is this comparing like with like? Prima facie it is not. She had been the subject of complaints and of representations by Police Federation representatives, the male chief inspectors had not. This might be the reason why she was treated as she was. This might explain why she was relieved of her responsibilities and they were not. But whether this factual difference between their positions was in truth a material difference is an issue which cannot be resolved without determining why she was treated as she was. It might be that the reason why she was relieved of her counselling responsibilities had nothing to do with the complaints and representations. If that were so,**

then a comparison between her and the two male chief inspectors may well be comparing like with like, because in that event the difference between her and her two male colleagues would be an immaterial difference.

10. I must take this a step further. As I have said, prima facie the comparison with the two male chief inspectors is not apt. So be it. Let it be assumed that, this being so, the most sensible course in practice is to proceed on the footing that the appropriate comparator is a hypothetical comparator: a male chief inspector regarding whose conduct similar complaints and representations had been made. On this footing the less favourable treatment issue is this: was Chief Inspector Shamoon treated less favourably than such a male chief inspector would have been treated? But, here also, the question is incapable of being answered without deciding why Chief Inspector Shamoon was treated as she was. It is impossible to decide whether Chief Inspector Shamoon was treated less favourably than a hypothetical male chief inspector without identifying the ground on which she was treated as she was. Was it grounds of sex? If yes, then she was treated less favourably than a male chief inspector in her position would have been treated. If not, not. Thus, on this footing also, the less favourable treatment issue is incapable of being decided without deciding the reason why issue. And the decision on the reason why issue will also provide the answer to the less favourable treatment issue.

11. This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others."

71. Mr Ford's decision to dismiss was based not only on the fact that charges had been proved against the Claimant, but on the seniority of the Claimant and the circumstances of the discussion at which the remarks were made. Having regard to those matters, which the Tribunal accepted as being Mr Ford's reasons and which were not the subject of any challenge on this appeal, it is clear that the complainants cannot be appropriate comparators at this stage of the process.

72. Third, Mr Matovu's submissions under this head were predicated on the assumption that the Claimant's allegations against the complainants were as serious as those made against the complainant. However, it cannot be inferred from concessions in evidence that the allegations against the complainants were worthy of pursuit meant that dismissal would necessarily have been the result. Mr Ford expressly referred in his dismissal letter to the seniority of the Claimant as being a factor relevant to his decision to dismiss. It was not a factor in deciding to initiate the investigation. The Tribunal refers to that letter in paragraph 57 of the Reasons,

where it also refers to the hypothetical comparator. It may be inferred that the reference there to the non-white hypothetical comparator "*in similar circumstances*" was to a senior clinician making similar discriminatory remarks in the presence of subordinates. It was open to the Tribunal to conclude that such a comparator would have been dismissed.

73. Ground 6 is not upheld.

Grounds 7 and 8

74. The complaint here is that the Tribunal misdirected itself in relation to the test in **British Home Stores Ltd v Burchell** [1980] ICR 303 in that it referred to only two out of the three elements comprising the test. The missing element was said to be that the belief as to misconduct had to be based on reasonable grounds. Mr Matovu says that this is a significant omission because the Tribunal has not considered whether the Respondent had reasonable grounds to believe that the remarks, in fact, amounted to a breach of the Respondent's policies.

75. Mr Kibling accepts that there is no express reference to reasonable grounds but contends that on a proper reading of the Judgment, it is clear that the Tribunal did have that test in mind. He submits that, in any event, this was a case where the conduct complained of was not in dispute. It was recorded and transcribed. In those circumstances, he says, there is less need to consider whether there were reasonable grounds for the belief as to guilt. The **Burchell** test is very well known. It should not need repeating, but as there is an allegation that an element of the test has been missed out I do set it out here:

> **"… What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the grounds of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, … the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he**

> **formed that belief on those grounds, had carried out as much investigation in the matter as was reasonable in all the circumstances of the case. …" (Page 304C-E)**

76. It should be said that this Appeal Tribunal confirmed in the case of **Boys and Girls Welfare Society v McDonald** [1996] IRLR 129 that the **Burchell** test does not mean that if an employer fails one or more of the three tests it is, without more, guilty of unfair dismissal. The focus should be upon the question whether the employer's action fell within the range of reasonable responses open to a reasonable employer.

77. Whilst the Tribunal did not refer expressly to reasonable grounds, what it said was as follows:

> **"64. We are satisfied that the claimant was dismissed by reason of his conduct and, in accordance with the case: *British Home Stores v Burchell* [1980] ICR 303, we have considered whether the respondent held a genuine belief in the claimant's guilt based on a reasonable investigation of the circumstances."**

78. It might be said that what the Tribunal has done here is to combine the second and third tests under **Burchell** into one. Hence the reference to the genuine belief as to the Claimant's guilt being "based" on a reasonable investigation. However, even if that is wrong and the Tribunal has failed to refer expressly to the reasonable grounds limb of the test, it is quite clear in my judgment that the Tribunal's analysis of the Respondent's actions took into account that aspect of the test.

79. It is right that this is not a case where the facts as to what occurred are in dispute. The transcript deals with that. The question was whether those things that were said amounted to gross misconduct as alleged. That required the Respondent to consider whether the remarks breached its Dignity at Work policy and/or the Equality, Diversity and Human Rights policy. The Tribunal clearly had this well in mind, as it refers in paragraph 65 to the fact that, "*As there*

was no dispute about what was said, the investigation focused on how those comments could reasonably be interpreted". It seems to me that the use of the term "reasonably" in that sentence indicates that the Tribunal was assessing whether the Respondent had reasonable grounds for interpreting the remarks as amounting to a breach of the policies.

80. The Tribunal then proceeds to identify all the matters taken into account by Mr Ford and subjects to scrutiny his interpretation of the comments and his rejection of the Claimant's explanation for why he said what he did. At paragraph 67, the Tribunal said that it could understand why Mr Ford rejected the Claimant's explanation:

> **"67. That explanation was not accepted by Mr Ford and we can understand why. If the comments were about non UK trained doctors generally, that does not explain why they were expressed as "sub-continent elements" rather than, for example, overseas doctors. The fact that the complainants were from the sub-continent and had raised grievances suggests that those observations were specific and personal to them. We therefore consider that the respondent was entitled to reject the claimant's explanation and conclude that the comments were a reference to the complainants and their racial background."**

81. The same process was followed in relation to the remarks at 3 and 4:

> **"68. Similarly, the respondent was entitled to conclude by reference to comments at paragraphs 3 & 4 that the claimant was, without justification, making an unfavourable comparison based on race of the reliability of Lola Arimoku, a Registrar of Nigerian origin, with that of Ms Martin, a registrar from Australia. The claimant's explanation (that this was a general discussion about the problem of shift swaps and the difficulties that arise if the swap is not reciprocated) [413-415] was rejected on the basis that there was no need for the reference to Nigeria or Australians in that context. Although it was suggested that the claimant did not refer to Lola's nationality in the text only to the country, he confirmed in evidence that he knew her to be of Nigerian origin."**

82. Once again, the Tribunal found that the Respondent was entitled to conclude that the Claimant was, without justification, making an unfavourable comparison based on race. In both of these paragraphs - 67 and 68 - the Tribunal is analysing the Respondent's explanations in reaching a conclusion that the remarks amounted to breaches of policy and accepts those explanations. In my judgment, in doing so it is accepting that the Respondent had a reasonable basis for its conclusions. That is to say, limb two of **Burchell** was satisfied.

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83. Mr Matovu submitted that it was incumbent upon the Tribunal to refer expressly to the definitions of harassment and discrimination as set out in the policies in order to test whether the Respondent had reasonable grounds for believing that those definitions were satisfied in this case. The Tribunal does, however, expressly refer to the two policies in question, and there is no doubt that Mr Ford, the decision maker, had them well in mind. The Tribunal refers expressly to the fact that the comments were considered to be racially offensive and derogatory, and had caused offence to the complainants. The Tribunal said that "*In other words, they amounted to harassment*" (see paragraph 69).

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84. Mr Matovu also sought to persuade this Court that some of the remarks - in particular remarks 8 and 9 - made by the Claimant were not inherently racially offensive and that one cannot conclude that they were simply because in one of them there is a reference to the sub-continent when that is obviously not a term of abuse in itself. As for remarks 3 and 4, Mr Matovu contended that there was nothing inherently offensive about referring to a plane being delayed, and one cannot infer anything about race, or indeed that Ms Arimoku was Nigerian, from them.

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85. I do not accept these submissions. Whilst it is correct that not all of these remarks might be regarded as overtly offensive, in the context of a senior clinician talking about junior doctors in a derogatory manner, it is clear that they have the potential to create a hostile environment for the complainants on the grounds of race. Although these remarks were not made in the presence of the complainants, they were heard subsequently, albeit by means of a surreptitious recording, the effect of hearing the remarks in that way is comparable to having the remarks reported to them afterwards by one of the attendees.

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86. In any case, the Tribunal's task was not, at this stage, to determine whether it considered the remarks amounted to gross misconduct, but whether the Respondent had reasonable grounds for believing that they did. I consider that the Tribunal had properly discharged that task.

87. Accordingly, grounds 7 and 8 of this appeal are not upheld.

Ground 9

88. This ground is in four parts.

89. Part A is an allegation that the Tribunal failed to consider properly the question of inconsistency of treatment as between the Claimant and the complainants. For reasons already set out, this is not, in my judgment, a case where the disparity of treatment cases in unfair dismissal, such as **Newbound**, would apply. I do not consider that the Tribunal erred in rejecting the disparity argument as it did. It clearly had the correct principles in mind as it referred to the evidence that another Consultant had been dismissed for similar behaviour based on race in the past.

90. The second point under this ground is that the Tribunal failed to have regard to its own findings regarding the arbitrary application of the Respondent's zero tolerance policy on racial harassment. However, the finding was not that the policy was applied arbitrarily, but that for practical reasons not every allegation of bad behaviour could be investigated. This ground does not raise any point of law.

91. The third ground under ground 9 alleges that the Tribunal overlooked a particular fact. It raises no point of law either.

92. The final part of ground 9 is that the Tribunal failed to consider a significant piece of mitigation in the form of a psychiatric medical report, which indicated that the Claimant's behaviour from August 2013 onward was almost certainly due to an underlying depressive illness and high levels of stress. It is also said that Mr Ford misconstrued this report as only indicating an effect on the Claimant after February 2014.

93. However, the evidence to which I was taken clearly indicates that Mr Ford did have regard to the report. I was taken to a passage in Mr Ford's statement, which was before the Tribunal. This provides:

> **"51. I considered whether there were any mitigating factors, which should reduce the sanction from dismissal to final written warning. I took into account: Peter Hale's long length of service and lack of disciplinary record; the context within which the discussion on 13 December 2013 took place and the nature and tone of the meeting which it followed; the report from Peter Hale's Consultant Psychiatrist which found that he had suffered from a significant depressive illness and the fact that Peter Hale's behaviours at the time of the incident might have been related to stress and underlying depression; and the fact that he apologised to Abayomi Alemoru for the "sub-continent element" comment."**

94. There is also a reference to the report in the dismissal letter. This evidence was before the Tribunal. It can be inferred that it took this evidence into account. The Tribunal was not required in its Judgment to refer to every piece of evidence that is adduced before it.

95. For these reasons, ground 9 is not upheld.

Ground 10

96. This was not pursued orally and in any case, appears to raise similar issues to those covered under ground 6. For the same reasons as for ground 6 above, it is dismissed.

Ground 11

97. The final ground is that the Tribunal failed to decide the issue of wrongful dismissal themselves. Mr Matovu submits that it was not open to the Tribunal simply to adopt the reasoning for the conclusion on unfair dismissal and apply that to wrongful dismissal, where its task was to reach its own conclusion on that issue. I was referred to the case of **London Ambulance Service NHS Trust v Small** [2009] IRLR 563:

> **"46. … As a general rule, however, it might be better practice in an unfair dismissal case for the ET to keep its findings on that particular issue separate from its findings on disputed facts that are only relevant to other issues, such as contributory fault, constructive dismissal and, increasingly, discrimination and victimisation claims. Of course, some facts will be relevant to more than one issue, but the legal elements of the different issues, the role of the ET and the relevant facts are not necessarily all the same. Separate and sequential findings of fact on discrete issues may help to avoid errors of law, such as substitution, even if it may lead to some duplication."**

98. Mr Kibling accepts that this part of the Judgment could have been better expressed but submits that the Tribunal's conclusions are clear and that nothing further was required given the detail of the earlier part of the Judgment. I accept Mr Kibling's submissions. The case of **Small** does not assist Mr Matovu. That merely sets out the common sense general rule that where separate issues such as contributory fault are being considered, it is preferable that the Tribunal sets out its findings of fact in respect of each issue separately. However, it is not an error of law not to do so.

99. The Tribunal here had already accepted all of the Respondent's reasons for concluding that there was gross misconduct. By saying that it was satisfied that the conduct complained of amounted to gross misconduct, it was adopting a shorthand method of accepting all of those reasons as its own. Whilst it might have been preferable for the Tribunal to have expressed its conclusions more fully, I do not consider that it erred in law in failing to do so, particularly in light of its detailed conclusions earlier in the Judgment.

100. Ground 11 therefore also fails.

The Cross-Appeal

101. There are three parts to the cross-appeal. The first is that the Tribunal erred in finding that the complainants were appropriate comparators in respect of the decision to instigate the MHPS procedures. The second is that there was a failure to have regard to the burden of proof provisions or a failure to apply them properly. The third is that it made an impermissible finding of fact in that it erroneously relied upon Mr White having given evidence on the MHPS issue to Mr Altman, when in fact Mr Altman had taken evidence from others.

102. I shall deal with each issue in turn. Before doing so, I should note that at the conclusion of submissions yesterday and after the Court had risen, the Court was asked to reconvene on the basis that Claimant's counsel had omitted to deal with one of the issues relevant to the cross-appeal; namely the burden of proof. In normal circumstances the mere fact that counsel may have omitted to deal with a matter is not good enough reason to reconvene the Court. However, *de bene esse* I invited the parties to make any submissions which they wished to do so on that issue in writing by later that day. I did receive some brief written submissions from Mr Matovu. Mr Kibling apologised for not being able to do so in the time available. However, it seems to me that Mr Kibling's submissions were adequately set out on this issue in his detailed skeleton argument. I do not consider that he was prejudiced by not being able to provide further submissions on these issues.

Ground A

103. The nub of the complaint here is that the Tribunal erred in treating the complainants equally as comparators when there were significant differences between them. One of them

had not said anything at all, and only two had referred to the word "slavery". Mr Kibling submits that it was incumbent upon the Claimant to identify which of the doctors were being relied upon, that the Tribunal could not properly rely on any of them. It should instead have relied upon a hypothetical comparator; namely a senior clinician with managerial responsibilities addressing subordinate staff.

104. Mr Matovu submits that the Tribunal had properly directed itself on this issue and that as Mr Altman's decision did not involve seniority the hypothetical proposed by the Respondent was inappropriate. Mr Matovu's submissions on this issue are to be preferred. Whilst there may be some differences between the complainants, the essential reason why they were considered appropriate is that a complaint of racism had been made against them, in respect of remarks they had made in the presence of other staff. The allegation had been made against all of them. Any differences as to the specific allegations against each were not relevant at this stage when the question was why Mr Altman had decided the Claimant should be subject to the MHPS procedure and the complainants should not.

105. Even if I am wrong about that, it is clear that the Tribunal's reasoning did refer to a hypothetical comparator. At paragraph 52, the Tribunal says that "*It is inconceivable that the respondent would have been dismissive of his [the Claimant's] complaint had he been an ethnic minority*". The underlined words clearly show that the Tribunal was considering the position of a comparator who was in similar circumstances to the Claimant.

Ground B

106. This ground was not developed to any significant extent orally. It suggested that the Tribunal failed to apply the burden of proof provision properly and it seemed to consider that

A the burden shifted merely upon establishing a difference in treatment, and a difference in status. However, it is clear from paragraph 45 of the Reasons that the Tribunal did not consider those matters sufficient on their own, and went on to consider whether there was "*something more*". The next three paragraphs in the Reasons set out matters which satisfied the Tribunal that there was sufficient material to shift the burden (see paragraphs 46 to 49).

107. It may be inferred from that that the Tribunal was satisfied that there was sufficient material from which it could, in the absence of any explanation from the Respondent, conclude that there had been less favourable treatment on the proscribed ground. It then looked to the Respondent for an explanation. That, it seems to me, was a correct application of the burden of proof requirements.

Ground C

108. The complaint here is that there was no evidence to support the finding that Mr White, who had sought to dissuade Ms McNevin from pursuing her grievance, gave advice to Mr Altman on how the Claimant's grievance should be handled (see paragraph 48 of the Reasons). It is further contended that this impermissible finding of fact was then relied upon to support a conclusion that both Mr Altman and Mr White were very much influenced by race. As such, says Mr Kibling, the finding that there was sufficient material to shift the burden was flawed. Mr Matovu submits that the reference to advice being given by Mr White was neither critical nor a necessary factor in the Tribunal's decision that the burden should shift, and that in any event, the Tribunal came to a clear finding that Mr Altman was very much influenced by race. That conclusion was based on other matters as well, such as the failure to expand Mr Alemoru's terms of reference, and Mr Altman's dismissive attitude to the Claimant's grievance.

109. Once again, Mr Matovu's submissions on this issue are to be preferred. Had the advice from Mr White been the only factor relied upon for the Tribunal to reach its conclusion the position might have been different, but it is clear from a fair reading of the Tribunal's Reasons that there were several other factors which were at play, and that those factors were potentially more significant in relation to the question of whether there was sufficient material to shift the burden of proof. In any case, the Tribunal did not find that, as a result of the advice wrongly said to have emanated from Mr White, Mr Altman changed his course of action in any way in relation to the Claimant's grievance. In my judgment, the error as to the source of advice does not undermine the Tribunal's conclusions or its approach to the burden of proof.

110. The cross-appeal therefore does not succeed.

Conclusion

111. The result is that grounds 1, 3 and 5 succeed. The remaining grounds fail. The cross-appeal fails.